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

(*Being an appeal from the Judgment of the Court of Appeal at Nyeri (Karanja, Kiage & J. Mohammed, JJ.A) dated 7th October, 2022 in Criminal Appeal No. 84 of 2015)*

Representation

Mr. Jalson Makori, Mr. Yamina Jami,
Mr. Duncan Ondimu & Ms. Becky Arunga for the Appellant
(Office of the Director of Public Prosecution)

Mr. Wahome Gikonyo for the Respondent
(Wahome Gikonyo & Company Advocates)

Ms. Winfred Odali for the amici curiae
(*ISLA, KELIN, FIDA-KENYA & WLW*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The appeal before the Court dated 2nd August, 2023 and filed on even date, is premised on Articles 159(2)(d)(e) and 163(4)(b) of the Constitution, Sections 3A, 15A and 21(1) of the Supreme Court Act, Cap 9B Laws of Kenya, and Rules 38(1)(a) and 39 of the Supreme Court Rules, 2020. The Appellant, through the Office of the Director of Public Prosecutions, challenges the Court of Appeal's decision in which the court held, *inter alia* that, the imposition of mandatory minimum sentences under the Sexual Offences Act, Cap 63A Laws of Kenya, is unconstitutional.

B. BACKGROUND

[2] 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).

C. LITIGATION HISTORY

i) At the Senior Principal Magistrate's Court

[3] At the hearing of Criminal Case No. 215 of 2011, ***Republic v Joshua Gichuki Mwangi,*** the prosecution called a total of five witnesses in support of its case. The facts of the case as recounted by the minor, PW2, were that on the material date, at about 5pm, the Respondent came to her home and deceived her mother that PW2's father had instructed the minor to accompany the Respondent to cut napier grass. Her mother allowed her to go with him together with two donkeys for the purpose of carrying the napier grass. PW2 further testified that she accompanied the Respondent to the farm where he left her alone for a while, only for him to return later and instructed her to go to his home without having cut any napier grass at all. Before arriving at his home, they reached a bushy area where the Respondent slapped her twice causing her to fall down. When the minor attempted to scream, the Respondent threatened to stab her with a knife. The Respondent then retrieved a condom and sexually assaulted her. Thereafter, the Respondent took the minor to his residence and beat up his wife asking her to sleep on the floor so that he could sleep on the bed with the minor. The wife raised an alarm attracting the Respondent's extended family, and in the ensuing scuffle the minor managed to escape. She sought refuge at a neighbouring home where she spent the rest of the night. On her way home the following day, she met her father and family members who were looking for her. The minor informed her family of

her ordeal, was taken to the local Police Station, then to Karatina Hospital where she was treated and issued with a P3 form which she identified in court.

[4] The minor's evidence was corroborated by her father, PW3, who testified that on 8th March 2011, at around 4pm, he sent the minor and her brother to the shops, but only her brother returned. Upon inquiry, his wife informed him that the minor had accompanied the Respondent to collect napier grass as per his instructions. Alarmed, PW3 denied having issued such instructions, and embarked on an unsuccessful search for the minor before returning home. At around 11.30 pm, he was woken up by people, among them the Respondent's wife who informed him that she had left the minor and the Respondent at their house. However, when they went to the Respondent's house, they found that the minor had fled into the night. The following day, they found the minor at a mechanic's house in the locality and took her to the Police Station then to Karatina District Hospital. The trial court also considered medical evidence by an officer from the Karatina District Hospital, which indicated that the minor's hymen had been broken.

[5] Upon close of the prosecution's case, the trial court concluded that the Respondent had a case to answer and he was put on his defence, wherein he was the sole witness. He testified that the whole incident was a plot hatched by his family members to implicate him and grab his land. Upon evaluation of the evidence before it, the trial court did not find the Respondent's version of events believable. It observed that the minor's family had nothing to do with any vindictive conduct harboured by the Respondent's family and that the evidence tendered against him was credible. Furthermore, the prosecution had proved beyond reasonable doubt that the Respondent was with the minor on the material day, and that he failed to rebut the evidence against him. Consequently, the trial court found the Respondent guilty of the main count under Section 215 of the Criminal Procedure Code, Cap 75 Laws of Kenya, and sentenced him to 20 years

imprisonment in accordance with the provisions of Section 8(3) of the Sexual Offences Act.

ii) At the High Court

[6] Aggrieved by the decision of the trial court, the Respondent lodged an appeal against both his conviction and sentence on four grounds: that the learned magistrate erred in law and in fact by convicting him on evidence that was full of inconsistencies; convicting him of defilement yet penetration was not proved; rejecting the Respondent's defence which was not challenged by the prosecution; and he was a family man with two children and therefore not sexually starved.

[7] While appreciating his role to review, re-visit and re-analyse the evidence tendered in the lower court, *Mativo, J. (as he then was)* condensed the grounds of appeal before him to two; *whether there was sufficient evidence to sustain the conviction* and *whether the Respondent's defence was considered*.

