REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu: DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. E002 OF 2024

–BETWEEN–

REPUBLIC ..... APPELLANT

–AND–

EVANS NYAMARI AYAKO ..... RESPONDENT

(*Being an appeal from the Judgment of the Court of Appeal at Kisumu (**H. Okwengu, H.A. Omondi & J. Ngugi**, JJ. A) in Civil Appeal No. 22 of 2018 dated **8th December 2023**)*

Representation

Ms. Freda Mwanza, Ms. Magdaline Ngalyuka,
Mr. Jami Yamina and Ms. Becky Arunga for the Appellant
(*Office of the Director of Public Prosecutions*)

Mr. Ray Tollo for the Respondent
(Gitonga & Tollo Advocates LLP)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Petition dated 1st February, 2024, and lodged on 15th February 2024, is premised on Article 163(4)(a) of the Constitution, Sections 3A, 15A, 15(2) and 21

of the Supreme Court Act, Cap 9B of the Laws of Kenya. The Appellant, through the Office of the Director of Public Prosecutions, challenged the Judgment of the Court of Appeal (*H. Okwengu, H.A. Omondi & J. Ngugi, JJ.A)* delivered on 8th December 2023 in ***Evans Nyamari Ayako vs Republic***, Criminal Appeal No. 22 of 2018 wherein that court held, *inter alia*, that life imprisonment in Kenya must be translated to mean thirty years (30) imprisonment.

B. BACKGROUND

[2] The Respondent, Evans Nyamari Ayako, was arraigned before the Senior Principal Magistrate's Court at Ogembo on 18th July 2011 and charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, Cap 63A of the Laws of Kenya. He was also charged with the alternative offence of committing an indecent act on a child contrary to Section 11(1) of the Sexual Offences Act. He pleaded not guilty to both offences. Upon hearing the prosecution's witnesses and weighing the evidence adduced, the trial Court found the Respondent guilty, convicted and sentenced him to serve life imprisonment in accordance with Section 8(2) of the Sexual Offences Act. The conviction and sentence were upheld on first appeal at the High Court but the sentence was later overturned by the Court of Appeal, and substituted with a sentence of 30 years imprisonment to run from 18th July 2011 which was the date he was arraigned in court.

C. LITIGATION HISTORY

a. At the Senior Principal Magistrate's Court

[3] In the *Senior Principal Magistrate's Court at Ogembo, Criminal Case No. 721 of 2011 Republic vs Evans Nyamari Ayako*, the prosecution called six witnesses. The minor, PW3, stated that on 10th July 2011, she was sent by her aunt (PW1) to take milk to a nearby homestead about 100m away from her home. On the way, she met the Respondent, known to her as *Nyamagosa* and whom she knew since

she attended the same school as his children. He led her to a maize shamba nearby and '*did a bad thing*' to her in her private parts by inserting his penis in her vagina. When she screamed for help, he held her throat and threatened to kill her if she continued to scream. After her ordeal, she met her aunt and uncle (PW1 and PW2, respectively) as she was walking back and informed them what had happened.

[4] The minor's testimony was corroborated by her aunt and uncle (PW1 and PW2, respectively) as well as PW5, the clinical officer who examined her following the defilement. At the close of the prosecution's case, the trial court found that the Respondent had a case to answer and accordingly put him on his defence. He denied all the charges against him, faulting the evidence and pleaded his innocence. He claimed that the charges had been brought against him because of a property dispute between him and the minor's family. He stated that in any event, he was not at the scene of the crime when the offence was allegedly committed.

[5] The trial court in its Judgment delivered on 19th December, 2014 delineated two issues for determination: *whether the minor was defiled* and *whether it was the Respondent who defiled her*. In view of the prosecution witnesses' testimonies and based on the evidence adduced, the court found that the minor had been defiled. On whether it was the Respondent who committed the crime, the court held that the minor had positively identified him and that the incident took place in broad daylight. Further, the Respondent did not challenge the prosecution witnesses' testimony. The court found the Respondent's defence of a property dispute and his alleged absence during the period in question unreliable because both claims were unsubstantiated and did not displace the prosecution's case.

