Mgalla v Republic (Criminal Revision E095 of 2024)
[2025] KEHC 8930 (KLR) (24 February 2025) (Ruling)

Neutral citation: [2025] KEHC 8930 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL REVISION E095 OF 2024

AN ONGERI, J

FEBRUARY 24, 2025

BETWEEN

ABDALLA HASSAN MGALLA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant was convicted with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* (SOA) No. 3 of 2006 and he was sentenced to 15 years imprisonment.

2. The Applicant appealed to the High Court and the appeal was dismissed on 8th December 2023.

3. The Applicant has now made the current application seeking revision of the sentence.

4. The parties have filed written submissions as follows:- the applicant submitted that he has exhausted all his avenues for appeal and thus has no pending appeal before any superior court. the applicant argued that he is thus a legitimate candidate for resentencing. The applicant submitted further that the imposition of mandatory minimum sentences as provided by the *Sexual Offences Act* is discriminatory in nature because they give differential treatment to the appellant from the kind of treatment accorded to convicts under other offences which do not impose mandatory sentences. The mandatory minimum sentences thus violate the accused person's rights under Article 27 of the *constitution*.

5. The applicant urged the court to consider the mitigating factors. The applicant at the time of commission of crime was young and had just married two wives. He was blessed with 12 children and among them 2 were in high school. He left behind a large family where he was the sole bread winner. His aging mother was additionally dependent on him as he was her only son.

6. The applicant submitted that after a thorough soul searching and reflection, he takes full and personal responsibility for the crime as charged. He indicated that it is his profound regret and apology having taken part in the commission of the crime in question. The applicant also pointed out that he would not repeat the same offence.

7. The prosecution alternatively submitted that the sentence that was passed by the trial and appellate court was legal. The prosecution argued that the issue of sentence has been dealt with exhaustively and therefore this court does not have jurisdiction to review the sentence. The applicant thus seeks for this court to sit on appeal on the decision made by a court of concurrent jurisdiction and a higher court. It was the prosecution position that the application herein is an abuse of court process and should not be allowed.

8. The sole issue for determination is whether the sentence imposed upon the Applicant should be revised.

9. The Supreme Court has given directions that the penalties for sexual offences are lawful and mandatory.

10. The supreme court said in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others* (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) held as follows;

> " iii. Whether minimum sentences as prescribed in the *Sexual Offences Act* are unconstitutional and (iv) whether courts have discretion to impose sentences below minimum those prescribed by the *Sexual Offences Act*.
>
> 64. Returning to the issue of the constitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act, we note that the Court of Appeal failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. We find this approach problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.
>
> 65. The proper procedure before reaching such a manifestly far-reaching finding would have been for there to have been a specific plea for unconstitutionality raised before the appropriate court. This plea must also be precise to a section or sections of a definite statute. The court must then juxtapose the impugned provision against the *constitution* before finding it unconstitutional and must also specify the reasons for finding such impugned provision unconstitutional. The Court of Appeal in the present appeal did not declare any particular provision of the *Sexual Offences Act* unconstitutional, failing

to refer even to the particular Section 8 that would have been relevant to the Respondent's case.

66. We also note that the Court of Appeal concluded its decision in this present matter by reducing the Respondent's sentence from the minimum of 20 years to 15 years. In doing so, the Court of Appeal did not clarify the considerations that went into its decision to reduce the sentence. The reasoning behind the court's decision is called into question by this omission as sentencing is a matter of fact unless an Appellate Court is dealing with a blatantly illegal sentence which was not the case in the present matter.

67. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.

68. This is why, even in the Muruatetu case, this Court was keen to still defer to the Legislature as the proper body mandated to legislate. While the courts have the mandate to interpret the law and where necessary strike out a law for being unconstitutional, this mandate does not extend to legislation or repeal of statutory provisions. In that regard, we echo with approval the words of the High Court in the case of *Trusted Society of Human Rights v Attorney-General and others*, High Court Petition No 229 of 2012; [2012] eKLR, at paragraphs 63-64 where it held as follows:

> "Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, the *constitution*, regarding the necessity of separating the Governmental functions. the *constitution* consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those

functions assigned to it without interference from the other two."

We reiterate the above exposition of the law and the answer to the two questions under consideration is that, unless a proper case is filed and the matter escalated to us in the manner stated above, a declaration of unconstitutionality cannot be made in the manner the Court of Appeal did in the present case.

G. Conclusion

69. Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence."

11. In view of the above decision, the application by the Applicant lacks in merit and the same is dismissed.

DATED, SIGNED AND DELIVERED THIS 24TH FEBRUARY 2025 VIRTUALLY VIA MTAT VOI.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Maina

The Appellant present at Manyani Prison