Wambua v Director of Public Prosecution (Criminal Revision E111 of 2024) [2025] KEHC 2026 (KLR) (17 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2026 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL REVISION E111 OF 2024

NIO ADAGI, J

FEBRUARY 17, 2025

BETWEEN

JOHN NZOMO WAMBUA ..... APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

RULING

1. The Applicant was charged with the offence of defilement contrary to section 8 (1) as read with section 8(3) of the *sexual offences Act* No. 3 of 2006.

2. The Trial Magistrate convicted and sentenced the Applicant to serve twenty (20) years imprisonment.

3. The Applicant appealed against the sentence at the High Court at Machakos in Criminal Appeal No. 70 of 2017 where Judge D. K. Kemei, agreed with the trial court that the sentence imposed is the minimum possible in law and saw no reason to interfere with it thus dismissed the appeal.

4. The Applicant has now filed an undated Notice of Motion seeking the following orders, that:

    a. A declaration that the Trial Court in not considering the applicant's mitigation and sentencing him by virtue of minimum mandatory sentences as provided for in the *Sexual offences Act* violated his constitutional rights as enshrined under article 50(2)(p), 25 and 28 of the *Constitution*'

    b. That this honourable court seeks to review the sentence pursuant to section 216 of the *Criminal Procedure Code* and the 2016 Judiciary Sentencing Policy Guidelines.

    c. Any other orders that the court deems just under Article 23 of the *Constitution* or any other enabling laws.

5. The Applicant averred that the court has jurisdiction to determine the case and the court should find that he is entitled to a resentencing order. That the court declares that his constitutional rights as indicated in the *Constitution* of Kenya under Articles 25, 28 and 50(2) have been violated pertaining to a fair trial and mitigation vis a vis the minimum mandatory sentences as provided for in the *Sexual Offences Act*.

6. That the court should find that the applicant has the right to benefit from the least severe sentence as provided for under article 50(2) (p) of the *Constitution*.

7. He averred that if the court fails to order for the relief sought, he would suffer irreparably as he will end up serving a longer sentence.

8. The application was directed to be canvassed through written submissions. Both parties complied by filing their respective submissions.

Analysis and Determination:

9. I have considered the application and written submissions filed on behalf of the respective parties. The issue for determination is whether the Court should review the sentence of 20 years imprisonment imposed by the Trial Court.

10. This Court is guided by the principles in the Court of Appeal case of *Bernard Kimani Gacheru vs. Republic* [2002] eKLR where it was stated as follows:

> "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

11. The Court of appeal also rendered itself as follows on sentences in sexual offences in the case of *Athanus Lijodi vs. Republic* [2021] eKLR

> "On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases *Muruatetu's case* (supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for instance *Evans Wanjala Wanyonyi v Republic* [2019] eKLR). Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited."

12. The same court in the case of *Dismas Wafula Kilwake Vs. Republic* [2019] eKLR stated as follows;

> "Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take

the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

13. The provision of section 8(1) as read together with provisions of section 8(2) of the *Sexual Offences Act* No 3 2006 and legislation that was in force before commencement of the *Constitution* of Kenya 2010 must be considered with adaptation, qualification and exception when it comes to the mandatory minimum sentence and in particular when the said sentences do not take into account the dignity of the individual as mandated under article 27 of the *Constitution* and as appreciated in the Francis Muruatetu case and applied by courts in several cases

14. In Francis Karioki Muruatetu & Another vs Republic the Supreme Court did provide guidelines and mitigating factors in re-hearing of sentence. The Judiciary sentencing policy guidelines list the objective of Sentencing At. Paragraph 4.1 they include the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the applicants to inflict harm.

15. In *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) the Supreme Court on 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* held as follows

    63. 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.

    64. 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.

    65. 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.

66. 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.

67. 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.

16. Having considered the sentence meted out and circumstances of this case as well as guided by the above precedents and also having considered that the said Section 8(2) of the *sexual offences Act* No. 3 of 2006 fettered the courts discretion in sentencing, I do find that the sentence was reasonable given proportionality between the sentence passed and the crime committed.

17. I have also considered that this court and the High Court in Criminal appeal No. 70 of 2020, *John Nzomo Wambua v Republic* hold the same jurisdiction and therefore this court cannot overturn the judgment and findings of an equal jurisdiction. That would amount to this court determining an appeal on its own decision. The Applicant has not exhausted all his avenues of appeal in this matter.

18. Accordingly, the application lacks merit and is hereby dismissed.

It is so ordered.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 17TH FEBRUARY 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 17TH FEBRUARY 2025

In the presence of :

In person..... for Appellant

Ms Agatha..... for Respondent

Milly Grace..... Court Assistant