[6] In mitigation, the Respondent stated that he had small children and was unwell. He requested for a non-custodial sentence. The trial court called for a probation officer's report and having considered it together with the Respondent's

mitigation, the circumstances of the case, and the law. The outcome was that the Respondent was sentenced to serve life imprisonment.

b. At the High Court

[7] Dissatisfied with the trial court's decision, the Respondent lodged an appeal on 24th March 2015 in the High Court, ***High Court Criminal Appeal No. 22 of 2015***, on the following grounds:

i. ***THAT*** *the trial court never gave the Respondent an opportunity and information to digest the evidence of the prosecution.*
ii. ***THAT*** *the trial court erred in both law and fact by not allowing the Respondent to consult any law experts or advocate so as to make the right decision on the plea.*
iii. ***THAT*** *the trial court erred in law and fact by relying on hearsay evidence as a basis of conviction and sentence.*
iv. ***THAT*** *the Trial Magistrate erred in law and fact by convicting and sentencing the Respondent to serve life imprisonment without considering his age.*
v. ***THAT*** *the Trial Magistrate erred in law and fact by not considering the Respondent's mitigation.*
vi. ***THAT*** *the conviction and the sentence are irregular and bad in law.*

[8] By a Judgment delivered on 24th May, 2017, the High Court (*Okwany, J.*) delineated the following two issues for determination: *whether the ingredients of the offence of defilement were proved* and *whether the sentence meted against the Respondent was lawful*. On the first question, the Court held that the three ingredients of defilement, that is, the age of the complainant, penetration and positive identification of the perpetrator, were proved by the prosecution. Regarding the question of the age of the minor, the Court held that even in the absence of a birth certificate, the age was properly established through the *voir*

dire conducted by the trial court, the P3 Form produced in evidence and the testimony of the minor's guardians. On the act of penetration, the Court held, that while the minor's soiled clothes were not produced as exhibits, this element was proved by the evidence of PW1, PW2 and PW3, which evidence was credible, consistent and uncontested when read alongside the evidence of PW5, the clinical officer who examined the minor following the defilement. On the perpetrator's identity, the Court held that, considering all the evidence in totality, the Respondent was properly identified. In addition, the court found that Respondent's defence consisted of mere denial and did not displace the prosecution's case.

[9] *On the sentence*, the High Court held that the trial court correctly applied the law to the facts of the case and imposed the minimum sentence provided for under Section 8(1) and (2) of the Sexual Offences Act, which is life imprisonment. The High Court therefore dismissed the appeal and upheld the conviction and sentence imposed on the Respondent.

c. At the Court of Appeal

[10] Unrelenting, the Respondent challenged the High Court's decision in the Court of Appeal in ***Criminal Appeal No. 22 of 2018 Evans Nyamari Ayako vs Republic***. His submissions dated 11th July 2022 restated the grounds of appeal as follows:

i. ***THAT*** *the two Courts failed in law by failing to observe that a voir dire was not conducted which was an essential step since the minor was a child of tender age.*

ii. ***THAT*** *the two Courts failed in both law and fact by not observing that the case was marred with contradicting and inconsistent testimony which could not have been used to secure conviction.*

iii. ***THAT*** *the two Courts erred both in law and fact for not taking into account that essential and key witnesses were not called during the proceed hearing of the case.*

iv. ***THAT*** *the trial Court and the High Court failed in both law and fact by failing to understand that the offence of defilement was not proved beyond reasonable doubt.*

[11] We note that at the hearing of that appeal, the Respondent's counsel informed the Court of Appeal that they would be appealing against the sentence only. In that regard, the Respondent's counsel submitted that the Respondent had been in custody for over 12 years and had left his young children without a father. In addition, he indicated that the Respondent was remorseful and had reformed and become a staunch Christian. Further, while noting that the sentence stipulated in the Sexual Offences Act was mandatory, he nonetheless argued that the court had a wide discretion to review the same to ensure that justice had been served. To that end, he urged the Court to exercise its discretion and to sentence the Respondent to a sentence equivalent to the period already served.

