

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL MISC. APPL. NO. 31 OF 2019

SAMUEL MWANZI MUTHUI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant was convicted and sentenced to 10 years imprisonment for offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

2. He did not appeal but has moved court under section 333(2) of the Criminal Procedure Code Cap 75 Laws of Kenya which states that, ***“subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from and to include the whole of the date on which it was pronounced except where otherwise provided in this Code provided that where the person sentenced under subsection (1) has prior to such sentence, been held in custody, the sentence shall take account of period spent in custody.”*** This was also affirmed in **Mitobi vs Republic [2018] eKLR**.

3. In mitigation the Applicant stated that he had family and children and also said he took care of his sister.

4. He had no previous conviction records.

5. The trial court said it took into consideration of period Applicant was in custody. However, as the provisions of section 11(1) of the Sexual Offences Act provided minimum mandatory sentence, he accorded Applicant 10 years’ imprisonment.

6. The **Muruatetu** case Supreme Court Petition No. 15 of 2015 of 17/12/2017 ruled that so is the subsequent superior court decisions” ***mandatory aspect of a sentence is unconstitutional. Thus, though the Applicant never appealed against the sentence, this court can interfere in the order on sentence by invoking revisionary powers and render a sentence commensurate to the circumstances of the matter especially where sentence is unconstitutional on aspect of minimum mandatory sentence.***

7. The court notes that the complainant as per the charge sheet is alleged to have been touched buttocks though in her testimony, she talked of being caressed on back and shoulders. The clinical officer PW9 didn’t find any injuries on the girl genitals and the age assessment is said to have been 11 – 13 by the time of the incident.

8. The Applicant was a first offender.

9. The court thus finds that the Applicant having been in custody since 17/1/2014 now 6½ years or so, he has suffered enough and learned a lesson. Thus, the court finds that the period served is adequate.

10. Thus, the court makes the following orders: -

(1) The sentence of trial court 10 years is set aside and substituted with the period already served.

(2) Thus the Applicant shall be released forthwith unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF JULY, 2020.

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C. KARIUKI

JUDGE