



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL MISC. APPLICATION NO. 66 OF 2019

ABDINASIR GUHAD BORE.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. The Applicant Abdinasir Guhad Bore was charged in Criminal Case No. 103 of 2012 with the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act and convicted and sentenced to life imprisonment.
2. Being dissatisfied with the conviction and sentence he appealed to this court in Criminal Appeal Case No. 74 of 2012 where the appeal was dismissed.
3. Being dissatisfied with the judgement on the first appeal he lodged a further appeal to the Court of Appeal which upheld the conviction and sentence of life imprisonment.
4. The current application is based on the decision of the Supreme Court on mandatory sentence; the case of **Francis Karioko Muruatetu & Anor vs Republic, Petition No. 15** as consolidated with **16 of 2015**.
5. In his submissions the Applicant mainly mitigated against the sentence meted out on him by stating that he was a young man when he committed the offence, he is now much older and appreciates how to co-exist in the community, further that he has spent his time in prison meaningfully and has learnt a trade.
6. The application was opposed by the State on grounds that a similar plea of resentencing was made to the Court of Appeal and the same rejected; further that courts are bound by the doctrine of stare decisis and raising the issue again in this court amounts to an abuse of court process. The State made reference to the case of **Dodhia vs National Grindlays Bank Limited & Anor [1970] E.A. 95**.
7. The issues before this court are two-fold; whether this court has jurisdiction to consider resentencing in cases where the concept of mandatory sentence was applied. Secondly whether indeed resentencing can apply to the Applicant in the circumstances of this case.
8. Following the ruling of the **Francis Karioko Muruatetu** case though the same dealt with the issue of murder the principle therein has been found to broadly apply to other cases where there are mandatory sentences that have taken away judicial discretion.
9. Further it is to be noted that the **Francis Karioko Muruatetu's** case did not outlaw the death sentence where same is deserving but rather made it clear that mandatory sentences are unconstitutional and emphasized on the need to treat all accused persons equal and fair by giving each one the opportunity to mitigate towards the sentence to be meted out in line with **Section 216 and 329 of the Criminal Procedure Act Chapter 75 of the Laws of Kenya** and the court to exercise discretion as it should when sentencing,
10. The Applicant herein according to the trial notes mitigated against the sentence before judgment and the trial court was of the following view:

“Mitigation well noted. Offence is however serious. Accused shall serve life sentence.”

11. On appeal to the High Court the court found that the sentencing against the Applicant was proper. The Judge stated:

“The trial magistrate addressed his mind to the relevant legal principles and arrived at the proper conclusion that the

appellant is guilty of the main charge of defilement....”

12. In its judgement the Court of Appeal stated:

“... We turn to consider the merits of this appeal, in which the appellant has challenged. The decision of the High Court (S.N. Mutuku J) dismissing the first appeal and upholding the life sentence imposed by the trial court for the offence of defilement of a child of five years contrary to section 8(1) (2) of the Sexual Offence Act.”

13. In the same court the Applicant cited the case of **Francis Karioko Muruatetu** seeking to have the court declare the mandatory nature of life sentence in **section 8(1) (2) of the Sexual Offences Act** unconstitutional.

14. The Court of Appeal further had this to say while affirming the life imprisonment:

“Sentencing is also discretionary, following the decision in Francis Karioko Muruatetu (supra) that declared any law that deprives the court of the exercise of judicial discretion by providing mandatory sentencing as “harsh, unjust and unfair. The mandatory nature deprives the court of their legitimate jurisdiction to exercise discretion not to impose” the mandatory sentence in appropriate cases.”

15. The Court of Appeal found the life sentence imposed on this Applicant as having been appropriate due to his barbaric act against a child the

The fact that he was not sympathetic.

16. The matter having thus been raised before the superior court which pronounced itself the same cannot be revised by this court. This court is bound by the Court of Appeal decision as it were.

17. For the above reasons the application lacks merit and is dismissed.

DELIVERED AND SIGNED AT GARISSA THIS 10TH DAY OF JUNE, 2021.

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ALI-ARONI

JUDGE