[12] The Respondent, through his counsel, drew the Court's attention to recent developments declaring the minimum sentences unconstitutional, and specifically drew attention to the case of ***Manyeso vs Republic*** (Criminal Appeal No. 12 of 2021) [2023] KECA 827 (KLR) in which the Court of Appeal had declared life imprisonment unconstitutional. He therefore urged the Court to set aside the sentence of life imprisonment and substitute it with a sentence of 30 years.

[13] In its decision delivered on 8th December 2023, the Court of Appeal *(H. Okwengu, H.A. Omondi and J. Ngugi, JJ.A)*, while appreciating the circumstances of the case, that is, the minor's age; the fact that the Respondent was violent and had threatened her; that extensive harm had been occasioned to the minor that necessitated surgery to her genitalia; and that he had not been remorseful, held that the maximum sentence imposed was justified. The Court of Appeal however,

then proceeded to determine the questions as to whether indefinite life imprisonment was constitutional.

[14] In answering the above question, the Court of Appeal considered emerging jurisprudence in this area of law. In that regard, the Court of Appeal cited the case of ***Manyeso vs Republic Case (Supra)*** in which the court relied on the rationale in ***Muruatetu & Another vs Republic; Katiba Institute & 4 Others (Amicus Curiae)*** (Petitions Nos. 15 & 16 of 2015) [2021] KESC 31 (KLR) ***(Muruatetu II)*** and held that a mandatory sentence denied a convict the opportunity to be heard in mitigation, unlike his/her counterparts who may be facing lesser sentences.

[15] In finding that an indeterminate life sentence violates Articles 27 and 28 of the Constitution, the Court of Appeal considered the emerging comparative jurisprudence on the evolving standards of human decency and human rights towards the abolition of life imprisonment or its redefinition to a term sentence. It therefore considered the practice in Namibia, Germany, South Africa, Mauritius, Spain and Zimbabwe and regional courts like the European Court of Human Rights, where indeterminate life imprisonment has been held to be antithetical to human rights and amounts to cruel and degrading punishment. Similarly, the Court of Appeal observed that several academic writers refer to life imprisonment without the possibility of parole as a *living death sentence, death by incarceration, virtual death sentence, prolonged death penalty, delayed death penalty, death sentence without an execution date* and *the other death penalty*.

[16] The Court of Appeal further noted that other jurisdictions have moved towards setting a determinate term for life imprisonment. In that context observed that in Malaysia, life imprisonment was equated to a term of not less than thirty (30) years and not more than forty (40) years, while in Pakistan, life imprisonment was equated to twenty-five (25) years. In Norway, the longest prison sentence is

twenty-one (21) years, but there is an exception for a maximum sentence of thirty (30) years for genocide, crimes against humanity and war crimes.

[17] The Court of Appeal also highlighted jurisdictions that have maintained the sentence of life imprisonment but with a chance for parole. The court observed in that regard, that in Germany, for instance, a prisoner sentenced to life imprisonment was eligible for parole upon serving 15 years. Similarly, in Zimbabwe, prisoners sentenced to life imprisonment are entitled to be released on parole. In South Africa, the sentence of life imprisonment is saved where there is a possibility of parole.

[18] Borrowing from the rationale in sentencing from the above jurisdictions, the Court of Appeal held that life imprisonment is cruel and degrading treatment since it is indefinite and in the present case decided to allow the appeal on the sentence imposed. In doing so, the Court reduced the Respondent's sentence of life imprisonment to thirty (30) years. In that regard, the Respondent was ordered to serve thirty (30) years from the date of his arraignment, being 18th July 2011.

d. At the Supreme Court

[19] Aggrieved, the Office of the Director of Public Prosecutions representing the Appellant lodged the present appeal dated 1st February 2024, on the following grounds:

i. *Whether or not a sentence of life imprisonment is a lawful and constitutionally valid sentence.*
ii. *That the Learned Judges of the Court of Appeal erred in law by promulgating/prescribing the sentence of life imprisonment to be equivalent to a 30-year term of imprisonment and usurped a function of the legislature thereby offending the doctrine of separation of powers.*

iii. *That the Learned Judges of the Court of Appeal erred in law and fact by holding that life imprisonment is a sentence that translates to thirty years imprisonment.*

iv. *Whether the life imprisonment sentence violates the constitutional provisions in Articles 2(5), 2(6), 27 and 28 of the Constitution, 2010.*

v. *Whether the Learned Judges of the Court of Appeal violated the principle of stare decisis.*

