



Republic v Mwangi; Equality Now & another (Intended Interested Party); Initiative for Strategic Litigation (ISLA) & 3 others (Intended Amicus Curiae) (Petition (Application) E018 of 2023) [2023] KESC 99 (KLR) (Civ) (10 November 2023) (Ruling)

Neutral citation: [2023] KESC 99 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

CIVIL

PETITION (APPLICATION) E018 OF 2023

MK KOOME, CJ, PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU & I LENAOLA, SCJJ

NOVEMBER 10, 2023

BETWEEN

REPUBLIC PETITIONER

AND

JOSHUA GICHUKI MWANGI RESPONDENT

AND

EQUALITY NOW & CENTER FOR RIGHTS EDUCATION AND AWARENESS (CREAW) INTENDED INTERESTED PARTY

NATHAN KHAEMBA MAKOKHA & HESBON ONYANGO INTENDED INTERESTED PARTY

AND

INITIATIVE FOR STRATEGIC LITIGATION (ISLA) INTENDED AMICUS CURIAE

KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV & AIDS (KELIN) INTENDED AMICUS CURIAE

FEDERATION OF WOMEN LAWYERS KENYA (FIDA) INTENDED AMICUS CURIAE

WOMEN'S LINK WORLDWIDE (WLW) INTENDED AMICUS CURIAE

(Being applications by Equality Now, Center for Rights Education and Awareness, Nathan Khaemba & Hesbon Nyamweya for joinder as Interested Parties and Initiative for Strategic Litigation, Kenya Legal and Ethical Issues Network on HIV and AIDS, Federation of Women Lawyers Kenya and Women's Link Worldwide for joinder as Amici Curiae)



Conditions that one had to fulfil to be admitted as an interested party at the Supreme Court

The Supreme Court dismissed applications by Equality Now, CREAM, and two convicted individuals seeking joinder as interested parties, finding they lacked a personal stake and that they would not be prejudice if excluded. However, it allowed ISLA, KELIN, FIDA, and WLW to participate as amici curiae, while limiting their participation to their already filed brief. The court emphasized neutrality, relevance, and novelty as key criteria for participation in constitutional litigation.

Reported by John Ribia

Criminal Procedure – parties to a criminal appeal - interested party – amicus curiae - application to be enjoined as an interested party at the Supreme Court - application to be enjoined as amicus curiae at the Supreme Court - what were the conditions that one had to fulfil to be admitted as an interested party at the Supreme Court - Supreme Court Rules, 2020 (Cap 9B Sub Leg) rule 24; *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2015] eKLR.

Brief facts

The respondent, Joshua Gichuki Mwangi, was convicted of defilement under the Sexual Offences Act, 2006. Several parties applied to join the Supreme Court proceedings: two sets of interested parties sought to challenge or defend the constitutionality of mandatory minimum sentences, while a group of NGOs applied as *amici curiae* to offer comparative legal perspectives and advocate for victims' rights. The applications were grounded in public interest and constitutional interpretation concerning sentencing, mitigation, and victims' protection.

Issues

- i. What were the conditions that one had to fulfil to be admitted as an interested party at the Supreme Court?
- ii. What were the conditions that one had to fulfil to be admitted as *amicus curiae* is at the Supreme Court?

Held

1. Rule 24 of the Supreme Court Rules, 2020 provided for the conditions under which a person may be admitted as an interested party in the Supreme Court.
2. One must move the Court by way of a formal application. Enjoinment was not as of right, but was at the discretion of the Court; hence, sufficient grounds must be laid before the court on the basis of the grounds laid out in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2015] eKLR (*Mumo Matemu Case*).
3. For admission as *amici curiae* by the joint intended *amici curiae*, the instructive provision was rule 19 of the Supreme Court Rules, 2020 and the guidelines set in the *Mumo Matemu Case*.
4. The joint intended *amici curiae* intended to address the court on points of law that no party in the proceedings had addressed including the State's obligation under article 21 (1) of the Constitution and comparative lessons on the application of mandatory minimum sentences from other jurisdictions. The Supreme Court allowed the application for admission of the joint intended *amici curiae*. However, their participation was limited to the filing of an *amici* brief only which they had already done and which the court would consider in determining the appeal.

Application partly allowed.

