

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

PETITION NO. 4 OF 2018

DAVIE MWATU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The Applicant was charged with offence of **Defilement** Contrary to **Section 8 (i)** as read with **Section 8 (4)** of Sexual Offences Act. NO. 3/2006. Particulars being that between **12/4/2013** and **12/6/2013** at unknown time in **Ikutha District** of **Kitui County** intentionally and unlawfully caused his penis to penetrate the vagina of **EMN** aged **17 years**.
2. In the alternative he faced a charge of **Indecent Act** Contrary to **Section 11 (1)** on the same particulars.
3. He was convicted and sentenced to serve **15 years imprisonment**. This triggered the lodging of the HCRA NO. 14/2017 in which the court dismissed it after hearing the parties and also 2 years seems to have been added to take care of the period the Applicant was on bail.
4. The Applicant did not proceed to Court of Appeal to challenge the High Court decision. However, he has now moved court on the new practices of moving court after exhausting appeal process via the re-sentencing process vide the Petition No. 4 of 2018. He impugns the imposition of mandatory life sentence order.
5. This is triggered by MUTUATETU and other recent superior court decisions which have held that minimum mandatory sentences are unconstitutional as they trash mitigating circumstances and rob judiciary discretion to determine appropriate sentences.
6. The State does not oppose the application of the re- sentencing as trial court mandatory sentence did not meet Constitutional threshold due to the aforesaid holding on unconstitutionality of mandatory sentences.
7. Thus this court without much ado makes the following orders:

1. The sentence imposed by Mutomo Senior Resident Magistrates Court on 14/2/2014 and confirmed by the High Court in HCRA No. 14//2017 on 8/2/2018 is hereby set aside.

2. The matter is referred back to Magistrates Court Mutomo for re-sentencing after the court considers petitioner's mitigations.

8. Orders accordingly.

Dated, Signed and delivered at Kitui this 15th day of October 2019.

C. KARIUKI

JUDGE