[20] The Appellant now seeks the following reliefs:

i. *The appeal be allowed.*

ii. *A declaration that the definition and prescription of life imprisonment in Kenya translates to thirty years is unlawful.*

iii. *An order reversing the term of thirty years.*

iv. *A declaration that defining and determining what ought to constitute the sentence of life imprisonment in Kenya is a legislative and not judicial function.*

v. *A declaration that the Judgment of the Court of Appeal at Kisumu delivered on the 8th December 2023 was rendered per incuriam.*

vi. *The Judgment of the Court of Appeal at Kisumu delivered on 8th December 2023 as to the sentence be set aside.*

[21] In response to the Appeal, the Respondent, in his notice of grounds affirming the decision and submissions both filed on 16th September, 2024, he has asked this Court to affirm the decision of the Court of Appeal.

D. PARTIES' SUBMISSIONS

(i) The Appellant

[22] The Appellant outlined the following issues for determination:

i. *Whether or not a sentence of life imprisonment is lawful and constitutionally valid;*
ii. *Whether or not the Learned Judges of the Court of Appeal erred by promulgating/prescribing the sentence of life imprisonment to be equivalent to a 30-year term of imprisonment and usurped a function of the Legislature thereby offending the doctrine of separation of powers; and*
iii. *Whether the Learned Judges of the Court of Appeal erred in law and fact by holding that life imprisonment is a sentence that translates to thirty years imprisonment.*

[23] On *whether the life imprisonment is lawful and constitutionally valid*, the Appellant argued that such a sentence is lawful and constitutional since it is an express penalty within the law. Further, the stated sentence has not been declared unconstitutional through a known legal and judicial process. Reflecting on the Court of Appeal's judgment, it was submitted that the appellate court had relied on municipal law from various jurisdictions but had not identified any case where a court of law translated life imprisonment to a term sentence, and how such a finding would find meaning within our jurisprudence. In any event, it was urged that a judicial pronouncement that transmutes life imprisonment to a term sentence would violate the Constitution of Kenya. Further, the Appellant submitted that the Court of Appeal had contradicted itself by adjudging life imprisonment unconstitutional in one case (***Manyeso v Republic Case***) and then contradicted itself by setting a term sentence as equivalent to life imprisonment in the present case.

[24] Moreover, by delimiting life imprisonment to a term sentence of thirty (30) years, the Court of Appeal had taken over the mandate of the Legislature in line

with Article 94 of the Constitution. In addition, the court had also violated Article 51 of the Constitution which provides that only Parliament can define a category of crime and prescribe punishment to it. Article 51(3) of the Constitution in particular, vests the Legislature with the duty of determining the treatment of prisoners including terms for parole, conditions for release, and supervision upon release. The Appellant cited the case of the Supreme Court of the United States of America in ***Gore vs United States***, 357 U.S. 386, 78 S. Ct. 1280, 2 L. Ed. 2d 1405 (1958) where it was held that the sphere of penology is purely a legislative function and not one for the courts.

[25] On *whether the Court of Appeal violated the principle of stare decisis,* the Appellant submitted that in ***Muruatetu II***, the Supreme Court declined to determine the question as to what constitutes life imprisonment noting that to do so is a function of the Legislature. In the circumstances, in its *order (d)* in that matter, this Court directed the Legislature and Executive to commence an inquiry into what ought to constitute a life sentence. Therefore, the Court of Appeal violated the principle of *stare decisis* by applying life imprisonment into a term sentence without any such enactment by the Legislature.

