



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. E013 OF 2024

-BETWEEN-

REPUBLIC.....APPELLANT

-AND-

JULIUS KITSAO MANYESORESPONDENT

(Being an appeal from the Judgement of the Court of Appeal at Malindi (Nyamweya, Lesiit and Odunga, J.J.A) dated 7th July 2023 in Criminal Appeal No. 12 of 2021)

Representation

Ms. Freda Mwanza, Ms. Magdalene Ngalyuka,
Mr. Jami Yamina & 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 appeal before the Court dated 26th March 2024 and filed on 27th March 2024 is premised on Article 163(4)(a) of the Constitution and Sections 3A, 15A,

21(1) of the Supreme Court Act, Cap 9B. The Appellant, the Republic of Kenya represented by the Director of Public Prosecutions, challenges the Court of Appeal's decision wherein the appellate court held that the sentence of life imprisonment under the Sexual Offences Act Cap 63A Laws of Kenya was unconstitutional.

B. BACKGROUND

[2] On 28th January 2013, the Respondent, Julius Kitsao Manyeso, was arraigned before the Senior Principal Magistrates Court at Malindi and charged in ***Criminal Case No. 64 of 2013*** with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act. The particulars of the offence were that, on 24th January 2013 at Arabuko Village in Malindi District within Kilifi County, he intentionally and unlawfully caused his penis to penetrate the vagina of N.M. a girl aged 4 ½ 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 3rd October 2013, the trial court found the Respondent guilty as charged on the main count and sentenced him to life imprisonment. The conviction and sentence were upheld on the first appeal at the High Court but overturned by the Court of Appeal, prompting the present appeal at the instance of the Republic.

C. LITIGATION HISTORY

i) At the Senior Principal Magistrate's Court

[3] At the hearing of Criminal Case No. 64 of 2013, ***Republic v. Julius Kitsao Manyeso***, the prosecution called a total of six (6) witnesses in support of its case. PW1, the minor, testified that, on 24th January 2013 at Arabuko Village, the Respondent went to her parent's house and sexually assaulted her. The minor's evidence was corroborated by PW2, her mother, who testified that on the material

date she decided to go to her grandmother's home, leaving her daughter and the Respondent in her home. On her return she heard PW3, sister to the minor, screaming: "Mum come! Julius has entered your room". She went and asked the Respondent what he was doing in her room. The Respondent instead of responding ran away. She entered the room and found the minor lying in the bed and when she pulled her clothes up, found that she had discharge on her body and private parts. She started screaming and other villagers came in response. She later reported the matter to the village elder and sub-chief, and also made a report at Malindi Police Station. The minor thereafter received medical treatment and a P3 form issued.

[4] Pw3, sister to Pw1 and daughter to Pw2, testified that on the material date, she was seated outside her mother's house with the Respondent and at some point in time, the Respondent entered the house to return some chairs. She also entered the house as she wanted to bathe. She found the Respondent in her mother's bedroom and when she asked him what he was doing there, he said that he wanted to put one chair in her mother's bedroom. She entered the bedroom and found the minor had discharge on her. She came out screaming and informed her mother who also entered the house and checked the minor's private parts; it had mucous and a watery discharge. They then reported the matter to the police station.

[5] PW4 was the village elder who received the first report of the alleged offence. He was informed that the Respondent had defiled a minor. He reported the matter to the sub-chief and thereafter the minor was taken to hospital. He testified that the Respondent later came and denied having defiled the minor. Pw5 was the administration officer who arrested the Respondent from the members of the public and took him to Malindi Police Station. He testified that when he arrested the Respondent, he admitted having defiled the minor. Pw6, the clinical officer who examined the minor, testified that her hymen was broken and her labia

injured. He therefore confirmed that she had been defiled and classified the injuries as harm. He produced the P3 form as Exhibit 1.

[6] The trial court, upon analyzing the evidence on record concluded that the Respondent had a case to answer, thereby putting him on his defence. He was the sole witness who testified in his defence. He stated that he was at his home when he heard noise at the neighbour's house and when he went to check what was happening, he learnt that the people who were screaming had gone to the village elder's house. He then went there where he was arrested and taken to the police station.

