REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome CJ & P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ)

PETITION NO. E018 OF 2023

-BETWEEN-

REPUBLIC.....APPELLANT

-AND-

JOSHUA GICHUKI MWANGI.....RESPONDENT

-AND-

INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA(ISLA).....AMICUS CURIAE

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

FEDERATION OF WOMEN LAWYERS - KENYA (FIDA-KENYA).....AMICUS CURIAE

WOMEN'S LINK WORLDWIDE(WLW).....AMICUS CURIAE

(The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the court)

DATE OF JUDGMENT: 12 July 2024

MEDIA SUMMARY

FINAL ORDERS: THE APPEAL HAS BEEN ALLOWED AND THE RESPONDENT ORDERED TO SERVE THE REMAINDER OF HIS PRISON SENTENCE

BACKGROUND

On 11th March 2011, the Respondent, Joshua Gichuki Mwangi, was arraigned before the Senior Principal Magistrate's Court at Karatina and charged in ***Criminal Case No. 215 of 2011***, with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars of the charge were that on 8th March 2011, at Ngorano Location in Mathira West District within the then Central Province, the Respondent intentionally caused his penis to penetrate the vagina of J.W.M., a child aged fifteen (15) years. The Respondent was further charged with an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. On 17th October 2011, the trial court found the Respondent guilty as charged on the main count and sentenced him to twenty (20) years imprisonment. The conviction and sentence were upheld on first appeal at the High Court but the sentence was later overturned by the Court of Appeal, allowing the Respondent's appeal, setting aside the 20-year sentence and substituting it with a 15-year sentence running from the time that the trial court imposed its sentence. That decision prompted the present appeal at the instance of the Republic (Office of the Director of Public Prosecution) and upon the appeal being certified as raising matters of great public importance by the Court of Appeal.

In the Supreme Court, the Director of Public Prosecutions challenged the Court of Appeal's decision on grounds that the learned Judges of Appeal;

i. *Acted ultra-vires and without jurisdiction by assuming original jurisdiction on constitutional matters not raised at the High Court;*

ii. *Violated the principle of stare decisis;*

iii. *Erred in holding that minimum mandatory sentences offend the doctrine of separation of powers;*

iv. *Erred in holding that minimum mandatory sentences deprive judicial officers the power to exercise judicial discretion; and,*

v. *Erred in holding that the meting out of minimum mandatory sentences contravenes an accused person's right to a fair trial.*

The DPP also prayed for the following Orders:

a. *An order setting aside the judgment of the Court of Appeal;*
b. *A declaration that the imposition of mandatory minimum sentences under the Sexual Offences Act is constitutional and is also in compliance with Articles 25, 27, 28 and 50 of the Constitution;*
c. *A declaration that the imposition of minimum mandatory sentences does not interfere with the independence of the Judiciary under Article 160 of the Constitution; and,*
d. *A declaration that the imposition of minimum mandatory sentences under the Sexual Offences Act does not undermine judicial discretion of trial courts.*

Upon considering the appeal, the Supreme Court determined as follows:

a. ***Judges of the Court of Appeal acted ultra vires and without jurisdiction by assuming original jurisdiction on constitutional matters which were not raised at the High***

Court while canvassing the minimum mandatory sentences question;

b. ***In departing from the decision on minimum mandatory sentences for sexual offences as stated in Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae)*** **(Petition 15 & 16 of 2015) [2021] KESC 31 (KLR)** ***(the Muruatetu Directions), the learned judges of the Court of Appeal violated the principle of stare decisis;***

c. ***Mandatory minimum sentences do not deprive judicial officers of the power to exercise judicial discretion.***

d. ***The Respondent who had been released should serve the remainder of his sentence from the date of conviction by the trial court.***