



REPUBLIC OF KENYA



KENYA LAW
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**Wangura v Republic (Criminal Appeal 99 of 2018)
[2024] KECA 1588 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1588 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 99 OF 2018
PO KIAGE, F TUIYOTT & JM NGUGI, JJA
NOVEMBER 8, 2024**

BETWEEN

KENNEDY OTIENO WANGURA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against sentence arising from the Judgment of the High Court of Kenya at Homabay (Majanja, J.) dated 3rd March 2016 in HC. Criminal Appeal No. 39 of 2015)

JUDGMENT

1. Section 361 of the Criminal Procedure Code is unequivocal that a second appeal to this Court on severity of sentence is a matter of fact and is not to be entertained by the Court. Here, however, this second appeal on the harshness of sentence, was argued on the proposition that the sentence was wrongfully imposed and upheld on the jurisprudential basis that the sentence prescribed by statute was a minimum sentence from which there could be no derogation.
2. Kennedy Otieno Wangura (the appellant) was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. In imposing a sentence of life imprisonment, the trial court (P. Mayova SRM) had this to say:

“I have considered the mitigation of the accused and that he is a first offender. However, the penalty for this offence is set by the law in mandatory terms. I therefore sentence the accused to life imprisonment. 14 days right of appeal explained.”
3. The sentence was upheld on a first appeal by the High Court (Majanja, J.)
4. The pronouncement of *Francis Karioko Muruatetu & another v Republic [2017] eKLR (Muruatetu)* was a turn on the jurisprudence of mandatory minimum sentences. For some time after the decision, the convention has been that minimum sentences prescribed by statute to be mandatory do not take



away the sentencing discretion that inheres in a sentencing court. Then there was a more recent development in *Republic v Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) in which the Supreme Court restricted the application of Muruatetu to the mandatory sentence for murder under section 204 of the *Penal Code*, at least in the meantime. The apex Court explained;

“56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term ‘mandatory minimum’ can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

57. In the *Muruatetu case*, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.”

5. Regrettably and whatever our view, in homage to this recent development we must, as we hereby do, dismiss this appeal.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF NOVEMBER, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