[7] Upon evaluation of the evidence before it, the trial court held that it had no doubt that the Respondent, having been seen coming out of the room where the minor was later found, had the opportunity to defile the minor. Further, the minor positively identified him as the person who had defiled her. The trial court in dismissing the Respondent's defence noted that whereas he had denied having defiled the minor, he nonetheless admitted of a reported incident regarding the minor's defilement. Consequently, the trial court found the accused guilty of the main count under Section 215 of the Criminal Procedure Code and sentenced him to life imprisonment in accordance with Section 8 (2) of the Sexual Offences Act.

ii) At the High Court

[8] Aggrieved by the decision of the trial court, the Respondent lodged an appeal against his conviction and sentence on grounds that the learned magistrate erred in law and in fact by: failing to consider that his age was not properly established and that he was below the age of 18 years when the offence was committed; failing to consider the unlawful detention of a minor below the age of 18 years in breach of Sections 189, 190 and 191 of the Children's Act Cap 141 and Article 53 (1) (c) of the Constitution; failing to consider that no formal documentary evidence like a copy of a birth certificate or age assessment was prepared, processed and produced

as an exhibit in court to prove his actual age for purposes of sentencing; failing to consider sharp contradictions by the prosecution in breach of Section 163 of the Evidence Act and failing to adequately consider the Respondent's defence.

[9] The High Court (*R. Nyakundi J.*) considered the grounds of appeal based on the critical elements of the offence of defilement i.e. age of the complainant, proof of penetration and positive identification of the assailant.

[10] On *proof of penetration*, upon considering the evidence at the trial court, the learned judge held that it was clear from the evidence of PW1 as corroborated by that of Pw2, Pw3 and the medical evidence by Pw6 that the victim had been defiled. He also found that the fact of the hymen rupture and lacerated labia captured on medical examination immediately after the commission of the alleged offence was significant and material to the case as determined by the trial court.

[11] On *the age of the victim*, the High Court held that from the age assessment conducted by the clinical officer during the medical examination of the victim, there was no dispute that the victim's age was assessed at 4 1/2 years old thus placing her under the bracket of victims defiled below the age of 11 years to justify the maximum sentence of life imprisonment under Section 8 (2) of the Sexual Offences Act. The court also held that the Respondent did not adduce any credible evidence to rebut the medical age assessment report.

[12] On *identification of the offender*, the court found that the evidence of PW1, Pw2 and Pw3 on identification was watertight and free from any error or mistake capable of drawing an adverse inference against the Prosecution's case. To this end, the court was satisfied that it was the Respondent who had defiled the minor.

[13] The High Court further noted that the Respondent's other concern on appeal involved his arrest, indictment, trial, conviction and sentence when he himself was in fact a minor. In answer to this submission, the court held that it was clear from the trial court record that the Respondent's age had been assessed on 31st January

2013 by Dr. Ariba of Malindi Hospital who found the Respondent to be 18 years old. The court added that the learned trial magistrate had the advantage of seeing the Respondent and must have taken the earliest opportunity to caution himself of any evidential gaps regarding the Respondent's age. The court therefore held that the question of age was clearly investigated, and an age assessment made by the medical doctor. Consequently, that evidence could not be faulted on appeal.

[14] As to *whether the prosecution case was riddled with inconsistencies and contradictions of a fatal nature to warrant an acquittal*, the court found that the Respondent had failed to identify the contradictions with precision or clarity to enable the court reach an outcome favourable to him. The court also considered the judgement of the trial court in totality and found no irregularities or contradictions on material points to vitiate the conviction.

[15] Lastly on the *sentence imposed*, the High Court found that the same was not excessive, unlawful or punitive to the extent that its jurisdiction could be properly invoked to vary it. Accordingly, the court dismissed the Respondent's appeal, and upheld the conviction and sentence.

iii) At the Court of Appeal

[16] Dissatisfied with the decision of the High Court, the Respondent lodged ***Criminal Appeal No. 12 of 2021***. He raised three (3) grounds of appeal in his supplementary grounds of appeal filed on 13th October 2022, namely that the learned High Court judge erred in law in upholding his conviction and by failing to consider that –

(i) the Respondent was denied his right to information disclosure prior to taking plea in breach of Article 50 (2) (a) (b) (c) (j) of the Constitution of Kenya;

(ii) the Respondent's right to legal representation as stipulated in Article 50 (2) (g) (h) of the Constitution was violated; and

(iii) the legal provision for mandatory life sentences under section 8 (2) of the Sexual Offences Act denies judicial officers their legitimate jurisdiction to exercise discretion in sentence and not to impose an appropriate sentence in an appropriate case on a case to case basis which is unconstitutional and unfair in breach of Article 27 (1) (2) (4) of the Constitution of Kenya. Hence, the sentence imposed on the Respondent is unlawful.

