



**State v Awanga (Miscellaneous Criminal Application E095 of 2023)
[2024] KEHC 12119 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 12119 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CRIMINAL APPLICATION E095 OF 2023**

**TA ODERA, J
SEPTEMBER 18, 2024**

BETWEEN

STATE PROSECUTION

AND

ELIJAH OCHIENG AWANGA ACCUSED

RULING

1. I have considered the undated application filed by the applicant herein. The applicant seeks review of his sentence of life imprisonment and that the period he was in remand be considered in computing his sentence. Prosecution submitted that this court lacks jurisdiction to deal with the issue of enhanced sentence as he ought to have raised it before the court which dealt with the matter.
2. I have carefully considered the application and the response. The issue of review of the sentence can only be dealt with on appeal to the Court of Appeal and not this court. In Supreme Court Petition No. E018 of 2023; *Republic v Joshua Gichuki Mwangi* and held that section 8 was still valid. The Honourable Justices of the Apex court observed as follows;

(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.”

3. 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.
- (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. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.”
4. The said decision being from the apex court in Kenya is binding on this court. There is therefore no room for reviewing minimum lawful sentences imposed on sexual offenders.
5. On consideration of the remand period Section 333 of the *CPC* provides for consideration of the remand period in sentencing a convict. In this case the applicant was sentenced to life imprisonment and so the issue of remand period does not arise. I do agree with prosecution that this court lacks jurisdiction to review the sentence herein. The application is thus dismissed for lack of merit.

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF: -

The offender

Kimanthi for the State

Mr. Bigogo for Accused

Court Assistant- Oigo

T.A ODERA

JUDGE

18.9.24

