



**Mwangiri v Republic (Constitutional Petition 9 of 2021)  
[2023] KEHC 1067 (KLR) (20 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1067 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CONSTITUTIONAL PETITION 9 OF 2021**

**SM GITHINJI, J**

**FEBRUARY 20, 2023**

**IN THE MATTER OF ARTICLES 20 (1) (2) (4), 22 (1) (3) OF THE  
CONSTITUTION OF KENYA, 2010.**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOM OF AN INDIVIDUAL UNDER ARTICLE 23 (1) (3), 25 (A) (B) (C),  
27 (1) (2) (4), 28, 29 (A) (C) (F), 25 (1) (2), 47 (1) (2), 48, 50 (1) (2) (B) (P)  
(Q), 6 (A), 159 (1) (2) AND 165 (A) (B) (D) (1) (11) AND 23 OF THE  
CONSTITUTIONAL OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 258 AND 259 (1) (3) OF THE  
GENERAL PROVISION OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF NEW AND COMPELLING EVIDENCE UNDER ARTICLES  
165 (6) (A) (B) OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF UNCONSTITUTIONALITY OF SECTION 8 (3) OF THE  
SEXUAL OFFENCES ACT NO.3 OF 2006 AND SECTION 216 AND 329 (2)  
(A) OF THE CRIMINAL PROCEDURE CODE**

**BETWEEN**

**SAMUEL MWANGIRI ..... PETITIONER**

**AND**

**REPUBLIC ..... REPUBLIC**



*(A Petition from the Judgement of the Court of Appeal Sitting at Court of Appeal Sitting at Malindi in Kca No.28 of 2019 Before Hon. Justice A.K.Murgor , Gatembu Kairu (Fciars) And W.Karanja (JJA) In Chambers Dated and Delivered on The 5th February, 2021)*

**JUDGMENT**

1. The petitioner filed the instant petition on February 14, 2022 seeking the following prayers;
  - i. That this honourable court invoke the jurisdiction in article 19 (3), 20 (1) and 27 (1) (2) (4) of the Constitution of Kenya 2010 and declare that equally the petitioner is entitled as a right and qualifies to benefit from the jurisprudence of the earlier cited cases. (sic).
  - ii. A declaration be made that section 8 (3) of the Sexual Offences Act No 3 of 2006 being unconstitutional to the extent that it provides a mandatory minimum sentence and denies judicial officers their exercise of discretion in sentencing prior to imposing an appropriate sentence based on the scope of evidence adduced and recorded on case to case basis and failing to consider the mitigating factors in contravention of article 27 (1) (2) (4) of the Constitution of Kenya 2010.
  - iii. That this honourable court of justice allow this petition in order for the presiding judges of the high court to rehear, receive and record the evidence and submission as may be presented and made for the purpose of passing an appropriate sentence.
  - iv. That the declaration and order should take into account the individual age of the petitioner being 31 years as at when the conviction was recorded up to the date of hearing and determination of this petition.
  - v. That any other order this honourable court of justice may deem fit to grant.
2. The DPP the respondent herein, filed grounds of opposition dated November 15, 2022 opposing the petition on grounds that.
  - a. The highest court of the land, Supreme Court of the Republic of Kenya wherein the Petitioner would have canvassed his grievances on the sentence has already pronounced itself on the issue of mandatory sentence in the landmark decision now popularly known as Muruatetu.
  - b. That the petition offends the provisions of articles 163, 164 & 165 of the Constitution of ultra vires and the principle of the hierarchy of court as the Court of Appeal dismissed the second appeal against both conviction and sentence in its entirety. This honourable court is not vested with powers to overturn the Court of Appeal and Supreme Court orders.
  - c. That the petition is frivolous, an afterthought and a waste of judicial precious time as this court is functus officio having heard and determined the first appeal against both conviction and sentence and subsequently dismissing the same.
  - d. That the applicant has failed to demonstrate how his rights to fair trial as envisaged in articles 49 and 50, Constitution of Kenya were infringed before, during and after trial to give life to this petition.
3. I have considered the petition and the grounds on which it is founded and the response, and the issue for determination is whether the petition is merited?