[17] On the *first two grounds*, the appellate court considered the Respondent's claim to the effect that his right to a fair trial had been violated in two respects. Firstly, by not being availed the witness statements before taking the plea in order to prepare for his trial and defence. In determining this ground, the Court of Appeal found that, contrary to the Respondent's assertions, the record showed that the prosecution informed the trial court that it would avail the witness statements. Thereafter, the Respondent did not raise any concerns about the availability or otherwise, of the witness statements. The Respondent participated in the trial and cross-examined the prosecution witnesses without any apparent difficulty. Further, the appellate court noted that the issue had not been raised in the Respondent's appeal to the High Court. Secondly, the Respondent contended that his right to legal representation was violated. On this issue, the appellate court acknowledged that it should be standard practice in every criminal trial for the accused person to be informed, at the outset, of his right to legal representation since the Constitution demands it. However, in the appeal before it, the Respondent did not raise the issue of legal representation either in the trial court or the High Court. The Record indicated that the Respondent had participated in the trial and cross-examined the witnesses. For these reasons, the court did not

find any merit in the Respondent's argument that his right to fair trial under Article 50 of the Constitution had been violated.

[18] The *third ground* centred on the sentence imposed and on that issue, the Court of Appeal took the view that the reasoning in ***Muruatetu & Another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)*** S.C. Petition No. 15 & 16 of 2015 (Consolidated) [2017] KESC 2 (KLR) (herein referred to as *the Muruatetu decision*) applied equally to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation, when those facing lesser sentences are allowed such mitigation. This, the Court of Appeal held, was an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the Constitution. The appellate court in addition took the view that an indeterminate life sentence amounted to inhumane treatment and violated the right to dignity under Article 28 of the Constitution. In this respect, the Court of Appeal was persuaded by the reasoning of the European Court of Human Rights in ***Vinter and Others vs The United Kingdom*** (Application nos. 66069/09 and 3896/10 [2016] III ECHR 317 (9 July 2013)) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and an inhuman punishment, and that it is now a principle of international law that all prisoners, including those serving life sentences, ought to be offered the possibility of rehabilitation and the prospect of release so that rehabilitation is achieved. The Court of Appeal also relied on the decision of the Court of Appeal of the United Kingdom in ***R vs. Beiber*** [2009] 1 WLR 223 where the court held that where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. Such a prisoner may also have served a sufficient term to meet the requirements of punishment and deterrence; and rehabilitation may have transformed him into a person who no longer poses any threat to the public. The Court found that if, despite this fact, he will remain

imprisoned for the rest of his life, it is at least arguable that this is inhuman treatment.

[19] The appellate court guided by the *Muruatetu decision* took the view that, having found the sentence of life imprisonment to be unconstitutional, it had the discretion to interfere with the said sentence. The court also noted that a factor to be considered was that the Respondent had raised the issue of his life imprisonment while he was 18 years of age in his first appeal, and yet did not say anything in mitigation after conviction by the trial court, which he attributed to his young age at the time. The court, further being alive to the fact that the Respondent was convicted for defiling a minor of 4 ½ years and the likely ramifications of his actions on the minor's future, took the view that, while the Respondent ought to be given an opportunity for rehabilitation, he nonetheless merited a deterrent sentence.

[20] Based on the foregoing findings, the appellate court upheld the Respondent's conviction of defilement, but partially allowed his appeal on sentence. It therefore set aside the sentence of life imprisonment imposed and substituted it with a sentence of 40 years to run from the date of his conviction.

iv) At the Supreme Court

[21] Aggrieved, the Appellant filed the instant appeal challenging 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 law by substituting the life imprisonment sentence with 40 years sentence thus usurping the legislative powers to define sentences.*

- iv. *Erred in law by misapplying the decision in the Muruatetu case in finding the life imprisonment sentence to be unconstitutional.*

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

- a. *The appeal be allowed;*
- b. *A declaration that the judgement of the Court of Appeal at Malindi delivered on the 7th July 2023 is unlawful.*
- c. *A declaration that substituting life imprisonment with a 40- year imprisonment is unlawful.*
- d. *Declaration that the indeterminate nature of life imprisonment shall be defined by Parliament and not the Courts.*
- e. *A declaration that a life imprisonment sentence is unconstitutional*
- f. *The Judgement of the Court of Appeal at Malindi delivered on 7th July 2023 be set aside.*

[23] In response to the petition, the Respondent filed a notice of grounds for affirming the decision and submissions dated 2nd September 2024.

