REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL MISC. APPLICATION NO. 102 OF 2019

BENEDICT KITHEKA KITUI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was charged with offence of defilement of a girl under the age of eleven years contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006.

2. He was convicted after trial and sentenced to life imprisonment.

3. He lodged an appeal in HCCRA No. 8 of 2013, Garissa which upheld conviction and confirmed sentence as a mandatory sentence.

4. In sentencing applicant, the trial court held that its hands were tied by law thus awarded the only sentence provided by law i.e. life sentence. This was on 8/9/2011 thus mitigation could not be considered.

5. The applicant has thus moved this court for re-sentencing in line with **Supreme Court Case of Muruatetu No. 15 of 2015** and subsequent superior court decisions which has held that mandatory aspect of a sentence is unconstitutional. The opinion of the Court of Appeal in **Jared Koita Injiri vs. Republic [2019] eKLR** where it held that:

> ***"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."***

6. The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in **S vs. Malgas 2001 (2) SA 1222 SCA 1235** paragraph 25 as follows:

> ***"What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."***

7. The State does not oppose the application but prefers matter being taken to trial court for re-sentencing after mitigations are considered.

8. Thus, the court makes the following orders:

> *(i)* ***The life sentence in Hola Criminal Case No. 54 of 2011 is set aside and matter sent back to Hola Magistrate's Court for sentencing after considering mitigations.***

DATED, DELIVERED AND SIGNED AT GARISSA THIS 10TH DAY OF JUNE, 2020.

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C. KARIUKI

JUDGE