



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL MISC. APPLICATION NO. 38 OF 2018

MWANGANGI MUTEL.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The petitioner has moved court seeking re-sentencing pursuant to Supreme Court decision of **Muruatetu Case** which declared mandatory death sentence in unconstitutional.
2. The Court of Appeal in Criminal Appeal **NO. 93 OF 2014 JARED KOITA VS REPUBLIC IN KISUMU** on 7/12/2018 held that in the instant case where appellant was sentenced to life imprisonment on the basis of the same mandatory sentence being stipulated by **section 8 (1) of Sexual Offences Act**, the reasoning of Supreme case of **Muruatetu** applied to this provision and thus unconstitutional on the same basis.
3. Similarly in Criminal Appeal No. 187 of 2015 High Court Mombasa – **Samuel Achieng Alego vs Republic, Odunga J** on 18/12/2018 held that **“the provisions of a legislation that was in force before the Constitution of Kenya 2010, such as Sexual Offences Act No. 3 of 2006 must be construed with.....adaptions, qualifications and exceptions when it comes to mandatory minimum sentences.”**
4. In the instance case the accused was charged with offence of defilement contrary to **section 8 (2) of Sexual Offences Act No. 3 of 2006** particulars being that he defiled a girl aged 4 years. He was convicted and sentenced to life imprisonment. He appealed to the High Court and the appeal was dismissed and he did not appeal any more.
5. He opted to petition for re-sentencing under the holding of Supreme Court case of **MURUATETU** and as applied by the Court of Appeal case of **JARED** (Supra) which have declared mandatory aspect of mandatory death and life sentences unconstitutional.
6. In the trial court when given chance to mitigate, the petitioner sought leniency but however the trial court held:

“The accused is informed that sentence for this nature of offence is mandatory life sentence.”

7. Thus the court sentenced accused for life sentence imprisonment. The trial court did not even consider the petitioner’s mitigation because it had no option and even if it considered the same, its hands were tied to render only one sentence i.e. life.
8. In line with the binding holdings in the mentioned Supreme and Court of Appeal decisions above, this court is constrained to set aside the life sentence meted out to the petitioner. However as the mitigation and record of the petitioner are to be considered and taking into account that petitioner can still challenge the sentence meted out to him, I find it fair I refer the matter to the Chief Magistrate Court for re-sentencing after mitigation and previous records are considered.
9. Thus the court makes the following orders:-
 1. **The sentence is set aside.**
 2. **The matter is referred back to the Chief Magistrate Court Garissa for re-sentencing after considering previous records of accused and his mitigation.**
 3. **Mention on 15/7/2019.**

DATED, DELIVERED AND SIGNED IN OPEN COURT AT GARISSA THIS 27TH DAY OF JUNE, 2019.

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CHARLES KARIUKI

JUDGE