



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**MISC CASE NO. 13 OF 2018**

**NOOR ABUKAR ABDI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

This matter has been placed before this court through a request by the applicant for orders of a retrial. The request was made through a chamber summons which was not dated but which was filed on 18<sup>th</sup> September, 2018 by the applicant Noor Abukar Abdi under certificate of urgency.

The applicant also filed written submissions which I have perused which seem to challenge the conviction of the trial court in Garissa Magistrate Criminal Case No. 2024 of 2011.

At the hearing of the application, the applicant said that he had appealed to a higher court but he has come here for review of sentence. I have not seen the High Court file but I have seen the judgement in the High Court of Garissa Cr. Appeal No. 42 of 2012 delivered on 16<sup>th</sup> October 2012 dismissing the applicant's appeal.

Mr. Okemwa, the Learned Principal State Counsel stated that this is an incest case. He stated that the applicant had come to this court following the Supreme Court decision in the Muruatetu case.

Having perused the application of the applicant, it was not a request for review of sentence but a request for a fresh trial. The High Court had already dismissed his appeal on both conviction and sentence in 2012. The applicant has said that he has come to this court but had made an appeal to the Court of Appeal wherein progress had so far not been made.

In the Supreme Court Petition between Francis Karioko Muruatetu & Another –vs- Republic (2017) eKLR, the Supreme Court dealt with a challenge of the mandatory death sentence. The challenge was the mandatory death sentence under Section 204 of the Penal Code. The Supreme Court came to the conclusion that a death sentence was retained by the Constitution and was therefore constitutional. However, it stated that the mandatory nature of that sentence was not constitutional as it denied an accused person some elements of the rights to fair hearing as sentencing was part of the hearing of the case. It was a denial of fair hearing because a trial court was denied the opportunity to hear the mitigating factors and take them into account in determining the appropriate sentence for the affected convicted persons.

The present matter does not relate to the death penalty, but relates to mandatory life sentence for incest where the victim was a daughter of the convict who was 11 years of age. It is a mandatory sentence. It is noteworthy that under the Sexual Offences Act of 2006, there are a number of penalties which have minimum sentence therefore a trial court cannot exercise jurisdiction to sentence somebody for a lower penalty irrespective of whatever mitigating circumstances.

In my view, the Muruatetu case dealt with the death penalty and the constitutionality of its mandatory nature. It did not deal with other sentences which are either mandatory or have minimum sentences. The Supreme Court gave directions and guidance on how those convicted and sentenced to mandatory death would raise the issue of sentence for the same to be reviewed. The court did not expand that principle to other mandatory sentences. I thus hold that the decision of the Supreme Court in the Muruatetu case does not apply to this case. The applicant has also said that he had appealed to higher court that is the Court of Appeal. He has not said how far he has pursued that appeal or whether he has withdrawn that appeal, which means that the appeal in the Court of Appeal is still alive and this court can thus not make a parallel decision in the same matter. Such action would easily amount to abuse of the court process.

Consequently, I find no merits in the application. The application is thus dismissed.

**Dated and delivered at Garissa this 27<sup>th</sup> Day of November 2018.**

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**George Dulu**

**JUDGE**