[26] By violating the principle of *stare decisis*, the Appellant added that the Court of Appeal's Judgment had the ripple effect on other statutes such as *the Prevention of Terrorism Act Cap 59B of the Laws of Kenya*, *the Prevention of Organized Crimes Act Cap 59 of the Laws of Kenya*, *the Counter Trafficking in Persons Act Cap 61 of the Laws of Kenya*, and *the Narcotics and Psychotropic Substances Act Cap 245 of the Laws of Kenya* all of which prescribe life imprisonment as a sentence. For instance, the Appellant highlighted that Sections 3(5) and (6) of *the Counter-Trafficking Persons Act* provides that the punishment for trafficking another person is not less than thirty (30) years or a fine of not less than Kshs.30,000,000/=, and life imprisonment for a subsequent conviction. Sections 4(3), 5(d) and 7 of the same Act all speak to various sentences and varied fines but

prescribe a penalty of life imprisonment, upon subsequent conviction, while Sections 9 and 10 speak to the sentence of life imprisonment in cases involving life-threatening circumstances, death, or organized criminal groups. Similarly, Section 4(1) and (2) of the *Prevention of Terrorism Act* provides for a sentence not exceeding thirty (30) years but where the stated crime results in the death of another person, it aggravates an act of terrorism, and one is liable, if convicted, to life imprisonment. Accordingly, the Appellant submitted that a prison term of 30 years is a baseline sentence that may be aggravated by existing or subsequent conviction, but it must have its basis in statute.

[27] The Appellant further highlighted that a separate bench of the Court of Appeal in the ***Manyeso vs Republic Case*** held that life imprisonment was unconstitutional and had ordered the Appellant to serve a term sentence of 40 years. This therefore would create a disparate jurisprudence on life imprisonment to the prejudice of the entire justice system. To that extent therefore, the Appellant posited that the Court of Appeal's Judgment in the present case was rendered *per incuriam,* and ought to be set aside.

(ii) The Respondent

[28] In his submissions dated 13th September 2024, the Respondent delineated the following issues for determination:

i. Whether the Court of Appeal had jurisdiction to substitute the life imprisonment sentence with a 30-year sentence.

ii. Whether the Court of Appeal violated the principle of Stare decisis with regard to the Muruatetu II Case.

iii. The Respondent's subsequent good conduct after conviction.

iv. Whether the Court of Appeal had discretion to substitute life imprisonment in the manner it did.

[29] *On whether the Court of Appeal had jurisdiction to substitute life imprisonment with a 30-year term sentence*, the Respondent contended that the Appellant conceded at the Court of Appeal that the issue was properly before the Court of Appeal. It therefore had jurisdiction to determine the same under Article 164(3) of the Constitution, Section 3 of the Appellate Jurisdiction Act Cap 9 of the Laws of Kenya and Section 361(1) and (2) of the Criminal Procedure Code, Cap 75 of the Laws of Kenya. The Respondent also argued that, while the Court of Appeal ought to hear matters of law on second appeals, constitutional matters such as the instant case, fit within the prism of a matter of law.

[30] *On whether the Court of Appeal violated the principle of stare decisis in its application of the Muruatetu II Case*, the Respondent acknowledged that *stare decisis* is a source of law under Section 3(1)(a)(b) (c) of the Judicature Act, Cap 8 of the Laws of Kenya and is also a constitutional imperative under Article 163(7) of the Constitution. In appreciating this time-honoured and now constitutionally under-pinned principle, the Respondent submitted that the Court of Appeal referred to and affirmed the ***Muruatetu II Case*** since it drew an analogy therefrom and applied it to the case before it. He added that the application of the *ratio decidendi* in ***Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)*** (Petition No. E018 of 2023) [2024] KESC 34 (KLR) was discernible from the present appeal since the issue of constitutionality of the sentence was not before the Court of Appeal in that case, unlike in the matter at hand, wherein by the parties' submissions and consent, the issue was made available to the Court of Appeal. However, he was categorical that he was not asking the Court to depart from its decisions in ***Muruatetu & Another vs Republic; Katiba Institute & 5 Others (Amicus Curiae)*** (Petition Nos. 15 & 16 of 2015) (Consolidated)) [2017] KESC 2 (KLR) ***(Muruatetu I and II Cases)*** as well the ***Republic vs Mwangi(supra).***

[31] *On whether the Court of Appeal properly exercised its discretion in reducing the life sentence*, the Respondent argued that while parties cannot clothe a court with jurisdiction by way of consent, sentencing is a discretionary matter which discretion the Court of Appeal properly exercised. In addition, the Appellant did not oppose the Respondent's submission before the Court of Appeal to the effect that it (the Court of Appeal) had the discretion to amend the sentence accordingly. In any event, the Appellant had supported this proposal and had urged the Court to impose a term sentence of 30 years in lieu of life imprisonment.

