Mbithuka v Republic (Criminal Miscellaneous Application E284 of 2024) [2025] KEHC 9731 (KLR) (Crim) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9731 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL MISCELLANEOUS APPLICATION E284 OF 2024

AB MWAMUYE, J

JUNE 12, 2025

BETWEEN

SAMMY KITAVI MBITHUKA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant seeks two main orders by his application dated 7th August 2024: first, a declaration that the mandatory life sentence prescribed by section 8(2) of the *Sexual Offences Act* No. 3 of 2006 is unconstitutional; and second, an order for resentencing of the applicant's conviction on the basis of mitigation and emerging jurisprudence. The applicant was convicted of defilement of a child under section 8(1) read with section 8(2) of the *Sexual Offences Act* and sentenced to life imprisonment. His first appeal to the High Court and his second appeal to the Court of Appeal were dismissed, leaving the life sentence intact.

2. The applicant was charged with defilement of a girl, aged under 12 years, contrary to section 8(1) of the *Sexual Offences Act*. Upon conviction, he was sentenced under section 8(2) to serve life imprisonment, the mandatory minimum in law. He appealed the conviction and sentence to the High Court, which affirmed both (High Court Criminal Appeal No. 60 of 2018, Malindi Law Courts, R. Nyakundi J, 14 May 2020). Thereafter he appealed to the Court of Appeal (Criminal Appeal No. 12 of 2021, Court of Appeal at Malindi, delivered 7 July 2023), which again affirmed the conviction and life sentence.

3. Following those decisions, the applicant filed this Miscellaneous Criminal Application in the High Court seeking to challenge the legality of his mandatory life term. He argues that section 8(2) ousts the court's sentencing discretion and violates his constitutional rights, and he requests that he be heard afresh in mitigation under the guidance of the Sentencing Guidelines.

4. The Court identifies the following issues for determination:

    a. Whether, in light of settled law on finality of judgments and appeals, this High Court has jurisdiction to entertain an application that effectively seeks to reopen a case in which both first and second appeals have been concluded.

Analysis

Jurisdiction of the High Court to Reopen a Concluded Case

5. The question of jurisdiction is paramount. It is undisputed that the applicant was tried, convicted, and sentenced to the mandatory life imprisonment under Section 8(2) of the *Sexual Offences Act* for defilement of a minor, and that both his conviction and sentence were upheld on first appeal. The applicant then moved this Court by way of the present motion, essentially seeking a re-sentencing on grounds of alleged unconstitutionality of the mandatory sentence and in light of mitigating circumstances. However, this Court cannot ignore the fact that the applicant's case has already been conclusively determined by the Court of Appeal, a superior court.

6. The High Court, as a lower court in the appellate hierarchy, lacks jurisdiction to reopen or review a matter that has been decided by the Court of Appeal, except on remand or as directed by a higher court. Indeed, Article 165(6) of *the Constitution* explicitly withholds from the High Court any supervisory jurisdiction over superior courts. In practical terms, once an appeal has been heard and determined by the Court of Appeal, the principle of finality (and the doctrine of functus officio) precludes this Court from entertaining the same matter under the guise of a constitutional motion or otherwise.

7. For instance, in James Osiro Liech v Republic [2021] KEHC 3799 (KLR), a defilement convict who had exhausted his first appeal sought resentencing based on the Muruatetu decision. The High Court (Kamau J.) emphatically dismissed that application, holding that unless and until the issue of mandatory sentences for sexual offences was litigated through the proper appellate channels up to the Supreme Court, the High Court was bound by the prevailing law and could not deviate from it. The court in Liech underscored that it was "bound" by the existing framework and its "hands would remain tied" absent a pronouncement by the apex court on the matter. In other words, a High Court cannot purport to grant relief that effectively overturns or bypasses a decision of the Court of Appeal in the same case to do so would violate the hierarchy of courts and the doctrines of stare decisis and res judicata.

8. Applying these principles to the instant case, the applicant's sentence was confirmed on appeal by the Court of Appeal. This Court is therefore functus officio in respect of that criminal cause. No appeal or order has been remitted back to us for reconsideration. The applicant's attempt to invoke our constitutional jurisdiction under Article 165(3)(b) (enforcement of rights) cannot succeed in the face of a binding appellate decision on the very subject. As the Supreme Court has observed, the High Court's power to address alleged constitutional violations does not exist in a vacuum and cannot be invoked so as to mount a collateral attack on a final decision of a higher court under the guise of a constitutional question. Such an approach would undermine the orderly process of appellate review and the certainty of final judgments.