[8] On the issue *whether there was sufficient evidence to sustain the conviction*, the court set out the ingredients of the offence of defilement and its penal sanctions under Section 8(1) and (3) of the Sexual Offences Act. While weighing the testimony of the minor as corroborated by her father, the court found that her account of the events of the material day was cogent and sufficient to positively link the Respondent with the offence. In the learned Judge's view, an offence of such nature could be proved by way of oral or circumstantial evidence of the complainant and in the present case, the oral evidence was credible.

[9] As to *whether the defence of the Respondent was considered*, the court stated that the Respondent did not rebut the evidence tendered by the prosecution. On sentencing, the court confirmed that the complainant was indeed a minor aged 15 at the time of the commission of the offence and was therefore a child within the meaning of Section 8(1) of the Sexual Offences Act, thereby attracting the

minimum sentence of 20 years under Section 8(3) thereof. Accordingly, in a judgment delivered on 11th November 2015, the court dismissed the Respondent's appeal, and upheld the conviction and sentence.

iii) At the Court of Appeal

[10] Dissatisfied with the decision of the High Court, the Respondent lodged ***Criminal Appeal No. 84 of 2022***. The appeal was based on five grounds, with the main complaint being that the 20-year sentence imposed on the Respondent was *harsh and unconstitutional*. The court was therefore urged to reduce the sentence to allow the Respondent re-join his family. The Respondent also averred that he would not be a threat to the complainant. It is instructive to note that these grounds were raised for the first time before the Court of Appeal and were not raised before either the trial court or the High Court.

[11] In a nutshell, the Appellant submitted that the mandatory nature of the sentence provided for in Section 8(3) of the Sexual Offences Act deprives courts of their legitimate jurisdiction to exercise their judicial discretion in sentencing. He relied on the Court of Appeal's decisions in ***Christopher Ochieng v. Republic***, Criminal Appeal No. 202 of 2011; [2018] eKLR; ***Jared Koita Injiri v. Republic***, Criminal Appeal No. 93 of 2014; [2019] eKLR and ***Evans Wanjala Wanyonyi v Republic,*** Criminal Appeal No. 312 of 2018; [2019] eKLR where in each instance, the court interfered with the sentences imposed on the basis that their mandatory nature was unconstitutional. It was further urged that our decision in ***Francis Karioko Muruatetu & Another v. Republic*** SC Petition No. 15 of 2015 as consolidated with Petition No. 16 of 2015; [2017] eKLR (the ***Muruatetu case)***, was applicable to the Sexual Offences Act, to the effect that the nature of mandatory sentences deprives courts of judicial discretion, which is not in conformity with the tenets of a fair trial under Article 50 of the Constitution. The Respondent therefore urged the court to reduce his 20-year imprisonment term to

a 10-year sentence which he had already served having been in custody from 10th March 2011.

[12] On the other hand, the Appellant urged that, sentencing aims to protect the society from harmful acts of criminals by serving as a prohibition to convicted persons from repeating a crime, and as a deterrent to members of the public from committing similar crimes. It was asserted that defilement is a particularly serious crime and that the gravity of its punitive measures is an indicator of the intention of the Legislature to curb and deter such heinous crimes which were prevalent in society. Furthermore, it was urged that the ***Muruatetu case***, whose aim was to abolish the mandatory death sentences was inapplicable to the Sexual Offences Act cases and therefore, applying the ***Muruatetu case*** to offences under the Sexual Offences Act was tantamount to amending the entire Act without going through the requisite legislative process.

[13] While underscoring its duty as a second appellate court to confine itself to matters of law, The Court of Appeal (*Karanja, Kiage & J. Mohammed, JJ. A*) determined that the sole issue arising for determination was that of *sentencing*, a matter of law within its jurisdiction. Contrary to the Appellant's justification that mandatory minimum sentences are for purposes of deterrence, predictability of imprisonment and enhancement of public safety, the Court of Appeal stated that such statutory sentences do not permit judges to consider appropriate sentences within the ambit of differing circumstances. Moreover, the court surmised that the mechanical nature of mandatory sentences is often at the expense of proportionality, which may result in unduly harsh sentences. In this regard, the court cited the Court of Appeal cases of ***Evans Wanjala Siibi v. Republic*** (supra) and ***Eliud Waweru Wambui v. Republic*** [2019] eKLR, in which harsh sentences were meted out against the convicted persons for sexual offences yet the cases characterised as *Romeo and Juliet* ones involved convicted persons, who,

like the victims, were also minors aged 17 at the time of the commission of their respective offences.