Orders

- i. *The Notice of Motion dated August 21, 2023 was dismissed.*
- ii. *The Notice of Motion dated August 24, 2023 was dismissed.*
- iii. *The Notice of Motion dated August 23, 2023 was allowed and the participation of the amici shall be limited to the court's consideration of the amici brief already on record.*
- iv. *Each party was to bear its costs.*



Citations

Cases

Kenya

1. *Maingi & 5 others v Director of Public Prosecutions & another* Petition E017 of 2021; [2022] KEHC 13118 (KLR) - (Explained)
2. *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* Petition 15 & 16 of 2015; [2021] KESC 31 (KLR) - (Applied)
3. *Trusted Society of Human Rights Alliance v Matemo & 3 others* Petition 12 of 2013; [2015] KESC 26 (KLR) - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 21(1); 23(3)(e) — (Interpreted)
2. Sexual Offences Act (cap 63 A) section 8 — (Interpreted)
3. Supreme Court Rules, 2020 (cap 9B Sub Leg) rules 3, 19, 24, 31, 32 — (Interpreted)

Instruments

1. African Commission on Human and Peoples' Rights, (ACHPR) 1987
2. Court of Justice Economic Community of West African States (ECOWAS) 1975
3. East African Court of Justice (EACJ), 1999
4. European Convention on Human Rights (ECHR) 1950
5. Inter-American Convention on Human Rights, 1969

Advocates

Ms Mwanza for the petitioner.

Mr Wambua Gikonyo for the respondent.

Ms Winfred Odali for the intended amici curiae.

Ms Marion Ogeto and *Beatrice Njeri* for the 1st joint intended interested party.

RULING

Representation

Ms. Marion Ogeto & Beatrice Njeri for the 1st joint intended interested party
(Equality Now)

Mr Nathan Makokha & Hesbon Nyamweya acting in person

Ms Winfred Odali for the joint intended *amici curiae*
(ISLA & KELIN)

Ms Mwanza for the petitioner
(Office of the Director of Public Prosecutions)

Mr Wambua Gikonyo for the respondent
(Wahome Gikonyo & Company Advocates)

1. This ruling will dispose of three applications currently before this court to ensure the efficient and prudent utilization of judicial resources. The first two applications by Equality Now and CREAM (1st joint intended interested parties), and Nathan Khaemba Makokha and Hesbon Onyango Nyamweya



- (2nd joint intended interested parties) seek to be joined to the petition as interested parties, whilst the third application by ISLA, KELIN, FIDA, and WLW seek admission as *amici curiae*; and
2. Upon perusing the notice of motion by the 1st joint intended interested parties dated 21 August 2023 brought pursuant to rules 3, 24, 31, and 32 of the [Supreme Court Rules, 2020](#) seeking leave to participate in the proceedings as indicated above; and
 3. Upon considering the grounds in support of the application and the averments contained in the supporting affidavit sworn by Fazia Jama Mohamed, the Director, Equality Now Africa Regional office, wherein she *inter alia* contends that; the 1st joint intended interested parties are non-profit organizations that promote the rights of women and girls in Africa; their application as joint interested parties is anchored on their direct involvement in issues relating to the constitutionality of the mandatory minimum sentences prescribed under the [Sexual Offences Act, 2006](#) as it pertains to victims of sexual violence, the gravity, extent, and impact of sexual violence cases which violate freedom from inhumane and degrading treatment as well as physical and psychological torture and the application of judicial discretion in cases involving sexual offences; the decision of the Court will have an impact on them as they will not only bring the application on their behalf but also on behalf of the victims of sexual violence in Kenya; and
 4. Noting the 1st joint intended interested parties' submissions dated 21 August 2023 and filed on 25 August 2023, wherein they submit that; they have established and satisfied the principles for joinder as interested parties; their mandate include advancing, advocating for, promoting and protecting the rights and interests of victims of sexual violence in Kenya and beyond; their work entails the amplification of the voices of victims of sexual offences in Kenya and ensure protection of persons who have suffered harm emanating from unlawful sexual acts; and therefore, they have a direct interest in ensuring the due diligence principle of punishment of perpetrators of sexual violence as enshrined in the minimum mandatory sentences in the [Sexual Offences Act, 2006](#) is upheld; the decision of the court will directly impact on their mandate and therefore they seek to address the court on, inter alia the utility of minimum mandatory sentences on victims of sexual violence, the gravity, extent and impact of sexual violence cases which violate the freedom from torture and cruel, inhuman and degrading treatment; and
 5. Taking into account the notice of motion dated 24 August 2023 by the 2nd joint intended interested parties brought under rules 24 and 31 of the [Supreme Court Rules, 2020](#) also seeking leave to be joined as joint interested parties; and
 6. Considering the grounds in support of the application and the averments contained in the supporting affidavit sworn by Nathan Khaemba Makokha on his behalf and on behalf of Hesbon Onyango Nyamweya who are both inmates at Kamiti Prison serving prison sentences wherein he contends that; there are fellow inmates held at various prisons within Kenya who have been tried, convicted and sentenced to the mandatory sentences imposed by the [Sexual Offences Act, 2006](#); the [Sexual Offences Act, 2006](#) continues to subject mandatory sentences to persons charged with sexual offences with undue regard to the germane trial process that involves mitigation; the said penal prescriptions violate the right to a fair hearing, freedom from discrimination and violate the doctrine of separation of powers; they intend to demonstrate that having mandatory sentences in the penal laws is a claw back to the advancements made in the bill of rights; and the omission of the pre-sentencing stage of mitigation is a violation of the right to fair trial envisaged in the [Constitution](#); and
 7. Also considering the 2nd joint intended interested parties' Submissions wherein they submit that; they have met the parameters for participation in the proceedings as interested parties following the principles set out in [Trusted Society of Human Rights Alliance v Mumo Matemu](#) SC Petition No



