



**Gichobi v Republic (Criminal Revision E519 of 2024)
[2025] KEHC 12013 (KLR) (14 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 12013 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL REVISION E519 OF 2024
EM MURIITHI, J
AUGUST 14, 2025**

BETWEEN

BIDIAN KABURUCHIO GICHOBI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By an application 18/11/2024, the applicant seeks, principally, the revision of sentence to substitute a non-custodial sentence for an imprisonment term of 13 years imposed by the Court upon a petition for re-sentencing in Kerugoya Constitutional Petition E052 of 2022, that reduced the applicant imprisonment sentence of 15 years for defilement c/s 8 (4) of the [Sexual Offences Act](#).
2. The grounds of the application are primarily that:
 9. That the applicant has since reformed and is remorseful for his action that put him where he is and strongly believes that he is ready and fit for release back to the society.
 10. That the applicant has further rehabilitated during the last 6 years he as been in custody and will be productive citizen as he is a successful businessman, employer, philanthropist and has undertaken a spiritual classes and is now a Pastor.
 11. That furthermore, the applicant has since developed severe illness and has been out of surgery since being in custody.”
3. The Court has considered the respective submissions filed by Counsel for the applicant and for the DPP, respectively dated 24/3/2025 and 16/6/2025.
4. This matter is governed by authority of the Supreme Court in three recent cases of [Republic v Mwangi; Initiative for Strategic Litigation in Africa \(ISLA\) & 3 others \(Amicus Curiae\)](#) [2024] KESC 34 (KLR) (Mwangi), ([Manyeso](#)) and ([Ayako](#)).



5. In *Mwangi*, which was approved and followed in the other two, the Court considered the issue of discretion of the court to reduce sentences below the statutory mandatory or minimum terms as follows:

iii. Whether minimum sentences as prescribed in the *Sexual Offences Act* are unconstitutional and (iv) whether courts have discretion to impose sentences below minimum those prescribed by the *Sexual Offences Act*.

64. Returning to the issue of the constitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act, we note that the Court of Appeal failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. We find this approach problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.

65. The proper procedure before reaching such a manifestly far-reaching finding would have been for there to have been a specific plea for unconstitutionality raised before the appropriate court. This plea must also be precise to a section or sections of a definite statute. The court must then juxtapose the impugned provision against the *Constitution* before finding it unconstitutional and must also specify the reasons for finding such impugned provision unconstitutional. The Court of Appeal in the present appeal did not declare any particular provision of the *Sexual Offences Act* unconstitutional, failing to refer even to the particular section 8 that would have been relevant to the respondent's case.

66. We also note that the Court of Appeal concluded its decision in this present matter by reducing the respondent's sentence from the minimum of 20 years to 15 years. In doing so, the Court of Appeal did not clarify the considerations that went into its decision to reduce the sentence. The reasoning behind the court's decision is called into question by this omission as sentencing is a matter of fact unless an Appellate Court is dealing with a blatantly illegal sentence which was not the case in the present matter.

67. 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 Montesquieuan 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.”

6. This Court is bound by the principle of stare decisis and the express stipulation of Article 163 (7) of the *Constitution*, and it is not open for the Court to consider a sentence lower than the minimum sentence of imprisonment for 15 years prescribed to under section 8(4) of the *Sexual Offences Act*.
7. The applicant was lucky that the Court (Mwongo, J.) had on 27/11/2023 reduced the sentence from 15 years to 13 years before the clarification by the Supreme Court in the three Supreme Court decisions of *Mwangi* (2024), *Manyeso* (2025) and *Ayako* (2025).
8. As noted by the DPP, the applicant is entitled to remission under section 46 of the *Prisons Act*. This Court does not have jurisdiction to reinstate the sentence of imprisonment for 15 years as the Supreme Court in *Mwangi* reinstated the 20 year minimum sentence.
9. Moreover, there is no report by the Prison authorities that the applicant’s health condition of a lesion at the back of his neck is not capable of treatment and management at the prison health facilities with possibility of referral to the relevant Referral Hospitals of the County.
10. The applicant shall continue to serve the reduced sentence of imprisonment for 13 years, with remission under section 46 of the *Prisons Act* and taking into account the time spent in custody before conclusion of the trial and sentence in the trial court.

Orders

11. Accordingly, for the reasons set out above, the revision application for a non-custodial sentence is declined.

Order accordingly.

DATED AND DELIVERED THIS 14TH DAY OF AUGUST 2025.

EDWARD M. MURIITHI

JUDGE



Appearances:

Mr. Mamba for the DPP.

Mr. D.N. Gichuki for the applicant.