[14] Additionally, the Court of Appeal debunked the Appellant's argument that application of this Court's findings in the ***Muruatetu Case*** on the Sexual Offences Act was tantamount to amending the Act without going through the required legislative process. The court held that the reasoning in that case, specifically on the limitation of judicial discretion by mandatory sentences, ran afoul of the right to fair trial and dignity under Articles 25 and 28 of the Constitution. Accordingly, the court held that the *ratio decidendi* of the ***Muruatetu case*** can be applied *mutatis mutandis* to the mandatory nature of sentences provided for in the Sexual Offences Act. To this end, the Court of Appeal, differently constituted, applied the ***Muruatetu Case*** and reduced sentences meted out against the Appellants while differently constituted in the cases of; ***Christopher Ochieng v. Republic*** [2018] eKLR, ***Jared Koita Injiri v. Republic*** [2019] eKLR, ***SS v. Republic*** [2021] eKLR and ***Simiyu v. Republic*** (Criminal Appeal No. 49 of 2018) [2021] KECA 295 (KLR).

[15] Furthermore, the court stated that, while it was alive to the fact that some convicted persons were deserving of no less than the mandatory minimum sentences provided in the Sexual Offences Act, some cases are deserving of leniency. The court also acknowledged the power of the Legislature to enact laws but held that the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers by arrogating the Legislature power to determine appropriate sentences yet it does not adjudicate particular cases and cannot appreciate the intricacies faced and appreciated by judges. Ultimately, in its judgment dated 7th October, 2022, the court allowed the Respondent's appeal, set aside the 20-year sentence and substituted it with a 15-year sentence running from the time that the trial court imposed its sentence.

iv) At the Supreme Court

[16] Aggrieved, the Appellant filed the instant appeal pursuant to leave granted by the Court of Appeal in its Ruling dated 5th July 2023 *(Karanja, J. Mohammed and Kimaru, JJ. A*), in which the appeal was certified as raising matters of general public importance; namely, *whether mandatory minimum sentences as prescribed in the Sexual Offences Act are unconstitutional* and *whether courts have discretion to impose sentences below the minimum mandatory sentences as prescribed in the Sexual Offences Act*. The appeal, in that context, challenges 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.

[17] Accordingly, the Appellant seeks the following reliefs:

a. The appeal be allowed;

b. An order setting aside the judgment of the Court of Appeal;

c. *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;*

d. *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,*

e. *A declaration that the imposition of minimum mandatory sentences under the Sexual Offences Act does not undermine judicial discretion of trial courts.*

[18] In response to the petition, the Respondent filed a replying affidavit dated 14th August 2023 and filed on 17th August 2023; to which the Appellant filed a replying affidavit dated 21st August 2023, and filed on 23rd August 2023.

D. SUBMISSIONS

i. The Appellant

[19] In written submissions dated 30th November 2023 and filed on 6th December 2023, the Appellant framed five issues as arising for determination by the Court, namely:

a. *Whether the learned 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. *Whether 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. *Whether the Court of Appeal erred in holding that mandatory minimum sentences offend the doctrine of separation of powers;*

d. *Whether the Court of Appeal erred in holding that mandatory minimum sentences deprived judicial officers the power to exercise judicial discretion; and,*

e. *Whether the Court of Appeal erred in holding that the meting out of mandatory minimum sentences contravenes and violates an accused's right to fair trial.*

[20] On *jurisdiction*, the Appellant submits that the Court of Appeal can only deal with matters coming before it by way of appeal from the High Court and specifically cannot assume original jurisdiction on constitutional matters. It reiterated that the issue of *mandatory minimum sentences* was not raised before the High Court hence the Court of Appeal had no jurisdiction to determine the same. To buttress its position, the Appellant cited the Court of Appeal case of ***Hassan Kahindi Katana v. Republic*** Malindi Criminal Appeal No. 8 of 2019; [2022] KECA 1160 (KLR) on the limits of the exercise of appellate jurisdiction under Article 164(3)(a) of the Constitution and Section 3(1) of the Appellate Jurisdiction Act, Cap 9, Laws of Kenya. It also urged that the Court of Appeal should have restrained itself from delving into a constitutional issue raised for the first time at the appellate stage, in the same manner that the Supreme Court restrained itself in the ***Muruatetu Case***.

[21] As regards *stare decisis*, the Appellant contends that the Court of Appeal misapplied the decision in the ***Muruatetu case*** and acted contrary to the express ***Muruatetu Directions***, in which the Court held that the decision's reasoning

only applied to the mandatory nature of the death sentence under Section 204 of the Penal Code, Cap 63, Laws of Kenya. In this regard, the Appellant submits that the Court of Appeal offended the doctrine of *stare decisis* as encapsulated in Article 163(7) of the Constitution which provides that all courts other than the Supreme Court are bound by the decisions of the Supreme Court. The Appellant also cited the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*** SC App. No. 5 of 2014; [2014] eKLR, in support of that submission.

