Samtom v Republic (Criminal Miscellaneous Application E329 of 2024) [2025] KEHC 8670 (KLR) (10 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8670 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL MISCELLANEOUS APPLICATION E329 OF 2024

REA OUGO, J

JUNE 10, 2025

BETWEEN

BONFACE NGEIYO SAMTOM ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Boniface Ngeiyo Samton (the applicant) has brought his application under Article 22(1), 23(1), 25(c), 27(10), 50(2)(p) & (q), and 165(3)(b) of *the Constitution* of Kenya 2010, as well as Section 329 and 316 of the *Criminal Procedure Code* seeking the following order:

    i. Spent

    ii. That the appellant is seeking a declaration by this court that his case revision has merits and it qualifies to be heard.

    iii. That he prays to be present during the hearing and determination of this matter.

2. The application is based on the following grounds:-

    a. That, the applicant was charged and convicted for an offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *sexual offences Act* No. 3 OF 2006 in criminal case number 130 of 2008 at Sirisia Magistrate court where the applicant was sentenced to 30 years imprisonment of which the same was replaced with life imprisonment at High Court of Kenya in Bungoma in HC CR. APPL NO. 11 OF 2010 and the same was confirmed by the Court of Appeal of Kenya at Eldoret in Court of Appeal no. 696 of 2013.

    b. That, the appellants sentence revision was also dismissed at High Court of Kenya at Bungoma in HC CRMISC. NO.78 OF 2019.

c. That the appellant is seeking a declaration by this court that his case revision has merits and it qualifies to be heard.

d. That the High Court has competent jurisdiction to hear and determine this application under Article 165 (3) (b) of *the Constitution* of Kenya 2010.

e. That a life sentence contravenes sections 216 and 389 of the criminal procedure codes on mitigation and the values of sentencing as in the sentence policy guidelines 2016 paragraph 4;1. That , under the provisions of *the constitution* of Kenya 2010 and Practice and Procedure Rules 2010 this court ha power to hear and determine infringements of fundamental rights and award remedies.

3. The application is further supported by an affidavit in which he depones as follows: he was charged and convicted of the offence of Defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006 in criminal case number 130 of 2008 at Sirisia Magistrate Court, where he was sentenced to 30 years' imprisonment, which was later commuted to life imprisonment at the High Court of Kenya in Bungoma in HCCR. APPL. NO. 11 OF 2010, and this was confirmed by the Court of Appeal of Kenya at Eldoret in Court of Appeal No. 696 of 2013. His sentence revision was also dismissed at the High Court of Kenya in Bungoma in HCCR. MISC. NO. 78 OF 2019. He is seeking a declaration from this court that this case revision has merit and qualifies to be heard. The High Court has competent jurisdiction to hear and determine this application under Article 165 (3) (b) of *the Constitution* of Kenya 2010. A life sentence contravenes Sections 216 and 389 of the *Criminal Procedure Code* regarding mitigation and the values of sentencing as outlined in the Sentence Policy Guidelines 2016, paragraph *4*, *1*. Under the provisions of *the Constitution* of Kenya 2010 and the Practice and Procedure Rules 2010, this court has the power to hear and determine infringements on fundamental rights and award remedies.

4. The application was opposed. The applicant and respondent submitted written submissions. I have carefully considered these submissions. The applicant was charged with defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* in Sirisia criminal case No. 130 of 2008. He was convicted and sentenced to 30 years' imprisonment. Thereafter, he lodged an appeal in the High Court in Bungoma, HCCRA No. 11 of 2010. The appeal was dismissed, and his sentence was enhanced to life imprisonment. He subsequently filed an appeal in the Court of Appeal, but it was once again rejected by the Court of Appeal in Eldoret, Court of Appeal No. 696 of 2013. He has returned to the High Court seeking a review of his sentence. Can the High Court review his sentence as sought? Does the life sentence he is currently serving in any way contravene the provisions of *the Constitution* or section 8 of the *Sexual Offences Act*? Can he be resentenced again to a definite jail term as he requested during the hearing of his application? The Supreme Court in Petition No. E018 of 2023, whilst answering the question on "Whether minimum sentences as prescribed in the *Sexual Offences Act* are unconstitutional and (iv) whether courts have discretion to impose sentences below the minimum 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. SC Petition No. E018 of 2023 33 [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 SC Petition No. E018 of 2023 34 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.

(68) 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.

5. The High Court observed in its judgment in HCCRA No. 11 of 2010 that the appellant was 20 years old and the complainant was 5 years old. Section 8 (2) does not prescribe a minimum sentence; the only sentence is life. That is the legal position. The Supreme Court held that the punishment under section 8 of the *Sexual Offences Act* remains lawful as long as that section remains valid. Furthermore, the applicant, in his application, is seeking a declaration that his case for revision has merit. Based on the Supreme Court's decision, his case warrants no review. It is also notable that an application for review filed by him in HCCRMISC NO. 78 of 2019 was dismissed. I find no merit in the applicant's application and therefore dismiss it.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 10TH DAY OF JUNE 2025.

R.E.OUGO

JUDGE

In the presence of:

Bonface Ngeiyo Samton - Applicant

Miss Matere - For the Respondent ; Wilkister - C/A