4. The jurisdiction of the High Court of Kenya in constitutional matters derives from the provision of article 23 of the 2010 Constitution; which states as follows:

“23. Authority of courts to uphold and enforce the Bill of Rights

1. The High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
2. Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
3. In any proceedings brought under article 22, a court may grant appropriate relief, including—
  - (a) a declaration of rights;
  - (b) an injunction;
  - (c) a conservatory order;
  - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24;
  - (e) an order for compensation; and
  - (f) an order of judicial review.”
5. The import of the above constitutional provision is that the jurisdiction of the constitutional court is limited to the interpretation or construction of provisions of the Constitution; and determining whether a person, or institution has acted in a manner that violates the provisions of the Constitution. In this regard, in as far as this court is tasked to determine whether the actions of the respondent violated the alleged provisions of the constitution, this court has jurisdiction to entertain the petition.
6. In the case of Mumo Matemo v Trusted Society of Human Rights Alliance Civil APP.290/2012 (2013) e KLR: the court said:

“if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

7. The court further stated;

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”



8. The burden to prove each of the grounds raised in the Constitutional Petition, that an impugned action offends some provision of the Constitution, rests on the person challenging the validity of the action. There is only a shift of evidential burden onto the respondent upon the Petitioner either raising a *prima facie* case necessitating adverse proof by the respondent; or where the evidence required to determine the matter before court is either in the possession, or only within the knowledge of the Respondent. This is in accordance with the provisions of section 107 of the Law of Evidence Act which states as follows: –
  - a. "107. (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - b. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person..."
9. To this end, in my view, I am not convinced that the petitioner has proved any acts of violation and/or infringement of rights by the respondent.
10. I would therefore associate myself with the dictum by the Court of Appeal in the case of Francis Gathungu v Kenyatta University [2018] eKLR, where the learned justices observed that “We think, with respect, that a willy-nilly attempt at constitutionalizing every common dispute must be discovered, named and rebuffed. This is by no means a manifestation of hostility towards upholding the bill of rights or fundamental of freedoms but rather a pragmatic approach to adjudication. The courts must be vigilant to confine constitutional determination to disputes that raise and invoke authentic and genuine constitutional questions.”
11. The court went ahead to cite the South African decision of Carmichele vs Minister Of Safety And Security [2001] [4] SA 938, 2001 [10] BCLR, where the court gave guidance on the demarcation between constitutional grievances and contractual or common-law grievances, with which the court respectfully agreed;
 

“Where the court determines rights asserted by a Party do not relate directly to the Bill of Rights, It may still apply the Bill of Rights to the dispute. It must always infuse any law with the general spirit, purport and objects of the Bill of Rights. The court is not confined by the pleadings filed by the parties; it must be prepared to raise of its own accord constitutional issues that may affect a legal relationship, interpretation of legislation or the development of the common-law. Simply because an interpretation of a statute, or common law rule, would in the abstract raise some kind of constitutional issue does not mean parties adopt constitutional argument in every dispute. The Court likewise need not provide a constitutional analysis of the status of common-law or piece of legislation in every case which such rule is dispositive.”
12. David Ramogi & 4 Others v The Cabinet Secretary, Ministry of Energy & Petroleum & 7 Others (2017) eKLR that spoke to the concern of filing suits as constitutional petitions in the High Court when they ought to have been filed in specialized courts and the court observed that the net effect of such stunts was a multiplicity of suits in various registries, possibility of duplication of judicial efforts and wastage of courts time. The court also counseled advocates to advise their clients candidly.
13. Constitution is the supreme law of the land; any court deciding on a legal dispute before it, under whichever law, must consider whether the decision is consistent with the provisions of the constitution, for if not, it is null and void. This particular matter having gone up to the Court of Appeal and decided on, cannot revert on its own, unless by an order of that court to the High Court. This would avoid a



situation where the High Court may reverse, the decision of the Court of Appeal. The High Court original and inherent jurisdiction under article 165 (3) does not water down the established hierarchy of courts under article 162 (1). The ladder is upward only unless referred back by a court at an upper level.

14. On the foregoing grounds I find the petition unmerited and is hereby dismissed.

**RULING READ, SIGNED AND DELIVERED AT MALINDI THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2023.**

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**S.M. GITHINJI**

**JUDGE**

In the Presence of: -

The Petitioner and the Prosecutor