[22] On *the issue of the doctrine of separation of powers*, the Appellant submits that Article 94 of the Constitution vests the mandate to legislate in Parliament, inclusive of promulgation of offences and prescribing of their attendant penalties. Therefore, it is in the exercise of this exclusive constitutional mandate that the Legislature prescribed the impugned mandatory minimum sentences under the Sexual Offences Act. The Appellant underscores that, while the High Court and by extension other superior courts have the mandate to interpret the law, that mandate does not extend to legislation or repeal of statutory provisions. Accordingly, legislation on mandatory minimum sentences with respect to the gravity of sexual offences was the Legislature's way of guiding the exercise of judicial discretion by way of checks and balances, and not a misapprehension of the separation of powers.

[23] As regards *judicial discretion*, the Appellant submits that, by interfering with a sentence affirmed by the High Court without considering relevant factors, the Court of Appeal passed a sentence that was injudicious. Specific to the facts of this case, the Appellant avers that there were no extenuating circumstances that could have warranted a sentence other that the mandatory minimum sentence. It is also submitted that the Court of Appeal mechanically imported the findings of the ***Muruatetu Case*** as to the mandatory nature of the death sentence in the offence of murder under the Penal Code, without contextualizing the position of the law on

sexual offences as it stands in Kenyan statutes. Moreover, it is submitted that, according to the Judiciary Sentencing Policy guidelines at paragraph 7.1.7, where the law provides a mandatory minimum sentence, the court is bound by those provisions and must not impose a sentence lower than what is prescribed.

[24] Finally, as regards *the right to a fair trial*, the Appellant urges that the Court of Appeal erred in its interpretation and application of Articles 25 and 50 of the Constitution. It submits that all persons charged under the Sexual Offences Act are entitled to constitutional and statutory protection relating to fair trial under Article 50 of the Constitution. Furthermore, trial magistrates are obligated to remind accused persons of their rights and where appropriate, to ensure the respect, protection and enforcement of those rights during the trial process. In any event, in rare and specific cases of violation, or threats of violation of the rights of accused persons, recourse lies with the High Court for appropriate reliefs. Therefore, the Appellant concludes that the Respondent's right to a fair trial was not interfered with, by the imposition of a lawful sentence.

ii. The Respondent

[25] In his submissions in opposition to the appeal dated 12th February 2024 and filed on 22nd February 2024, the Respondent maintains that the Court of Appeal's decision was legally sound.

[26] On *the issue of jurisdiction*, the Respondent posits that his grounds of appeal as framed gave the Court of Appeal wide latitude to consider the constitutional validity of the sentence meted out against him. Towards this end, the Respondent surmises that, since his grounds of appeal were mainly based on the unconstitutionality of his mandatory sentence, the ***Muruatetu case*** was properly applied by the Court of Appeal, in its finding that the sentence contravened the right to a fair trial under Article 25 of the Constitution which is a non-derogable and absolute right.

[27] As regards the assertion that *minimum mandatory sentences offend the doctrine of separation of powers, deprive judicial discretion and violate the right to a fair trial*, the Respondent urges that the reasoning in the ***Muruatetu Case*** on the mandatory nature of the death sentence applies to mandatory minimum sentences under the Sexual Offences Act. Furthermore, he submits that such sentences violate the doctrine of separation of powers by making judges mere spectators in imposing a sentence already set by the Legislature, yet it is not the Legislature's duty to sentence offenders. The Respondent also cites the case of ***Maingi & 5 others v. Director of Public Prosecutions & Another***, H.C. Petition No. E017 of 2021; [2022] KEHC 13118 (KLR) and ***Wachira & 12 Others v. Republic and 2 Others,*** HC Petition Nos. 97, 88, 90 & 57 of 2021 (Consolidated); [2022] KEHC 12795 (KLR) to buttress the submission that mandatory sentences place a limitation on judicial discretion, disregard individual characteristics of each case and leave no room for examination of the prospect of rehabilitation or the incarceration method to be adopted. In any event, it is submitted, mistakes on sentences can be remedied through the requisite appellate mechanism.

[28] In conclusion, the Respondent urges the Court to uphold the Court of Appeal decision, declare that the mandatory minimum sentences under the Sexual Offences Act are unconstitutional and issue guidelines similar to the ***Muruatetu Case*** on a framework to deal with sentence re-hearing.

iii. Amici Curiae (Initiative for Strategic Litigation in Africa (ISLA), Kenya Legal and Ethical Issues Network on HIV/AIDS (KELIN), and Women's Link Worldwide (WLW)

[29] By the Ruling dated 10th November 2023, the Court admitted the joint *amici curiae* to the instant proceedings and limited their participation to the Court's consideration of their brief dated 23rd August 2023. In their brief, the *amici*

submitted on the following issues: *violence against women being tantamount to discrimination; the State's due diligence obligation to punish perpetrators of sexual violence; the necessity of mandatory minimum sentences for sexual offences as prescribed by Parliament* and *comparative lessons on the application of mandatory minimum sentences in other jurisdictions*.