9. Moreover, since the applicant's challenge ultimately targets the legality of the sentence prescribed by Section 8(2) of the *Sexual Offences Act*, the proper course would have been to file a substantive constitutional petition at first instance (raising the issue of that law's validity) before the initial trial or during the direct appeals, rather than after the case has run its course in the ordinary criminal hierarchy. The Supreme Court in Francis Muruatetu & Another v R; Katiba Institute & 4 others (Amicus)

[2021] KESC 31 (KLR) (the directions issued on 6th July 2021) made this abundantly clear. In those directions which are binding on all courts the Supreme Court expressly limited the application of Muruatetu to the offence of murder, and admonished that its holding on the unconstitutionality of the mandatory death penalty could not automatically be applied to other offences or sentences.

10. The Court underscored that any expansion of the Muruatetu principle would require a "proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels" on the specific provision at issue. Absent such a test case, "Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*". This guidance reinforces that a High Court cannot simply disregard a legislatively mandated sentence (or a superior court's affirmation thereof) without a clear warrant in law or a higher court's directive.

11. In sum, on the first issue, the Court finds that it has no jurisdiction to entertain the applicant's plea for resentencing. The applicant's case was heard on appeal by the Court of Appeal, whose decisions are binding on this Court. It is a fundamental constitutional principle that precedents set by the Court of Appeal and the Supreme Court bind this Court. Short of a successful appeal or review by a higher court, this Court must decline any invitation to reopen or overturn those outcomes. On this ground alone, the application before us is fatally defective.

> Constitutionality of the Mandatory Life Sentence under Section 8(2) of the *Sexual Offences Act*

12. The applicant argues that this mandatory sentence, which deprives the trial court of any discretion to consider mitigating circumstances or the offender's particular circumstances, is unconstitutional. He has invited the Court to consider emerging jurisprudence and evolving standards, including the reasoning in recent cases, to find that a sentence other than life imprisonment could be appropriate in his case.

13. There is no doubt that in the wake of the landmark Muruatetu, litigants and courts alike began to question the propriety of mandatory minimum sentences in other contexts, including sexual offences. Indeed, over the past few years, the Court of Appeal has delivered notable decisions signaling a shift toward recognizing the right of an offender to mitigation in all cases. A prime example relied upon by the applicant is Julius Kitsao Manyeso v Republic [2023] KECA 827 (KLR). In that decision, the Court of Appeal at Malindi held that the mandatory life sentence for defilement (where the victim is a child below a certain age) was unconstitutional. The appellate court reasoned that sentencing is an integral part of the right to a fair hearing, and that a law barring the consideration of individualized mitigating factors unduly deprives the court of its judicial function and the convict of the right to be heard on punishment. The Malindi Court of Appeal pointedly stated that "such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation", terming this disparity unfair and discriminatory. In that case, having declared the automatic life term "an indeterminate life sentence" incompatible with constitutional guarantees, the Court of Appeal set aside the life imprisonment and substituted a term of 40 years imprisonment for the offender.

14. Soon thereafter, a differently constituted bench of the Court of Appeal sitting in Kisumu reached a similar conclusion in Evans Nyamari Ayako v Republic (2023). Building on Manyeso, the Kisumu Court of Appeal found that an indefinite life imprisonment with no prospect of release amounts to cruel, inhuman and degrading punishment, and it embraced the concept of a "right to hope" for convicted persons. In a bold pronouncement, the Court redefined "life imprisonment" in Kenya to mean a term of 30 years' imprisonment (subject to remission) rather than incarceration for the natural

life of the prisoner. The court observed that in many jurisdictions, life sentences are either defined by statute or through parole systems, and it held that Kenya should be no exception "life imprisonment translates to thirty years' imprisonment", unless and until the law is amended to provide otherwise.

15. The applicant before us has urged the Court to apply the same reasoning to his situation. He contends that his mitigation (including factors such as his age, personal circumstances, and rehabilitation efforts) was not considered at sentencing due to the fetters of Section 8(2), and that this amounted to a violation of his rights under (among others) Article 25(c) (fair trial), Article 27 (equality before the law), and Article 28 (human dignity) of *the Constitution*.

16. Having carefully considered the applicant's plea, I acknowledge the persuasive force of the Court of Appeal's pronouncements in Manyeso, Ayako and similar cases. However, I must equally acknowledge that those pronouncements have since been overtaken by a binding decision of the Supreme Court. The evolution of jurisprudence in this area culminated in the case of Republic v Joshua Gichuki Mwangi, Supreme Court Petition No. E018 of 2023. In that case decided on 12th July 2024, the Supreme Court had the occasion to review the Court of Appeal's nullification of a 20-year mandatory sentence under the *Sexual Offences Act*. The apex court allowed the Director of Public Prosecution's appeal, thereby reversing the trend set by the Court of Appeal and affirming the constitutionality of the sentencing regime in the *Sexual Offences Act*. The Supreme Court decisively held that the minimum and mandatory sentences prescribed by the *Sexual Offences Act* (including the life sentence under Section 8(2)) remain valid and lawful unless and until duly invalidated through a proper judicial process.