D. SUBMISSIONS

i. The Appellant

[24] In its written submissions dated 19th August 2024 and filed on 12th September 2024 the Appellant framed four issues as arising for determination by the Court, namely:

- a. *Whether the Court of Appeal acted ultra vires and without jurisdiction by assuming original jurisdiction on a constitutional issue not raised at the Superior Court.*
- b. *Whether the Court of Appeal violated the principles of Stare Decisis.*

- c. *Whether the Court of Appeal erred in law by substituting the life imprisonment sentence with a 40 years sentence thereby usurping the legislative powers to define sentences.*
- d. *Whether the Court of Appeal erred in law by misapplying the decision in the Muruatetu case in finding a life imprisonment sentence to be unconstitutional.*

[25] On *whether the Court of Appeal acted ultra vires and without jurisdiction*, the Appellant submitted that the trial court imposed a lawful sentence; the issue of constitutionality of the life imprisonment sentence was not an issue at the trial court or the High Court and that the Court of Appeal proceeded to address itself, on the same, as an original trial court. Further, the constitutional validity of the sentence imposed could properly be challenged before the High Court and therefore the Respondent was not without a remedy in law, had that ground been dismissed as it ought to have been. The Appellant cites the High Court decision in ***Protus Buliba Shikuku vs Republic*** Constitutional Reference No. 3 of 2011 (2012) eKLR to assert the High Court's jurisdiction to redress a violation arising from the operation of law through the system of courts even if the case had gone through the appellate process.

[26] The Appellant further urged that *the Court of Appeal violated the principles of stare decisis* thereby offending Article 163 (7) of the Constitution. It took the view that the impugned decision is one of the many decisions of the appellate court that had created confusion as to what the law is on the sentence of life imprisonment and has further diminished sound judicial administration and public confidence demonstrable from the decisions of the Court of Appeal in ***Juma Abdalla vs Republic*** Malindi Cr Appeal No. 44 of 2018, ***Kyallo Mulwa vs. Republic*** Mombasa Cr. Appeal No. 109 of 2022, ***Lawrence vs. Republic*** Malindi Cr. Appeal No. 48 of 2017 (2021) KECA 172(KLR), ***Marindanyi vs Republic*** (Cr. Appeal 27 of 2015) (2023) KECA 450 (eKLR), ***Joshua Gichuki***

Mwangi vs. Republic Nyeri Cr. Appeal No. 84 of 2015 (eKLR), and **Martin Wekesa vs. Republic** Eldoret Cr. Appeal No. 112 of 2019 (eKLR)

[27] The appellant further submitted that in other instances such as **Katana and Another vs. Republic** Cr. Appeal 8 of 2019 (2022) KECA 1160 (KLR), the Court of Appeal invoked the doctrine of *stare decisis*, holding that the *Muruatetu decision* had not invalidated the mandatory or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute. It was the appellant's submission that the provisions of Article 163 (7) provided for the principle of *stare decisis* and pursuant to the same, other courts may only depart from earlier decisions of the Supreme Court if they could properly distinguish their decisions from those determined by the Supreme Court. It is only the Supreme Court that may depart from its earlier decisions if circumstances so warrant.

[28] The Appellant also argued that the High Court has also contributed to the uncertainty emanating from the conflicting positions of the Court of Appeal as to the applicability of the *Muruatetu case*. The same is demonstrated by the decisions of **Stephen Kimari Gathano vs. Republic** Cr. Appeal No. 12 of 2020 (2022) eKLR, **Joseph Murimi Wanjiru vs. Republic** Cr. Petition No. 27 of 2019 [2020] KEHC 697 (KLR), **Musyoki vs. Republic** (Cr. Appeal No. 72 of 2019) (2023) KEHC 18562 KLR, where the High Court followed those decisions by the Court of Appeal regarding *Muruatetu* as well as **Katiba Institute & 4 others (Amicus Curiae)** S.C. Petition 15 & 16 of 2015 (Consolidated)[2021] KESC 31 (KLR) to set aside the sentence of life imprisonment and substitute it with various lesser sentences. Deepening the uncertainty, urges the appellant, is the fact that elsewhere, in **Willy Kipkoech Kerich vs. Republic** 2022 Kericho HC Cr. Appeal No. 27 of 2015 and **Kimutai vs Republic** (Cr. Petition E045 of 2021) (2022) KEHC 11784 (eKLR), the same court dismissed an appeal and application for sentence rehearing arising from life

imprisonment under the Sexual Offences Act, citing the binding Judgement of the Supreme Court in the *Muruatetu decision*.