- 12 of 2013 [2015] eKLR (*Mumo Matemtu* case) and *Francis K Muruatetu and another v Republic* SC Petition No 15 of 2015 as consolidated with Petition No 16 of 2015 2015 [2016] eKLR (*The Muruatetu* case); both the applicants were convicted of the offence of defilement and sentenced to the mandatory minimum sentences stipulated under section 8 of the *Sexual Offences Act, 2006*; Hesbon Onyango Nyamweya, among others, successfully challenged the minimum mandatory nature of the sentences prescribed in the *Sexual Offences Act, 2006* at the High Court in Machakos, *Mainingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment); therefore, it is in the interest of justice that they be joined as interested parties at this stage; and that they would be prejudiced if the intervention is denied as they are victims of the violation of the right to mitigate their circumstances before sentencing; and
8. Cognizant of the joint intended *amici curiae*'s notice of motion dated 23 August 2023 brought under article 23(3)(e) of the *Constitution* and rule 19 of the *Supreme Court Rules, 2020* seeking leave to be joined in the proceedings as joint *amici curiae*; and
 9. Noting the grounds in support of the application and the averments contained in the supporting affidavits sworn by Sibongile Ndashe, Allan Maleche, Anne Ireri and Jovanas Rios Cisnero, wherein they inter alia contend that; they are officials of non-governmental organizations that specialize in women and children's rights through strategic and public interest litigation; they possess expertise in women and children's rights and are not aligned to any of the parties before the court; they have been appointed as amicus curiae in several cases in Kenya, the *Inter-American Court of Human Rights*, and the *European Court of Human Rights*; they have submitted communications to and before the *African Commission on Human and People's Rights*, the *African Court on Human and People's Rights*, *ECOWAS Court of Justice* and the *East African Court of Justice* (EACJ); they seek to highlight the nature and gravity of sexual offences in Kenya and the impetus for the enactment of the *Sexual Offences Act, 2006*, international, regional and comparative laws, standards and jurisprudence establishing the due diligence standard and the state's due diligence obligation to punish perpetrators and promote the enjoyment of sexual and reproductive health and rights; and
 10. Upon reading the submissions of the joint intended *amici curiae* where they reiterate the contents of their supporting affidavits and submit further that; they meet the criteria set out in rule 19 of the *Supreme Court Rules, 2020* and the guidelines developed by this court in the *Mumo Matemtu case(supra)* for admission as *amicus curiae*; and they are in a position to aid the court in arriving at a decision that is based on law; and
 11. Bearing in mind the replying affidavit sworn on 6 September 2023 by Charles Wahome Gikonyo, an advocate, on behalf of the respondent wherein he supports the admission of the 2nd joint intended interested parties as such; and
 12. Further noting the replying affidavits sworn by Charles Wahome Gikonyo, an advocate, on behalf of the respondent where he opposes the admission of the 1st joint intended interested parties as well as the intended *amici curiae* on the grounds that; the applications do not meet the requirements for admission as interested parties and *amici curiae*; the intended *amici curiae* do not address novel aspects of any legal issue in question; the intended *amici curiae* are biased as they support the necessity of minimum mandatory sentences for sexual offences, and are therefore, not neutral in the proceedings; the 1st joint intended interested parties have not shown any personal stake/interest in the matter and only seek to champion public interest; and have equally not shown the prejudice they stand to suffer if they are not joined as interested parties; and
 13. Having considered the applications, responses, and submissions before us,
We now opine as follows:



i. Rule 24 of the Supreme Court Rules, 2020 provides that:

- “(1) A person may, within seven days of filing a response in any proceedings, apply for leave to be joined as an interested party.
2. An application under sub-rule (1) shall include—
- a. a description of the interested party;
 - b. a depiction of such prejudice as the interested party would suffer if the intervention was denied; and
 - c. the grounds or submissions to be advanced by the interested party, their relevance to the proceedings, and their departures from the standpoint of the parties.”

ii. This court has on numerous occasions pronounced itself on the criteria for admission as an interested party. Specifically, the court laid guiding principles for admission of an interested party in Mumo Matemo case. These principles were reiterated and reaffirmed in Muruatetu case as follows:

“(37) From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.”
- v. It is common ground that the origin of the dispute before this court can be traced to criminal proceedings where the respondent was charged with the offence of defilement and was subsequently tried, convicted, and sentenced in accordance with the Sexual Offences



Act, 2006. Criminal proceedings have a direct impact on an individual's fundamental rights and freedoms as enshrined in the the Constitution. Therefore, the court must exercise caution in permitting the involvement of third parties, including interested parties and *amici curiae*, as their participation may lead to the proliferation of the issues brought for determination by such an individual.

- vi. In the above context, and turning to the 1st joint intended interested parties' case, they seek to generally address the court on the utility of minimum mandatory sentences on victims of sexual violence, and the gravity, extent, and impact of such sentences. Having carefully considered their Submissions, it is our view that the 1st joint intended interested parties raise issues of public interest generally and have not shown any personal stake in the matter, nor the prejudice they stand to personally suffer in case of non-joinder. Furthermore, the issues they seek to submit on have largely been addressed by the petitioner in this matter and there is no value in them repeating the same issues in different words. We, therefore, find that the 1st joint intended interested parties have not met the conditions for admission as interested parties.
- vii. Likewise, the 2nd joint intended interested parties have not shown any personal stake in this specific matter nor the prejudice they will suffer if not joined as interested parties. While they may be in the same position as the respondent, having been convicted of sexual offences, there is nothing they will add to the petition which the respondent cannot. Furthermore, Hesbon Onyango Nyamweya having successfully challenged the minimum mandatory nature of the sentences prescribed in the Sexual Offences Act at the High Court in Machakos, in Maingi & 5 others v Director of Public Prosecutions & another (*supra*) he is at liberty to pursue the same separately, if at all it has been appealed against. Consequently, we find that the 2nd joint intended interested parties have not met the conditions for joinder in the manner they seek.
- viii. We now turn to the application for admission as *amici curiae* by the joint intended *amici curiae*. In this context, the instructive provision is rule 19 of the Supreme Court Rules, 2020 which provides as follows:

“ 19.



- (1) The court may on its own motion, or at the request of any party, permit a person with particular expertise to appear in any matter as a friend of the court.

Participation of friends of the court.

2. The court shall before admitting a person as a friend of the court, consider:
 - a. proven expertise of the person;
 - (b) independence and impartiality of the person;
 - or
 - (c) the public interest.”

iX. This court has also set the guiding principles applicable in determining an application for joinder as *amicus curiae* in the Mumo Matemu case where it stated as follows:

“An amicus brief should be limited to legal arguments. The relationship between *amicus curiae*, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.

An amicus brief ought to be made timeously, and presented within reasonable



time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the *Constitution*'s call for resolution of disputes without undue delay. The court may, therefore, and on a case-by-case basis, reject *amicus* briefs that do not comply with this principle.

An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.”

- X. Having considered the proposed *amici* brief, we note that the joint intended *amici curiae* intend to address the court on points of law that no party in the proceedings has addressed including the State's obligation under article 21(1) of the *Constitution* and comparative lessons on the application of mandatory minimum sentences from other jurisdictions. In the circumstances, we are inclined to allow the application for admission of the joint intended *amici curiae*. However, their participation shall be limited to the filing of an *amici* brief only which they have already done and which the court will consider in determining the appeal.
- Xi. While it is settled that costs follow the event, we are alive to the fact that the issues raised by the parties in the instant matter constitute public interest issues. In these circumstances, we find that each party do bear their own costs.

- 14. Accordingly, we make the following orders:
 - a. The notice of motion dated 21 August 2023 is hereby dismissed.
 - b. The notice of motion dated 24 August 2023 is hereby dismissed.
 - c. The notice of motion dated 23 August 2023 is hereby allowed and the participation of the amici shall be limited to the court's consideration of the amici brief already on record.
 - d. Each party shall bear their costs.
- 15. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER 2023

.....
M.K KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT



.....

P.M MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

M.K IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

