Barawa v Republic (Petition E001 of 2023)
[2025] KEHC 16549 (KLR) (14 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16549 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

PETITION E001 OF 2023

M THANDE, J

NOVEMBER 14, 2025

BETWEEN

SANGA BARAWA ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. In his undated Petition filed on 28.3.23, the Petitioner states that he was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the SOA in Kilifi Criminal Case No. 93 of 2018 and sentenced to 15 years imprisonment. He has not appealed against his conviction and sentence. He contended that he was sentenced to the mandatory minimum sentence without consideration of his mitigation. He further argued that the mandatory minimum sentence imposed upon him falls afoul of the right to a fair hearing. He now seeks that his sentence be reviewed to a lenient term and relied on Article 50(2)(p) and (q) of *the Constitution*. He also prayed that the period spent in custody pending trial be computed into his sentence pursuant to Section 333(2) of the Criminal Procedure Code. He further asked for probation orders.

2. 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 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. 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 therefor, a sentence of 15 years. The appellant being dissatisfied with the decision of the

Court of Appeal moved to the Supreme Court. After hearing the parties, the Supreme Court allowed the Appeal.

3. 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.
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> 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.

4. 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.

5. 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:
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> > "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."

6. 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 imposes sentences in accordance with the provisions of the law as set by Parliament.

7. Article 50(2)(p) and (q) of *the Constitution* relied on by the Petitioner provides:

> 1. Every accused person has the right to a fair trial, which includes the right—
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> (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;
>
> (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

8. A plain reading of Article 50(2)(p) shows that the same relates to an offence in respect of which punishment has been changed between the time of commission of the offence and sentencing. In such event, an accused person shall be entitled to the least severe punishment. Clearly this provision does not relate to every sentence nor is it applicable in this case.

9. Article 50(2)(q) guarantees to every convicted person, the right to appeal to, or apply for review by, a higher court as prescribed by law. The Petitioner has availed this right by seeking review of his sentence.

10. *The Constitution* has conferred upon this Court supervisory jurisdiction over subordinate courts. Article 165(6) and (7) provides as follows:

> (6) 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.
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> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice

11. In exercise of its supervisory jurisdiction, this Court is empowered to call for the record of proceedings in such subordinate courts, and make and give appropriate orders and directions as it deems necessary to ensure the fair administration of justice.

12. To give effect to this provision with regard to criminal matters, the Criminal Procedure Code provides for revision powers of the Court. It also elaborates the purpose of calling for the record of proceedings

in subordinate courts by this Court, which is to satisfy itself as to the correctness, legality or propriety of any finding or order. Section 362 of the Criminal Procedure Code provides:

> 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.

13. Where the Court finds after examining the record of proceedings before a subordinate court that the same are wanting in correctness or that there is illegality or impropriety of a finding, order or sentence, the Court may by dint of the revision powers conferred upon it by Section 364 enhance the sentence or alter or reverse the order except that of an acquittal.

14. The sentenced imposed upon the Petitioner is as prescribed in Section 8(4) of the *Sexual Offences Act* which provides:

> A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

15. Upon conviction of the offence of defilement of a child between the age of 16 and 18 years, as the Petition was, a person shall be liable to a sentence of 15 years imprisonment. Section 347 of the Criminal Procedure Code provides that a person convicted on a trial held by a subordinate court may appeal to the High Court. Our courts have repeatedly stated in many cases, that where a clear procedure for redress is prescribed by *the Constitution* or a statute, that procedure should be strictly followed. One such case is Speaker of the National Assembly v James Njenga Karume [1992] eKLR where the Court of Appeal stated:

> In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

16. The sentence imposed upon the Petitioner is legal and the contrary has not been demonstrated. In the premises the orders sought cannot be granted in the present Petition. Flowing from the above stated provisions of the law and the authority cited, the Petitioner's redress lies in an appeal to this Court. It is in the exercise of its appellate jurisdiction that this Court can examine the record and look at the harshness or otherwise of the sentence complained about and make a decision thereon.

17. Section 333(2) of the Criminal Procedure Code provides as follows:

> Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

18. From the record, there is no mention by the trial court that the period that the Petitioner had spent in custody pending trial, was taken into account when sentencing him, as required in law. This is a serious omission on the part of the trial court, as it amounts to non-compliance with an express statutory provision.

19. In the end, the Petition partially succeeds. The 15 year sentence imposed upon the Petitioner shall run from 9.11.18, the date of his arrest. All other prayers in the Petition are declined.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 14TH DAY OF NOVEMBER 2025

M. THANDE

JUDGE