[29] The Appellant therefore argued that there is a lack of uniformity, predictability and certainty that has been visited upon accused persons facing sentencing before the trial courts, and appellate courts, all basing their divergent findings on the *Muruatetu decision*. The main issue in all the above cases is non-conformity with the *stare decisis* doctrine.

[30] On the *legislative powers to define sentences*, the Appellant submitted that Article 1 of the Constitution affirms the sovereignty of the people which power is donated to the democratically elected representatives of the people; and that power is exercised by Parliament in its legislative function under Article 94 (1) of the Constitution. The Appellant further argued that the Court of Appeal in substituting the life imprisonment sentence with a 40-year sentence was in fact effecting an amendment to Section 8(2) of the Sexual Offences Act. In effect, argued the appellant, the Court of Appeal had overturned the Supreme Court Judgement in *Muruatetu*. There being no legislation post- *Muruatetu* that defines the sentence of life imprisonment, the appellant submitted that such definition cannot be introduced through judicial craft. Therefore, to the extent that the Court of Appeal in this instance defined life imprisonment to be 40 years and made it a determinate sentence, it offended the doctrine of separation of powers.

[31] On *whether the Court of Appeal misapplied the decision in Muruatetu cases*, the Appellant submitted that the Court of Appeal misapplied the decision, specifically paragraphs 24, 93 to 96 which were clarified in the *Muruatetu* directions. The Appellant urged that it is only after the events contemplated under paragraph 96 of the *Muruatetu decision* that a judicial officer could have the discretion to set certain minimum or maximum sentences along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.

[32] The Appellant lastly submitted that the Court of Appeal in its impugned decision overlooked the directions in the *Muruatetu* case thereby creating glaring uncertainty which the Supreme Court ought to correct. It therefore urged that this Court set aside the impugned decision and grant the reliefs sought in its Appeal.

ii. The Respondent

[33] The Respondent filed grounds of affirmation of the decision of the Court of Appeal and submissions in opposition to the appeal both dated and filed on 2nd September 2024 arguing that the Court of Appeal's decision was legally sound.

[34] On *whether the Court of Appeal acted ultra vires in substituting the life imprisonment sentence to 40 years imprisonment*, the Respondent submitted that the Court of Appeal was mindful that sitting on a second appeal, it had to distinguish in its judgement between what had and what had not been raised in the first appeal, before it delved into the issues for determination. The Court cited Article 164 (3) of the Constitution, Section 3 of the Appellate Jurisdiction Act Cap 9 and Section 361 (1) and (2) of the Criminal Procedure Code Cap 75 Laws of Kenya which provisions grant it the jurisdiction to hear and determine a second appeal on a question of law which provisions do not preclude the Court from considering constitutional matters which are matters of law. He urged that the issue of sentence having been dealt with by the High Court, provided a foundation for the Court of Appeal to address the same.

[35] In response to the appellant's submission that the issues canvassed by the Court of Appeal ought to have been properly channelled in a fresh constitutional petition at the High Court, the Respondent relies on the decision of this Court in ***Dande & 3 Others versus Inspector General, National Police Service & 5 Others*** SC Petition Nos. 6,4 and 8 of 2022 (Consolidated) (16th June 2023) KESC 40 stating that the High Court, is clothed with jurisdiction to interrogate questions of law when called upon to do so, even without a party having to file a

separate claim or action. To this end, the Respondent urged that the Court of Appeal in its judgement reiterated the authority of the High Court. He further added that no prejudice was occasioned to the Appellant by the Court of Appeal's consideration of the legality of the sentence under Section 8 (2) of the Sexual Offences Act.

[36] As to *whether the Court of Appeal violated the principle of stare decisis*, the Respondent submitted that the Court of Appeal had in fact followed precedent set by this Court in the *Muruatetu*. Further, the Respondent submitted that nothing stopped the Court of Appeal from analysing the rationale in the *Muruatetu decision* and *directions*. The Respondent urged that the rationale of the Court in the *Muruatetu decision* therefore properly informed the decision of the Court of Appeal holding that, it is unjustifiable discrimination for a life sentence to deny a convict a chance to mitigate.

