Nyanguka v Republic (Miscellaneous Criminal Application E014 of 2024) [2025] KEHC 4457 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4457 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

MISCELLANEOUS CRIMINAL APPLICATION E014 OF 2024

M THANDE, J

MARCH 28, 2025

BETWEEN

ELISABAN ONDIMU NYANGUKA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. By an Application filed on 13.4.23, the Applicant seeks a declaration that the life sentence imposed upon him is unconstitutional. He also seeks a just fair and proportionate sentence be imposed in line with authorities cited.

2. The Applicant states that he was charged with and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* (SOA) and sentenced to life imprisonment. His appeal at the High Court in HCCRA No. 68 of 2017 was dismissed.

3. In his Application, he contends that Odunga, J. (as he then was) in Machakos *Petition No. E017 of 2021* declared that the mandatory nature of the minimum sentences under the *SOA* are unconstitutional as they violate Article 28 of the *Constitution*.

4. 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.

5. 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 on appeal. After hearing the parties, the Supreme Court allowed the appeal.

6. 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.
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> 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.

7. 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.

8. 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:
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> > 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."

9. By dint of Article 163(7) of the *Constitution*, 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 imposes sentences in accordance with the provisions of the law as set by Parliament. Accordingly, the prayers sought by the Applicant cannot issue.

10. In light of the foregoing, the Court finds that the Application filed on 13.4.23 lacks merit and is hereby dismissed.

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

M. THANDE

JUDGE