



REPUBLIC OF KENYA



KENYA LAW
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**Kombe v Republic (Criminal Revision E004 of 2024)
[2025] KEHC 17680 (KLR) (28 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL REVISION E004 OF 2024**

M THANDE, J

NOVEMBER 28, 2025

BETWEEN

NICODEMUS KIBONI KOMBE APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. In his undated application, the Applicant states that he was convicted of the offence of defilement contrary to Section 20(1) of the *Sexual Offences Act* (SOA) in Kilifi Criminal Case No. 101 of 2021 and sentenced to life imprisonment. He contended that he was sentenced to the mandatory minimum sentence without consideration of his mitigation. He further argued that the mandatory minimum sentence in the SOA are unconstitutional for stripping the trial court of the discretion to consider mitigating circumstances and determine the appropriate sentence. He now seeks that his sentence be reviewed in consideration of his mitigation and that he did not waste the trial court's time during the trial process. He also urged the court to consider he is the sole provide to his young family.
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.
 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:
 - “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 Applicant was charged with incest (and not defilement) under Section 20(1) of the SOA which provides:

Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

7. The victim of the offence with which the Applicant was charged and convicted of was his daughter and only 9 years old. In the proviso to Section 20(1) the punishment set by parliament for incest, where victim is under the age of 18 years, is imprisonment for life.

8. 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.

9. In light of the foregoing, the Court finds that the Application is devoid of merit and the same is hereby dismissed.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 28TH DAY OF NOVEMBER 2025

M. THANDE

JUDGE