[37] In conclusion, the Respondent submitted that the Court of Appeal acted within its jurisdiction, adhered to legal principles, and appropriately exercised its judicial discretion. The decision to substitute the life sentence with a 40-year sentence was also just, proportionate, and in line with constitutional requirements. The Respondent therefore urges this Court to uphold the decision of the Court of Appeal and dismiss the appeal.

E. ISSUES FOR DETERMINATION

[38] Having considered the submission of the parties we find that the main issues arising for determination in this appeal are as follows:

- i. *Whether this Court has jurisdiction to hear and determine the appeal.*
- ii. *Whether the Court of Appeal acted ultra vires and without jurisdiction by assuming original jurisdiction on a constitutional issue not raised at the Superior Court.*

- iii. *Whether the Court of Appeal violated the principles of Stare Decisis by misapplying the decision in Muruatetu cases in finding that the sentence of life imprisonment was unconstitutional.*
- iv. *Whether the Court of Appeal erred in law by substituting the life imprisonment sentence with 40 years sentence without a clear legislative basis.*

F. ANALYSIS AND DETERMINATION

(i) Whether the Court has Jurisdiction to hear and determine the appeal.

[39] The appellate jurisdiction of this Court is as set out in Article 163 (4) of the Constitution which provides that:

“(4) Appeals shall lie from the Court of Appeal to the Supreme Court—

(a) as of right in any case involving the interpretation or application of this Constitution; and

(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).” [Emphasis Added]

[40] This appeal has been filed under Article 163 (4) (a) of the Constitution. The main issue before the trial Court concerned the charge of defilement of a minor. At the High Court, the appeal was on both conviction and sentence, while the appeal before the Court of Appeal was restricted to the issue of sentence. The Court of Appeal found and held that the sentence of life imprisonment is unconstitutional. In order to determine the question of whether this Court has jurisdiction to determine the present appeal, we have to address the question of whether the case took a constitutional trajectory through the hierarchy of courts.

[41] Our approach, as held in *Nduttu & 6000 Others vs. Kenya Breweries Ltd & Anor* (Petition 3 of 2012) [2012] KESC 9 (KLR), and *Joho & Another vs. Shahbal & 2 others* (Petition 10 of 2013) [2014] KESC 34 (KLR), has always been that a specific provision(s) of the Constitution must have been an issue for interpretation and/or application by both the High Court or courts of equal status as well as the Court of Appeal before it reaches us. In *Nduttu & 6000 Others vs. Kenya Breweries Ltd & Anor (supra)* we held as follows:

“(28) The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an Appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a).”

[42] In *Gatirau Peter Munya v Kithinji & 2 others* (Petition 2B of 2014) [2014] KESC 38 (KLR) the Court held that the focus should not solely be on the explicit mention of a constitutional provision but also the overall context and impact of the court’s reasoning.

[43] In *Asanyo & 3 others v Attorney-General* (Petition 7 of 2019) [2020] KESC 62 (KLR), concerning an appeal touching on the scope and doctrine of precedent/stare decisis, the Court took a pragmatic approach in assuming jurisdiction whilst noting that the appeal, in its essence, did not flow from the subject matter that had featured before the trial Court but that the grievance of the

petitioners had its origin in the appellate court and required this court's intervention.

[44] Further, this Court in granting leave to the Appellant in this instant matter to file its appeal out of time vide its Ruling dated 1st March 2024 held as follows concerning the issues then raised by the appellant:

“...Moreover, without pronouncing ourselves on the merits of the intended petition/appeal, we find that the grounds of appeal raised therein warrant this court's consideration. In particular, whether the Court of Appeal erred in entertaining a constitutional issue that had not been raised at the trial court and the High Court; whether the Court of Appeal misapplied this Court's decision and subsequent directions in Muruatetu & Another v Republic; Katiba Institute & 4 Others (Amicus Curiae), SC Petition No. 15 & 16 of 2015; [2021] KESC 31 (KLR) in finding the sentence of life imprisonment unconstitutional; and whether the Court of Appeal usurped the legislative powers of Parliament in substituting the sentence of life imprisonment prescribed under Section 8 (2) of the Sexual Offences Act with 40 years imprisonment.....”

