



**Mwero v Republic (Miscellaneous Criminal Application
E090 of 2022) [2023] KEHC 633 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION E090 OF 2022**

**A. ONG'INJO, J
FEBRUARY 9, 2023**

BETWEEN

SALIM MWACHONDO MWERO APPLICANT

AND

REPUBLIC RESPONDENT

(Mombasa High Court Criminal Appeal No. 45 of 2015 where Hon. Lady Justice Njoki)

RULING

1. The applicant herein was charged and convicted with the offence of defilement contrary to section 8 (1) as read with 8 (2) of the *Sexual Offences Act* No. 3 of 2006 in Criminal Case No. 3039 of 2010 at Mombasa by Hon. Ruguru where judgement was delivered on February 6, 2015 and the applicant was sentenced to serve life imprisonment.
2. Aggrieved by the conviction and sentence, the applicant appealed in Mombasa High Court Criminal Appeal No. 45 of 2015 where Hon. Lady Justice Njoki Mwangi substituted the sentence of life imprisonment to 36 years imprisonment guided by the holding in *Jared Koita Injiri v Republic* (2019) eKLR in which it was held: -

“In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.

The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a



young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”

3. Although the applicant’s mitigation was not considered when he was being sentence on account of the mandatory nature of section 8 (2), the judge in the criminal appeal substituted the sentence to a determinate one in consideration of the holding that mandatory maximum and minimum sentences are unconstitutional. The applicant’s application was therefore dealt with in the appeal and no more orders can be made in respect of this application. The same is dismissed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 9TH DAY OF FEBRUARY 2023**

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Applicant present in person

HON. LADY JUSTICE A. ONG’INJO

JUDGE