[30] As regards *violence against women as a form of discrimination*, the *amici* submit, *inter alia*, that the same is widespread in Kenya with at least 60% of women experiencing physical violence whereas 30% of women have experienced a form of sexual violence in 2022. Furthermore, in 2021, 92% of sexual and gender-based violence reported to the police were reported by women and girls and that the United Nations Committee on the Elimination of all Forms of Discrimination against Women (CEDAW Committee) noted that gender-based violence affects women disproportionately and includes acts that inflict physical, mental or sexual harm and is a violation of the Convention on the Elimination of All Forms of Discrimination against women (CEDAW). They add that justice systems for those reasons as well as policy responses should consider the varying and intersecting forms of discrimination faced by women, and ensure that gendered stereotypes, rape myths and gender biases do not lead to miscarriage of justice and re-victimization of victims.

[31] On *the State's due diligence obligation to punish perpetrators of sexual violence*, the *amici* underscore that Kenya has ratified CEDAW, DEVAW and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol). Accordingly, these instruments enjoin States to develop penal, civil, labour and administrative sanctions in domestic legislation, to punish and redress wrongs caused to women who are subjected to violence. Specifically, CEDAW's Recommendations No. 19 and 35 and the 1995

Beijing Declaration and Platform further elaborate on the importance of adequate punishment and sentencing for sexual violence.

[32] It is further submitted that, prior to enactment of the Sexual Offences Act, sexual offences were found in multiple laws such as the Penal Code and the Children and Young Persons Act. This multiplicity of laws led to their inconsistent interpretation and application, often to the detriment of victims of sexual offences. Furthermore, the Penal Code designated sexual offences as crimes against morality which were deemed to be less serious than crimes against the person. Sexual offences also categorised as rape, defilement and incest attracted a maximum life sentence but no minimum sentence was prescribed. According to the *amici*, for these reasons, the 1990s through the early 200s recorded disturbing levels of sexual violence. Moreover, prior to the enactment of the Sexual Offences Act in 2006, judicial officers meted out low and disparate sentences. Therefore, there was need for legal reforms to establish consistency and uniformity to ensure that the sentences reflected the seriousness and scale of sexual violence against women. This culminated in the enactment of the Sexual Offences Act which set out mandatory minimum sentences exemplifying the State's due diligence to punish under international laws and standards.

[33] As pertains *the necessity of mandatory minimum sentences as prescribed by Parliament*, the *amici* contend that, notwithstanding the enactment of the Sexual Offences Act, courts have been proven to deviate from the same, in effect meting out lenient and inconsistent sentences for sexual offences. To illustrate their assertion, they cite the case of ***Republic v. Nahashon Muinde*** Criminal Case no. 73 of 2018 in which the Magistrate's Court at Makindu sentenced the accused person to 3 years' probation for defiling and impregnating a 14-year-old girl. Also cited was the case of ***Republic v Nicholas Wambogo*** [2022] eKLR in which the High Court, while enhancing a 3-year sentence for defilement of a 14-

year-old girl to 15 years held that the legislative scheme does not impose a fetter upon the discretion of a sentencing court, but emphasises material factors which may justify imposition of the minimum sentence.

[34] Additionally, the *amici* submit that mandatory minimum sentences ensure that prejudicial myths and stereotypes no longer culminate in lenient sentences that do not reflect the gravity of sexual offences. They cite instances in which courts have been influenced by myths that; attempted rape is not a serious offence; the absence of separate physical injury renders the crime less serious; and an alleged relationship between the perpetrator and the victim diminishes the perpetrator's culpability. Further, as regards the *Romeo and Juliet* cases, the *amici* propose adoption of age gap provisions to address the aspect of consensual sex between adolescents. This model creates age brackets whereby consensual sex between persons of the same age bracket is decriminalised, without scrapping off mandatory minimum sentences for sexual offences. Besides, the ODPP's Diversion Policy provides that all child offenders are eligible for diversion, including for sexual offences. The *amici* in that regard posit that mandatory minimum sentences adopt a victim-centred approach for survivors of sexual offences, ensuring that their rights are protected in line with Section 4 of the Victim Protection Act, Cap 79A, Laws of Kenya (VPA).

[35] On *comparative lessons as to the application of mandatory minimum sentences in other jurisdictions*, the *amici* urge that numerous jurisdictions have amended their criminal laws relating to rape and other forms of sexual and gender-based violence. These countries have also introduced mandatory minimums to ensure greater consistency in sentencing, and in recognition of women's and children's rights given their disproportionate position as victims of sexual violence. The *amici* in that context highlight the situation obtaining in South Africa, whereby legislation defines and limits the mitigating circumstances that judges may employ

in justifying a lesser sentence to the mandatory minimum. Prohibited grounds include the sexual history of the complainant, the accused's cultural and religious beliefs about rape, and the previous relationship between the accused and the complainant.

