



**Kimani v Republic (Criminal Appeal 51 of 2017)
[2024] KECA 1080 (KLR) (21 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1080 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 51 OF 2017
F TUIYOT'T, FA OCHIENG & WK KORIR, JJA
AUGUST 21, 2024**

BETWEEN

SAMUEL NDUNGU KIMANI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of the High Court of Kenya sitting at Naivasha (Meoli, J.) delivered on 12th May 2017, in Criminal Appeal No. 17 of 2014))

JUDGMENT

1. Just recently, on 12th July 2024, the Supreme Court in Petition No. E018 of 2023, Republic vs Joshua Gichuki Mwangi, had this to say regarding minimum sentences prescribed by section 8 the [Sexual Offences Act](#):

“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....

(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”

2. Here, Samuel Ndungu Kimani (the appellant) was convicted for the offence of defilement of a girl contrary to section 8(1) and (3) of the [Sexual Offences Act](#) No. 3 of 2006 and sentenced to 20 years imprisonment, the statutory minimum. The first appeal, dismissed by the High Court (Meoli, J), was not a challenge of the sentence imposed by the trial court but only on conviction. Before us is a second appeal which is an appeal against sentence only.
3. The appeal must fail for at least two reasons. One, it is a second appeal in which the appellant seeks to take up a grievance not taken up in the first appeal. This is impermissible without leave of court. None was sought here and none was granted. (See the decisions in [Alfayo Gombe Okello v Republic](#) [2010] eKLR and [John Kariuki Gikonyo v Republic](#) [2019] eKLR).
4. Second, the Supreme Court has once again spoken unequivocally that the minimum sentences prescribed under the [Sexual Offences Act](#) remain lawful until such time that they are declared unconstitutional. The appeal before is not a petition questioning the constitutionality of the sentence imposed and we are unable to interfere with it as it is lawful and valid.
5. In the end, we must reach a decision, which we now do, that the appeal lacks merit. It is dismissed.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF AUGUST, 2024.

F. TUIYOTT

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