[32] In this respect, the Respondent stated that the Appellant was wrong for urging the Court of Appeal to substitute the sentence of life imprisonment with a term sentence, and then to turn around and appeal against the same proposal. This was contrary to the Appellant's mandate under Article 157 of the Constitution. Further, that the Respondent suffered prejudice since the Appellant had shifted goalposts. He prayed that the appeal was without merit and ought to be dismissed.

E. ANALYSIS

[33] Having considered the pleadings, and the parties' respective submissions, the following issues arise for determination:

i. *Whether the Court of Appeal acted ultra vires in substituting life imprisonment with 30 years.*
ii. *Whether in applying the* ***Muruatetu II Case*** *the Court of Appeal violated the doctrine of stare decisis.*
iii. *What remedies should issue?*

i. Whether the Court of Appeal acted ultra vires in substituting life imprisonment with 30 years.

[34] The Appellant submitted that the issue of the legality and constitutionality of life imprisonment had not been a matter that was considered by the High Court in this matter. By considering that question, therefore, the Court of Appeal had assumed original jurisdiction over the issue. The Respondent, on the other hand, argued that the Court of Appeal had jurisdiction to hear the same, since the constitutionality and legality of a sentence is a matter of law. Further, that the Appellant had conceded at the material time that the Court of Appeal had jurisdiction to determine that issue and had even entered a 'consent' with the Respondent asking the Court of Appeal to exercise its discretion and substitute his sentence with a term sentence. We shall consider this issue under 2 heads:

a. *Whether the Court of Appeal had jurisdiction to determine the constitutionality of the sentence of life imprisonment.*
b. *Whether the Court usurped the powers of Parliament by setting a term sentence as a substitute for life imprisonment.*

[35] This Court in ***Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others*** (Application No. 2 of 2011) [2012] KESC 8 (KLR), held as follows:

> *"(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondent s in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings… Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the*

constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

[36] Article 164(3) of the Constitution, and Section 3 of the Appellate Jurisdiction Act, Cap 9 of the Laws of Kenya, provide that the Court of Appeal has jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament. In addition, Section 361 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya provides:

"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.

(2) On any such appeal, the Court of Appeal may, if it thinks that the Judgment of the subordinate court or of the first appellate court should be set aside or varied on the ground of a wrong decision on a question of law, make any order which the subordinate court or the first appellate court could have made, or may remit the case, together with its Judgment or order thereon, to the first appellate court or to the subordinate court for

determination, whether or not by way of rehearing, with such directions as the Court of Appeal may think necessary."

[37] We have considered the record and note that one of the Respondent's grounds of appeal before the High Court was that his *"...conviction and sentence is irregular and bad in law*'. This ground does not speak to the constitutionality of the penalty of life imprisonment and neither did the Respondent submit on it, whether orally or in written form. Therefore, the question of the constitutionality of life imprisonment was not advanced in any form before the High Court. In its determination on the sentence, the High Court specifically expressed itself as follows:

"24. Turning to the appeal on sentence, Section 8(2) of the Sexual Offences Act No. 3 of 2003 stipulates as follows:

> *'8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.'*

25 .... The sentencing provided by the Sexual Offences Act is a minimum mandatory sentence which is usually pegged on the age of the victim in which case the younger the victim the stiffer the sentence. Therefore, once the trial court was satisfied that all the ingredients of defilement had been proved beyond reasonable doubt, as I have already found in this judgment, there was no room for court to exercise discretion and the only minimum mandatory sentence provided for under the Sexual Offences Act was life imprisonment."

[38] Therefore the issue in question made its maiden appearance in the Appellant's submissions before the Court of Appeal dated 10th September 2022.

[39] In the circumstances, we agree with the Appellant that the Court of Appeal assumed original jurisdiction over the interpretation and application of the

Constitution, a mandate of the High Court under Article 165(3)(d) of the Constitution. In stating so, we reiterated ***In the Matter of the Interim Independent Electoral Commission*** (Applicant) (Constitutional Application No. 2 of 2011) [2011] KESC 1 (KLR), that the High Court has the mandate to interpret the Constitution, while the Court of Appeal and the Supreme Court have appellate jurisdiction over the same matters having been resolved by the High Court at first instance. Equally, in the ***Republic vs Mwangi Case (supra)*** we held that before courts can consider the constitutionality or legality of minimum sentences and mandatory sentences, the issue must first have been canvassed and escalated through the proper channels.