[36] Similarly, it is submitted that South Africa, Tanzania and Lesotho have statutory provisions requiring higher sentences in certain cases, such as those involving repeat offenders and/or aggravating circumstances. Other jurisdictions with mandatory minimums on sexual offences include Rwanda, Zambia and Botswana while the United Kingdom has Definitive Guidelines on the Sexual Offences Act, 2003 which specifies a range of sentences for each type of offence with specified categories reflecting varying degrees of seriousness. The *amici* in that context that, urged that looking to the future, these models can be adopted by Kenya, while retaining mandatory minimum sentences in statutes.

E. ISSUES FOR DETERMINATION

[37] The issues that arise for the Court's consideration as delineated by the Court of Appeal and which are matters of great public importance under Article 163(4)(b) are:

i. *Whether mandatory minimum sentences as prescribed in the Sexual Offences Act are unconstitutional; and,*
ii. *Whether courts have discretion to impose sentences below the minimum mandatory sentences as prescribed in the Sexual Offences Act.*

[38] From the pleadings and submissions of the parties, and taking note of the above core issues, this Court is of the considered view that additional but related questions are pertinent in the determination of the present appeal and in the public interest-this being a matter certified as one involving matters of great public

importance. As such, the totality of the issues arising for determination in this appeal is as follows:

i. *Whether the learned Judges of the Court of Appeal acted ultra vires and without jurisdiction by assuming original jurisdiction on constitutional matters not raised at the High Court;*

ii. *Whether in departing from the decision in* ***Muruatetu & another v Republic***, SC Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) ***(the Muruatetu Directions)****, the Court of Appeal violated the principle of stare decisis.*

iii. *Whether minimum sentences as prescribed in the Sexual Offences Act are unconstitutional;*

iv. *Whether courts have discretion to impose sentences below the minimum mandatory sentences as prescribed by the Sexual Offences Act.*

F. ANALYSIS AND DETERMINATION

(i)Whether the learned Judges of the Court of Appeal acted ultra vires and without jurisdiction by assuming original jurisdiction on constitutional matters not raised at the High Court.

[39] Before considering the issues as delineated by the Court of Appeal, we are bound to pronounce ourselves, *in limine* on the question as to whether the Court of Appeal acted *ultra vires* and without jurisdiction in the first place, since it forms part of the grounds of this appeal. This issue is intricately intertwined with the other three issues delineated above and so we shall determine them together.

[40] The Appellant submits in that context that, the Court of Appeal does not enjoy original jurisdiction on questions relating to the interpretation of the Constitution; it can only deal with such questions only by way of appeal from the

High Court. The Appellant further contends that the issue of minimum mandatory sentences was not raised before the High Court and that the issue was raised for the first time before the Court of Appeal. Therefore, the Court of Appeal had no jurisdiction whatsoever to determine it.

[41] The Respondent on the other hand contends that the grounds of appeal he framed gave the Court of Appeal wide latitude to consider the constitutional validity of the sentence meted out against him. He points out that, since his grounds of appeal were mainly based on the unconstitutionality of his mandatory sentence, ***the Muruatetu case*** was properly applied by the Court of Appeal, in its finding that the sentence contravened the right to a fair trial under Article 25 of the Constitution which is a non-derogable and absolute right.

[42] On our part, we note that the Court of Appeal in its judgment delivered on 7th October 2022 pointed out that the Respondent's appeal was based on five grounds, with the main complaint being that *the 20-year sentence imposed on the Respondent was harsh and unconstitutional.* Further that the court was urged to reduce it so as to allow him to go back to his family.

[43] Article 164(3) of the Constitution defines the Court of Appeal's jurisdiction, which is expressly restricted to appeals from the High Court and any other court or tribunal that is designated by an Act of Parliament. Under Article 165(3)(d)(i) and (ii), the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution. This includes determining whether any law is inconsistent with or in violation of the Constitution and whether any action taken under the authority of the Constitution or any law is inconsistent with or in violation of the Constitution. This jurisdiction is however subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court.

[44] This clear and uncontested position lends credence to the argument by the Appellant that the Court of Appeal heard and determined the present matter without jurisdiction, regarding the unconstitutionality of the sentence meted against the Respondent, because the High Court did not in any way address the issue that the appellate court ultimately focused its judgment on.

[45] We have further noted that, from the Respondent's Grounds of Appeal which appear in the Record of Appeal, the Respondent specifically complained that the sentence of 20 years was *harsh and excessive* and that the court ought to reduce the same to a convenient term deemed fit to enable him re-join his family and society while not being a threat to the complainant. The constitutionality of the sentence imposed within the relevant statute was therefore not an issue placed before the Court of Appeal for its determination.

