

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**CRIMINAL MISC. APPLICATION E052 OF 2025**  
**WILSON NJORA MBUTHIA .....**  
**APPLICANT**

**VERSUS**

**THE REPUBLIC .....**  
**RESPONDENT**

**RULING**

1. The applicant was sentenced to three years by the Hon. Kaimenyi Kanyiri in Karatina PMC SO E021 of 2020. He now seeks that the time he was in custody be taken into consideration. When the matter came to court this morning, the applicant sought to withdraw the application. However, I noted that the applicant was charged with the offence of rape. The court below sentenced him to only three years' imprisonment, rather than the minimum of 10 years.
2. The prosecution opposed the withdrawal as the applicant was serving an illegal sentence. I have perused section 3(1) of the Sexual Offences Act, which provides as follows:

- (1) A person commits the offence termed rape if-
  - (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

(b) the other person does not consent to the penetration; or

(c) The consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section, the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

3. The sentence passed is clearly illegal. The Supreme Court has guided all the courts pursuant to Sexual Offences Act in the case of **Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others** (Amicus Curiae) [2024] KESC 34 (KLR) 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 Montesquieuvian 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.

4. In the circumstances, I find that the sentence being served by the applicant is illegal and thus null and void. The court has the power to correct a manifest illegality that is on the face of the court. The court below lacked the power to sentence the appellant to a term of less than 10 years. Such a sentence is illegal and cannot be supported. This court cannot affirm a state where a rape victim sees the perpetrator back in the streets, free to rape again. The applicant was not only given a slap on the wrist but is

enjoying the fruits of an illegal order. In **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169**, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

5. This court has powers under Articles 165(6) and 165(7) of the Constitution, 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.

(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.

6. By disregarding the decision of the Supreme Court, the court went outside the Constitution. Article 163(7) provides as follows:

(7) All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court

7. In view of the unlawful nature of the same, the sentence of three years is set aside. It is replaced with a minimum sentence of 10 years. The same shall commence on the date of arrest, excluding the period the Applicant was on bond from 25/6/2020 to 12/1/2025. The ruling is to be served on the trial court together with the Supreme Court decision above for compliance.

8. Regarding withdrawal of the application, it will not be useful as this court is entitled to set aside unlawful sentences, especially for sexual offences, as directed by binding decisions of the Supreme Court.

### **Orders**

1. The upshot of the foregoing, I make the following orders:
  - a. The application to withdraw the application is dismissed.
  - b. The application dated 23/7/2025 is partly allowed in terms of taking into consideration the period in custody.

- c. However, the sentence meted out to the applicant in Karatina PMC SO E021 of 2020 is illegal and contrary to the binding directions given by the Supreme Court in **Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others** (Amicus Curiae) [2024] KESC 34 (KLR). The three-year sentence is set aside and replaced with the minimum sentence of 10 years.
- d. The ten-year sentence shall commence on the date of arrest, excluding the period the Applicant was on bond from 25/6/2020 to 12/1/2025.
- e. The ruling is to be served on the trial court, Hon Kaimenyi Kanyiri, together with the Supreme Court decision above, for compliance.
- f. The file is closed.

**DELIVERED, DATED and SIGNED** at **Nyeri**, virtually on this **19<sup>th</sup>** day of **January, 2026**. Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**  
**JUDGE**

**In the presence of: -**

Pro se Appellant

Ms Kaniu for the Respondent

Court Assistant - Michael

ORIGINAL