[40] Even if we were to agree with the Respondent that the constitutionality of a sentence is a matter of law, in the present context, it would still have been subject to adjudication by the High Court as the court of first instance. To this end, this Court has in a myriad of cases underscored its respect and confidence to the competence of the courts in the judicial hierarchy to resolve disputes. See ***Ngoge vs Kaparo & 5 Others*** (Petition No. 2 of 2012) [2012] KESC 7 (KLR).

[41] Arising from the foregoing, it is clear, therefore, that a purported "consent" of parties does not confer jurisdiction upon a court of law. Likewise, since we have now established that the Court of Appeal did not, in the circumstances of this case have jurisdiction to determine the constitutionality or otherwise of life imprisonment or ascribe a term sentence thereto. In the same vein, this Court cannot delve into the question of the constitutionality of the sentence of life imprisonment, as it has not been cascaded through the proper channels.

[42] Having said that, we take note that the Respondent pleaded that he had since reformed and also expressed his remorse at the Court of Appeal. While this is indeed commendable, an appeal before this Court is not the forum to raise such matters.

a. *Whether the Court usurped the powers of Parliament by setting a term sentence as a substitute for life imprisonment.*

[43] Each of the three branches of the Government has its own unique role in ensuring the proper functioning of the State. These roles also complement each other. To achieve this delicate yet essential balance between the Executive, the Legislature and the Judiciary, the Constitution specifically outlines the obligations and mandate of each arm of Government. This division fosters a system of checks and balances, where each branch operates independently yet works collaboratively to uphold constitutional governance, to prevent abuse of power and ensure the rule of law. This balance is vital for maintaining the trust and functionality of a democratic government.

[44] Article 94 of the Constitution in particular vests Parliament with the power to make provisions with the force of law. It further provides that other persons or bodies may also do so only under legislative fiat or the Constitution, but this authority has to be express and specific as to the purpose, objectives, limits, nature and scope of the law to be made. In this way, the Constitution is comprehensive with the necessary safeguards that protect the people of Kenya. We would also add that, before a provision has the full effect of the law, it has to go through various stages of the legislative process, principal among them being public participation. The enactment of legislation without going through these necessary safeguards means that the resultant law would lack legitimacy and will be rendered unconstitutional.

[45] In the ***Republic vs Mwangi Case***, this Court held that, whilst sentencing is an exercise of judicial discretion, Parliament sets the parameters for sentencing for each crime in statute. We stated as follows:

> *"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".

[46] In ***Muruatetu I,*** faced with a similar question of ascribing a term sentence to life imprisonment, this Court considered Article 51 of the Constitution which provides for the rights of detained persons. Sub article 3 thereof specifically tasks Parliament with enacting legislation for the humane treatment of detainees, persons in remand and convicts. We, therefore, held that while life imprisonment ought not necessarily mean a prisoner's natural life, it is for the Legislature to prescribe what constitutes life imprisonment and the parameters applicable, if at all. In that connection, we did, as the Supreme Court, recommend that the Attorney General and Parliament ought to commence an enquiry on this issue, and develop legislation on what constitutes a life sentence. Despite making this recommendation on 14th December 2017, and making an order that the Judgment be placed before the Speakers of the National Assembly and the Senate to, among other things, set the parameters of what constitutes life imprisonment, we note this recommendation has not been given consideration by the two offices of Parliament.

[47] In view of the foregoing, we find that the Court of Appeal ought not to have proceeded to set a term sentence of thirty (30) years as a substitution for life imprisonment, as the effect would be to create a provision with the force of law while no such jurisdiction is granted to it. The term of thirty years was arrived at arbitrarily without involvement of Parliament and the people. In consequence, we find that the Court of Appeal ventured outside its mandate and powers.

ii. Whether in applying the Muruatetu Case (Muruatetu II), the Court of Appeal violated the doctrine of stare decisis.