[46] We reproduce the grounds of appeal verbatim and for clarity as follows:

> *"1. THAT,* ***the 20yrs imprisonment imposed against me is harsh and excessive.***
>
> *2. THAT, I urge this Hon. Court to reduce the same under its own convenient term deemed fit(sic).*
>
> *3. THAT, if the sentence is reduced at the court's discretion it will enable me join my family and society and not be a threat to the complainant.*
>
> *4. THAT, I am now 34 years old with 3 children being the only bread winner who by now they are under the care of the elderly parents same who are not financially stable(sic).*
>
> *5. THAT, other grounds to be adduced and I kindly urge this court to be present during the hearing of this appeal(sic)."*

[47] The record also shows that issue of constitutionality of the sentence was raised for the first time before the Court of Appeal and introduced by way of submissions by counsel representing the Respondent. Having combed through the Record of Appeal and proceedings, we note that the constitutionality of the Respondent's sentence was also not raised either before the trial court or the High Court. The Respondent having failed to raise the issue of the constitutionality of the mandatory minimum sentence imposed on him in his appeal before the High Court, it is obvious to us that he was precluded from addressing the issue on appeal before the Court of Appeal.

[48] Before further delving into the question of constitutionality or otherwise of the sentence, we must take cognizance of provisions of Section 361(1) of the Criminal Procedure Code which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court. We produce the same verbatim as follows:

> *"361. Second Appeals*
>
> *(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law,* ***and the Court of Appeal shall not hear an appeal under this section—***
>
> ***(a) on a matter of fact, and severity of sentence is a matter of fact****; or*

(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

[49] Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was *harsh and excessive* was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction.

[50] As we have stated before, this Court recognizes and respects the constitutional competence of courts in the judicial hierarchy to resolve matters before them. We have also settled that for an appeal to lie to the Supreme Court from the Court of Appeal under Article 163(4)(a), the constitutional issue must have first been in issue at both the High Court and then the Court of Appeal for determination. We have stated so in a myriad of cases including ***Peter Oduor Ngoge vs Francis Ole Kaparo & 5 Others***, SC Petition No. 2 of 2012 [2012] eKLR and ***Erad Suppliers & General Contractors Limited V National Cereals & Produce Board***, SC Petition No. 5 of 2012 [2012] eKLR. It was subsequently summed up in ***Gladys Wanjiru Munyi v Diana Wanjiru Munyi,*** SC Petition No. 31 of 2014 [2015] eKLR thus:

*"In **Peter Ngoge v. Francis Ole Kaparo & 5 Others**, Sup. Ct. Petition No. 2 of 2012 [2012] eKLR, we signaled the guiding principle that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, do*

indeed have the competence to resolve all matters turning on the technical complexities of the law, and that only cardinal issues of law, or of jurisprudential moment, deserve the further input of the Supreme Court."

We reiterate the above guiding principle and would dissuade courts below from exceeding their mandate under the erroneous view that they have been confronted by a jurisprudential moment.

(ii)Whether in departing from the decision in Muruatetu & another v Republic; S.C Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) ***(the Muruatetu Directions), the Court of Appeal violated the principle of stare decisis?***

In the ***Muruatetu case***, this Court was clear that what was in contention before it was the *mandatory* nature of the sentence of death imposed upon the Appellants therein by the High Court and affirmed by the Court of Appeal for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The Appellants had argued that the mandatory sentence of death was inconsistent with the Constitution. This Court in its final judgment issued the following declarations and orders:

*"a) **The mandatory nature of the death sentence as provided for under section 204 of the Penal Code** is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.*

b) This matter is hereby remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment.

c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this court on the same.

d) We direct that this Judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought to constitute life imprisonment". (Our emphasis).

[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:

*"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."

.....

14. ***It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent***

with the Constitution. *It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.*

15. *To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the Penal Code,* ***that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached****.* ***Muruatetu*** *as it now stands cannot directly be applicable to those cases*." [Emphasis ours]

[52] We therefore find that in this matter the Court of Appeal did offend the principle of *stare decisis*. Notably, we observe that the Court of Appeal determined that the *ratio decidendi* in the ***Muruatetu Case*** on the unconstitutionality of mandatory sentences could be applied *mutatis mutandis* to the mandatory nature of minimum sentences provided for in the Sexual Offences Act. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the ***Muruatetu case*** and the ***Muruatetu directions*** in this instance.

[53] As we have stated before in several cases, unlike in other jurisdictions, Kenya's *stare decisis* principle is a constitutional obligation meant to enhance the legal system's predictability and certainty. In the case of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others,*** SC Petition No. 2B of 2014 [2014] eKLR, we stated that Article 163 (7) of the Constitution is the embodiment of the

time-hallowed common law doctrine of *stare decisis*. It holds that the precedents set by this Court are binding on all other Courts in the land. It is imperative for all courts bound by decisions to rigorously uphold their authority, ensuring the effective functioning of the administration of justice. Without this steadfast and uniform commitment, the legal system risks ambiguity, eroding public trust, and causing disorder in the administration of justice.

[54] Turning to the specific issue confronting us in this appeal, we are of the view that, in failing to follow the ***Muruatetu*** decision and later Directions, the Court of Appeal's blanket application of the *ratio decidendi* in the ***Muruatetu case*** conflated the concept of *mandatory sentences* with *minimum sentences*.

