

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL MISC. APPLICATION NO. 56 OF 2019

SAMMY MUSYIMI KIMWELE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was charged and convicted and sentenced to serve 21 years of offence of defilement of a girl aged 13 years contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006.
2. He appealed to the High Court at Garissa and the court in dismissing appeal held that the sentence was the minimum prescribed by the law thus dismissed the appeal on conviction and sentence.
3. The applicant did not appeal in the Court of Appeal but has now applied this court to resentence him as he was awarded minimum sentence under the provisions of mandatory minimum sentence which has been since been declared unconstitutional due to the mandatory nature or aspect of the sentence vide **Muruatetu case** of the Supreme Court and other superior courts decisions.
4. The prosecution submitted that the 21 years' sentence was within the law.
5. Having read the trial court file and the High Court in appeal decision, I find that the minimum sentence was awarded without consideration of the mitigation as it was mandatory minimum sentence thus same is unconstitutional.
6. Thus this court makes the following orders: -

(i) The sentence of 21 years' imprisonment in Criminal Case No. 38 of 2011 Kyuso is hereby set aside.

(ii) The matter is referred to trial court in Kyuso for sentencing.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 2ND DAY OF APRIL, 2020.

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C. KARIUKI

JUDGE