



REPUBLIC OF KENYA



**Balozi v Republic (Criminal Appeal E122 of 2023)
[2025] KEHC 13066 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13066 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E122 OF 2023
M THANDE, J
SEPTEMBER 19, 2025**

BETWEEN

JALI KATANA BALOZI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant, Jali Katana Baloi 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* [SOA]. The particulars of the offence are that between December 2018 and 16.1.19 at [particulars withheld] village of Watamu location within Kilifi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of Z.K. [the Complainant] a child aged 8 years. Following a full trial, the Appellant was convicted of the charges and sentenced to life imprisonment.
2. Being aggrieved the Appellant filed his appeal challenging his conviction sentence. In his amended grounds of appeal the Appellant raised the grounds that the trial Magistrate erred in:
 1. denying the Appellant his right to legal representation at the state expense in contravention of Article 50[2][g][h] of *the Constitution*.
 2. failing to consider that the mandatory nature of Section 8[2] of the SOA fetters judicial discretion to consider the Appellant's mitigation prior to passing sentence in breach of Articles 27 and 50[2][p] of *the Constitution* and passed a sentence which that is unconstitutional.
3. The Respondent opposed the Appeal vide written submissions dated 24.9.24. A reading of the submissions however shows that they relate to the previous grounds of appeal and not the amended grounds. As such, they do not address the issues raised by the Appellant.



4. I will begin with the first ground in which the Appellant contends that his right to be informed that he has a right to legal representation under Article 50[2][g] and [h] of *the Constitution* was violated.
5. Article 50[2] of *the Constitution* guarantees to every accused person the right to a fair trial. A key aspect of this right is the right of an accused person to be represented by an advocate and to be informed of this right promptly. Article 50[2][g] of *the Constitution* provides:

Every accused person has the right to a fair trial, which includes the right—

[g] to choose, and be represented by, an advocate, and to be informed of this right promptly;

[h] to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

6. I have looked at the record and note that the trial Magistrate did not inform the Appellant of his right to legal representation. The record also shows that the Appellant did not raise the issue in the court below.
7. It is trite law that an appeal cannot lie on a ground in respect of which the court appealed from had not rendered a decision thereon. For an appellate court to determine such issue, it must be demonstrated that the same had been raised but the trial court had failed to determine it.
8. As indicated, the alleged violation of the Appellant's right under Article 50[2] of *the Constitution* is a new issue that was not raised in the trial court and no decision was made thereon. As such, this Court sitting on appeal cannot make a decision on the same. An appeal can only lie where there has been a decision made by the lower court. In this regard, I am guided by the holding in *Kipkorir v Republic* [Criminal Appeal E056 of 2022] [2024] KECA 745 [KLR] [21 June 2024] [Judgment] where the Court of Appeal stated:

We are of the considered opinion that this court sitting as a second appellate court can only entertain matters that were considered by the court being appealed from. An appeal can only lie where there has been a decision made by a lower court. If an issue was not brought up before the lower court, and therefore not determined, then any decision made by the appellate court would not be considered a judgment on an appeal.

9. Similarly, in *Katana & another v Republic* [Criminal Appeal 8 of 2019] [2022] KECA 1160 [KLR] [21 October 2022] [Judgment] the Court of Appeal considered an appeal in which the appellant therein raised a similar ground of violation of his right to a fair trial for the first time on appeal. The Court stated:

In the present appeal, it is notable that the issue of a violation of the right to a fair trial was not raised by the appellants in their appeal before the High Court, and therefore cannot be the basis for vitiating the High Court's decision. Be that as it may, the record of the trial court shows that the appellants indicated they were ready to proceed with the trial, actively participated in the trial and cross-examined all the witnesses, and it is not evident that they suffered any or any substantial injustice. For these reasons, we do not find any merit in the appellants arguments that their rights to a fair trial on under articles 50[2][g] and 50[2][h] of *the Constitution* were violated.

10. The record herein shows that when the trial commenced after the Appellant had been supplied with all statements, the prosecution stated that they were ready to proceed with 3 witnesses. The Appellant



stated that he too was ready. The Appellant actively participated in the trial and cross examined all witnesses. There is nothing on record to show that the Appellant suffered any or any substantial injustice. I accordingly find no merit in the Appellant's contention that his right to a fair trial under Article 50[2][g] and [h] of *the Constitution* was contravened. This ground fails.

11. I now turn to the ground that the mandatory life sentence under Section 8[2] of the SOA is unconstitutional.
12. The question of the constitutionality of the mandatory minimum sentences under the SOA has been the subject of judicial consideration in our superior courts in numerous cases. In the recent 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] [Judgment]*, the Supreme Court put this convoluted matter to rest.
13. The respondent in that case had been charged with and convicted of the offence of defiling a 15 year old child, contrary to Section 8[1] as read with Section 8[3] of the *Sexual Offences Act*. The trial court imposed the mandatory minimum sentence of 20 years imprisonment, which was upheld by the High Court, on appeal. Being aggrieved, the respondent appealed to the Court of Appeal. In its judgment, the Court of Appeal declared the sentence unconstitutional, set it aside and substituted therefore, a sentence of 15 years. The appellant being dissatisfied with the decision of the Court of Appeal moved to the Supreme Court on appeal. After hearing the parties, the Supreme Court allowed the appeal.
14. In its judgment overturning the decision of the Court of Appeal, the Supreme Court stated:
 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.
15. While affirming that sentencing is an exercise of judicial discretion, the Supreme Court emphatically stated that it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. Further that where Parliament enacts legislation, the courts should adjudicate disputes based on the provisions of the law.
16. The Supreme Court had earlier in its judgment stated as follows:
 51. In light of the structural and supervisory interdicts issued, the Court issued the *Muruatetu* Directions, wherein it, inter alia, pronounced itself on the application of its decision in the *Muruatetu* Case to other statutes prescribing mandatory or minimum sentences as follows:

“



“ 10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision’s expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it. In that paragraph, we stated categorically that:

“ [48] Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under article 25 of *the Constitution*; an absolute right”.

Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the “courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases.

11. The ratio decidendi in the decision was summarized as follows:

“ 69. Consequently, we find that section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment”.

We therefore reiterate that, this court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute.”

17. By dint of Article 163[7] of *the Constitution*, the decision of the Supreme Court is binding on this Court. The mandatory minimum sentences in the SOA were fixed by Parliament in exercise of its legislative mandate to set the parameters of sentencing for each crime. As such, courts are required to impose sentences in accordance with the provisions of the law as set by Parliament. Accordingly, the ground that the mandatory life sentence imposed upon the Appellant is unconstitutional, fails.

18. I accordingly find no merit in the Appeal and dismiss the same.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 19TH DAY OF SEPTEMBER 2025

M. THANDE

JUDGE