17. It criticized the Court of Appeal for declaring the law unconstitutional in sweeping terms without pinpointing a specific statutory provision or undertaking the requisite constitutional analysis. The Supreme Court observed that no court below had fully heard and determined a constitutional challenge to Section 8 of the *Sexual Offences Act*; hence the Court of Appeal had acted ultra vires by effectively usurping a constitutional petition jurisdiction in the course of a normal criminal appeal. Importantly, the Supreme Court stressed that sentencing policy is primarily a legislative function: courts must enforce the penalties set by law unless those penalties are formally declared unconstitutional on a proper basis. In sum, the Supreme Court reinstated the primacy of Parliament's role in setting punishment and admonished that courts should not lightly invalidate statutory sentences without robust justification and due process.

18. For the avoidance of doubt, the Supreme Court in Mwangi made its holdings abundantly clear. It set aside the Court of Appeal's decision that had tampered with the mandatory sentence, and it reinstated the original sentence (life imprisonment or the prescribed term) as imposed by the trial court and affirmed on first appeal. The apex court declared that the sentence imposed under Section 8 of the *Sexual Offences Act* was "lawful and remains lawful as long as Section 8 ... remains valid." In the Supreme Court's view, the Court of Appeal "had no jurisdiction to interfere" with the lawful sentence in the absence of a clear constitutional or legal basis to do so. Consequently, the Court of Appeal's earlier declaration that mandatory minimum sentences in the *Sexual Offences Act* were per se unconstitutional was overturned. The net effect of the Mwangi judgment is that, as things stand, Section 8(2) of the *Sexual Offences Act* is an enforceable and constitutional provision of the law. The mandatory life sentence is deemed the appropriate punishment for the prescribed offence, subject only to a successful future constitutional challenge or legislative amendment.

19. This ruling by the Supreme Court is binding on all lower courts, including this Court. In fact, the High Court at Meru (Gitari J.) recently underscored this exact point when faced with a similar argument. In Criminal Appeal E079 of 2023 (Meru), the Court noted that the Supreme Court's pronouncement in Republic v Mwangi had "settled the law on the sentences under Section 8 of the

Sexual Offences Act", leaving no room for deviation: the High Court "cannot depart from it." We respectfully align ourselves with that position. No matter how compelling the applicant's mitigation or the "evolving" Court of Appeal jurisprudence might seem, this Court is duty-bound to follow the authoritative pronouncement of the Supreme Court. The doctrine of stare decisis (now entrenched in our Constitution by virtue of Article 163 and the hierarchical court structure) demands as much.

20. Accordingly, I find that the mandatory life sentence under Section 8(2) of the *Sexual Offences Act* is not unconstitutional in the present state of the law. The Supreme Court has affirmed its constitutionality, and that declaration is conclusive and binding on this Court. While the applicant cited the progressive decisions of the Court of Appeal for the proposition that the mandatory sentence should be reconsidered, those decisions no longer represent the law after the Supreme Court's intervention. In effect, the applicant is asking this Court to do what the Court of Appeal did in Manyeso yet the Supreme Court has since ruled that such action falls outside the proper remit of a court at our level in the absence of a duly proven constitutional violation. To accede to the applicant's request would not only flout binding precedent but also amount to an impermissible reversal of a final appellate decision. This Court simply has no authority to declare Section 8(2) unconstitutional on its own motion when the apex court has pronounced it to be valid law. Any departure from the legislated sentence can only be sanctioned by either the Supreme Court (upon a successful appeal or advisory opinion) or by Parliament (through statutory amendment).

21. In conclusion, the High Court lacks jurisdiction to reopen the applicant's concluded case, and in any event, the mandatory life sentence imposed is lawful and must stand in light of the prevailing binding jurisprudence. The applicant's plea for re-sentencing is therefore untenable. This Court is bound to uphold the sentence as earlier confirmed on appeal, unless and until a higher court or the law itself provides otherwise. The upshot is that the application for resentencing on the basis of an allegedly unconstitutional mandatory sentence cannot succeed.

22. I therefore decline to grant the orders sought, for want of jurisdiction to do so. The life sentence imposed on the applicant remains undisturbed. Appeal dismissed with no orders as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 12TH DAY OF JUNE 2025.

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BAHATI MWAMUYE

JUDGE