



**Mwaniki v Republic (Criminal Revision E038 of 2023)
[2025] KEHC 15059 (KLR) (22 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15059 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL REVISION E038 OF 2023
DKN MAGARE, J
OCTOBER 22, 2025**

BETWEEN

BENARD KAMAU MWANIKI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This is a ruling over an application dated 10.9.2025 and filed by the Applicant based on the reasoning of the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* [2021] KESC 31 (KLR). On the basis of the said decision, the applicant sought to review the life sentence imposed on him. This was said to be pursuant to article 50(2)(p)(q). The sought to be released on probation orders having taken into consideration section 333(2) of the criminal procedure code.
2. He was charged, convicted and sentenced to serve a life sentence pursuant to section 8(1) and 8(2) of the *Sexual Offences Act*. The said section provides as follows:
 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
3. The powers of the High Court in revision are contained in Section 362 through to 366 of the Criminal Procedure Code. Section 362 of the Act provides as follows:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.



4. What the High Court can do under its revision jurisdiction is stated under Section 364 of the Criminal Procedure Code, which states as follows:
- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may –
 - (a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
 - (b) In the case of any other order than an order of acquittal, alter or reverse the order.
 - (2) No order under this section shall be made to the prejudice of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
 - (3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
 - (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.(5)When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.
5. The revisionary power of this court also serves the supervisory role and the court is empowered by Article 165(6) of the Constitution of Kenya to review a decision by a subordinate court. Article 165(6), the relevant provision, is as doth:
- The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
6. The application is premised on several Court of Appeal decisions. These are the decisions of *Manyeso v Republic* [2023] KECA 827 (KLR) and *Mwangi v Republic* [2022] KECA 1106 (KLR). All these decisions have since been overturned by the Supreme Court vide *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) and *Republic v Manyeso* [2025] KESC 16 (KLR).
7. The court directed the prison authorities to find out cases filed by the applicant. It turned out that the applicant appealed to this court and the Court of Appeal, all which were dismissed vide HCCRA No. 207 of 2010 and CACRA No. 64 of 2014. The appeal was both on sentence and conviction.
8. The court further notes that the minor is under the age of 11 years. The sentence provided under section 8(2) of the Sexual Offences Act is one, mandatory one - life sentence. Consequently, the provisions of section 333(2) of the Criminal Procedure Code are of little use when the applicant has one life. In the case of *Republic V Mwangi; Initiative for Strategic Litigation in Africa (Isla) & 3 Others*



(Amicus Curiae) [Supra], the Supreme Court finally settled the issue of mandatory sentences in sexual offences as follows:

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.

68. 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 Montesquieuan 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.

9. The applicant has not moved the court to do a declaration of unconstitutionality of any section of the law. Ipso facto, the court cannot touch on the mandatory sentences in the sexual offences until properly moved. Further, by dint of the principle of stare decisis, the court's hands are tied.
10. The applicant having exhausted all his remedies, he can only place his hopes in God and the committee on the power of mercy. Unfortunately, his trips to court ends here and ends now. The procedure for the exercise of the Power of Mercy is governed by the guidelines set out in the *Constitution* and the Prerogative of Mercy Act, 2011. The process of placing a case before the President for consideration is therefore informed by these provisions. The Power of Mercy in respect of convicted persons is expressly provided for under Article 133 of the *Constitution* as follows:



- (1). On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by –
 - (a). granting a free or conditional pardon to a person convicted of an offence;
 - (b). postponing the carrying out of a punishment, either for a specified or indefinite period;
 - (c). substituting a less severe form of punishment; or
 - (d). remitting all or part of a punishment.
 - (2). There shall be an Advisory Committee on the Power of Mercy, comprising –
 - (a). the Attorney General;
 - (b). the Cabinet Secretary responsible for correctional services and
 - (c). at least five other members as prescribed by an Act of Parliament, none of whom may be a State Officer or in public service.
 - (3). Parliament shall enact legislation to provide for-
 - (a). the tenure of the members of the Advisory Committee;
 - (b). the procedure of the Advisory Committee; and
 - (c). criteria that shall be applied by the Advisory Committee in formulating its advice.
 - (4). The Advisory Committee may take into account the views of the victims of the offence in respect of which it is considering making recommendations to the President.
11. The applicant must now be alive to the truism that one moment of painful pleasure has taken away all his productive life. He must take steps to make amends with the creator and serve the life sentence. It may not be easy, it may not be the best that the courts could give him, but it is the only sentence he has. He has to serve it.
12. All said and done, the application is improperly before me and is accordingly dismissed.

Determination

13. In the upshot, I make the following orders: -
- a. The undated application filed on 29.08.2023 is dismissed for lack of merit.
 - b. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 22ND DAY OF OCTOBER, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Kimani for the State

Pro se Applicant – present

Court Assistant – Michael



M. D. KIZITO, J.