[55] Black's Law Dictionary, 9th Edition, defines a *mandatory sentence* as follows:

> *"A sentence set by law with **no discretion** for the judge to individualize punishment."*

While *minimum sentence* is as defined as follows:

> *"The **leas**t amount of time that a convicted criminal must serve in prison before becoming eligible for parole."*

[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.

[58] The *amici* in that context submitted, and we agree, that sterner sentences ensure that prejudicial myths and stereotypes no longer culminate in lenient sentences that do not reflect the gravity of sexual offences. They cite instances in which the courts have been influenced by myths that; attempted rape is not a serious offence; the absence of separate physical injury renders the crime less serious; and, the alleged relationship between the perpetrator and the victim diminishes the perpetrator's culpability.

[59] South Africa introduced minimum sentencing in 1997 through the Criminal Law Amendment Act with the intention of reducing serious and violent crime, achieving consistency in sentencing and to address public perceptions that the sentences meted out were not sufficiently severe. The Supreme Court of Appeal in the case of ***S v Malgas 2001 (1) SACR 469 (SCA)*** para. 25 explained and declared the purpose of minimum sentences as follows:

"In short, the legislature aimed at ensuring a severe, standardised and consistent response from the courts to the commission of such [serious] crimes"

[60] In response to a 1992 Special Report to Congress by the United States Sentencing Commission denouncing mandatory minimum sentences, Robert Mueller, a former Assistant Attorney General, defended mandatory minimum sentences on behalf of the Department of Justice in his article '*Mandatory Minimum Sentencing'* published in the Federal Sentencing Reporter, Vol. 4, No. 4, Turmoil over Relevant Conduct in the Ninth Circuit (Jan. - Feb., 1992), pp. 230-233. He stated that, through mandatory minimum sentence statutes, Congress sends a strong message that society would not tolerate certain forms of criminal behaviour. Further, that mandatory minimum sentences deter criminal activity by maximizing the certainty and predictability of incarceration for crimes that pose serious threats to the nation's quality of life such as drug trafficking near schools. For him, mandatory minimum sentences assure an absolute sentencing floor, allowing only departure above the stated minimum.

[61] Having so stated, we are aware that mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, USA, Australia, South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed. That is why the Supreme Court of the United States, which has actively challenged mandatory death sentences since the early twentieth century, ruled in ***Miller v. Alabama, 132 S. Ct. 2455 (2012***) that imposing mandatory life imprisonment without parole for juvenile offenders at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. Similarly, the European Court of Human Rights has on several

occasions applied the "grossly disproportionate test," for instance in the cases of ***Harkins and Edwards v. United Kingdom, 2012 ECHR 45*** and ***Murray v. Netherlands, 2016 ECHR 408*** where the court found that mandatory sentences of life imprisonment without the possibility of parole go against Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms on the prohibition from torture and inhuman and degrading punishment. Canada has also actively struck down minimum mandatory sentences and recently a 9 Judge bench of the Supreme Court of Canada in ***R. v. Safarzadeh Markhali, 2016 SCC 14***, reiterated its Constitutional commitment for proportionality in sentences. In Australia, in the case of ***Magaming v. The Queen, (2013) 253 CLR 381*** the High Court struck down minimum mandatory sentence in the Migration Act finding that the statute usurped judicial power by granting the prosecution office the discretion to determine the minimum penalty to be imposed by allowing them to elect which offences to charge suspects with.

[62] Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in ***Muruatetu*** which must remain binding to all courts below.

(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.***

[63] 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.

[64] 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.

[65] 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.

[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.

[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. 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 Montesquieuian 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.

G. CONCLUSION

[68] Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the Sexual Offences Act remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.

H. FINAL ORDERS

[69] We take cognizance of the fact that upon delivery of the judgment of the Court of Appeal reducing the Respondent sentence from 20 years to 15 years, the Respondent had since been released from prison. The consequent effect of our decision herein of setting aside the judgment of the Court of Appeal would be reinstating the initial sentence of 20 years and it is upon the relevant organs of State to abide by our decision.

[70] Consequently, our final Orders are as follows:

a) ***The Petition of Appeal is allowed to the extent of setting aside the Judgment of the Court of Appeal in Nyeri in Criminal Appeal No. 84 of 2015 Joshua Gichuki Mwangi v. Republic delivered on 7th October, 2022.***

b) ***The Respondent, Joshua Gichuki Mwangi, should complete his 20-year sentence from the date of imposition by the trial court.***

c) ***There shall be no order as to costs.***

DATED and **DELIVERED** at **NAIROBI** this **12th** day of **July, 2024.**

.....

M. K. KOOME
CHIEF JUSTICE & PRESIDENT OF
THE SUPREME COURT

....

M. K. IBRAHIM **S. C. WANJALA**
JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

....

NJOKI NDUNGU **I. LENAOLA**
JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

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SUPREME COURT OF KENYA