[48] Article 163(7) of the Constitution provides as follows:

> *All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.*

[49] This Court has underscored the importance, fidelity and centrality of respecting and observing the doctrine of *stare decisis*. It serves as a reference point, and ensures that there is consistency, certainty and predictability in the administration of the law which in turn, enhances confidence in the justice system. *Stare decisis* sets the baseline of how people conduct their everyday affairs and how they transact with the State. See ***Asanyo & 3 Others vs Attorney-General***, (Petition 7 of 2019) [2020] KESC 62 (KLR).

[50] In ***Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others Case(supra)*** we held as follows:

> *"[60] … the decisions of Kenya's Supreme Court, which ought always to be arrived at only after the most conscientious and detailed consideration, will stand as the binding reference-point in the norms governing the judicial process. Such a position is vital for the maintenance of the certainty, predictability, and jurisprudential standards that sustain the principles of the Constitution, and the rights and duties flowing from the*

legal set-up, and which provide sanctity for the legitimate actions of the people."

[51] In the instant case, the Court of Appeal in its judgment, referred to the case of ***Manyeso vs Republic Case***, where a different bench of the Court of Appeal cited the ***Muruatetu I Case*** in stating that the rationale therein applied *mutatis mutandis* to the issue of mandatory indeterminate life sentence.

[52] In the ***Muruatetu II Case*** we reiterated that the rationale in the ***Muruatetu I Case*** was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the Penal Code. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence.

[53] In the ***Republic vs Mwangi Case***, we explained as follows:

"[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."

[54] It is therefore abundantly clear that it was not open to the Court of Appeal to apply the *ratio decidendi* in ***Muruatetu I*** in the instant matter. Therefore, to the extent that the Court of Appeal did so, it has offended the principle of *stare decisis*.

iii. What remedies should issue?

[55] As we framed the remedies for determination, we also thought it wise to address the Appellant's conduct in this matter. It is a fact that counsel appearing for the Director of Public Prosecutions and on behalf of the Appellant before the Court of Appeal, supported and even proposed the substitution of life imprisonment with a term sentence, only to file this appeal with a different stand. The Office of the Director of Public Prosecutions is established under Article 157 of the Constitution of Kenya and operationalized by the Office of the Director of Public Prosecutions Act ("ODPP Act"), Cap 6B of the Laws of Kenya. Section 3 of the ODPP Act sets out the guiding principles that guide this office in discharging its mandate. Some of these principles are *the rules of natural justice, the promotion of public confidence in the integrity of the office, the need to serve the cause of justice, prevent abuse of the legal process and public interest, secure the observance of democratic values and principles, promotion of constitutionalism* among others. We therefore do agree with the Respondent that it was in bad faith for the Appellant to support a cause, the legality thereof notwithstanding, and then turn around and lodge an appeal against the same. It is important that the ODPP is consistent since this also plays a crucial role in the defence an accused person will mount. Inconsistency erodes public confidence and credibility of the justice system.

[56] In conclusion, having found and held as we have hereinabove, the remedy that commends itself to us, is the setting aside of the Court of Appeal's Judgment to the extent that it determined the parameters of life imprisonment and to the extent that it converted the Respondent's life imprisonment sentence to thirty (30) years running from 18th July 2011. For the avoidance of doubt, the High Court's Judgment delivered on 24th May 2017 is hereby reinstated.

[57] In line with our decision in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others,*** (Petition 4 of 2012) [2014] KESC 31 (KLR), and taking

into account the nature of this matter, we are inclined to order that parties bear their own costs.

I. ORDERS

[58] Consequently, and for the reasons aforesaid, we make the following Orders:

i. ***The Appeal dated 1st February 2024 is allowed.***
ii. ***The Judgment of the High Court is hereby reinstated.***
iii. ***For the avoidance of doubt, the Respondent shall serve life imprisonment as sentenced by the Magistrates' Court.***
iv. ***Parties shall bear their own costs.***
v. ***We hereby direct that the sum of Kshs.6,000/= deposited as security for costs upon lodging of this appeal, be refunded to the Appellant.***

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **11th** day of **April**, 2025.

.....

P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF
THE SUPREME COURT

....

M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

S.C. WANJALA
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.