[45] Having expressed ourselves as above, we note that the issue of the sentence was considered before the trial court, High Court and the Court of Appeal and that the Court of Appeal made a finding on the constitutionality of the sentence of life imprisonment. Moreover, the appeal concerns the exercise of jurisdiction and the extent of such jurisdiction by the appellate court both in view of the doctrine of stare decisis, and on consideration of original jurisdiction in an otherwise appellate setting. Consequently, we find that the issues of contestation before the Court of Appeal revolved around the interpretation and application of the

Constitution and as such, we hold that this Court is vested with jurisdiction to handle the appeal before it.

iii. Whether the Court of Appeal acted ultra vires and without jurisdiction by assuming original jurisdiction on a constitutional issue not raised at the Superior Court.

[46] Article 164 (3) of the Constitution sets out the jurisdiction of the Court of Appeal to hear appeals from –

“(a) the High Court; and

(b) any other court or tribunal as prescribed by an Act of Parliament.”

[47] The Appellate Jurisdiction Act, Cap 9 provides in its preamble that it is an Act of Parliament to confer on the Court of Appeal, jurisdiction to hear appeals from the High Court and for purposes incidental thereto. Section 3 specifically provides for the Court of Appeal’s jurisdiction as follows:

“(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law.

(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.

(3) In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court.”

[48] At the Court of Appeal, the Respondent raised three (3) grounds of appeal in its supplementary grounds of appeal filed on 13th October 2022 as follows:

- a) *The Learned High Court Judge erred in law in upholding his convictions and failing to consider that the Respondent was denied his right to information disclosure prior to taking plea in breach of Article 50 (2) (a) (b) (c) (j) of the Constitution of Kenya.*
- b) *The Learned High Court Judge erred in law in upholding his conviction and by failing to consider the Respondent’s right to legal representation as stipulated or in violation of Article 50 (2) (g) (h) of the Constitution.*
- c) *The Learned High Court Judge erred in law in upholding his conviction and by failing to consider that the legal provision for mandatory life sentence under section 8 (2) of the Sexual Offences Act denies the judicial officer their legitimate jurisdiction to exercise of discretion in sentence not to impose an appropriate sentence in an appropriate case based on the scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and unfair in breach of Article 27 (1) (2) (4) of the Constitution of Kenya. Hence, the sentence imposed on the Appellant is unlawful.*

[49] By dint of Rule 107 of the Court of Appeal Rules, 2022, in force at the time and pursuant to which, the Respondent filed his appeal, a party is not allowed, without leave of the court, to challenge a decision of the High Court on a ground that was neither relied upon nor considered by that court. Rule 107 specifically provides:

“107. At the hearing of an appeal—

(a) no party shall, without the leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or a notice of cross-appeal, or support the decision of the superior court on any ground not relied on by that court or specified in a notice given under rule 95 or rule 96.”

[50] In ***Karani v Judicial Service Commission*** (Petition 3 of 2021) [2022] KESC 37 (KLR) we held that it is a long-held practice that parties are precluded from arguing their cases piecemeal. They must present the entirety of their case at the first instance to allow the courts, or administrative bodies in this case, to make a full and final determination of all pertinent issues relevant to a case. Further, we cited the persuasive authority of the Court of Appeal in ***Pop In (Kenya) Ltd & 3 Others vs Habib Bank AG Zurich*** [1990] KECA 62 (KLR) where the appellate court held that:

“..But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.....”

[51] Similarly, in ***George Owen Nandy vs. Ruth Watiri Kibe*** [2016] KECA 622 (KLR), the appellate court held thus: -

“In general, a litigant is precluded from taking a completely new point of law for the first time on appeal. The jurisdiction of this court is not to decide a point which has not been the subject of argument and decision of the lower court unless the proceedings and resultant decision were illegal or made without jurisdiction. (See Nyangau v Nyakwara [1986] KLR 712) Earlier, in Kenya Commercial Bank v Osebe [1982] KLR 296, this court held that an appeal must be confined to the points of law raised and

determined by the trial court, except where the trial court commits an illegality or acts without jurisdiction, which is not the case here....”

[52] The Court of Appeal in dismissing the Respondent’s first and second grounds of appeal, held that the right to information and the consideration of the right to legal representation under Article 50 of the Constitution was not raised in the High Court. We have equally canvassed the record and found that the constitutionality of life imprisonment under the Sexual Offences Act was neither canvassed before the trial court nor the High Court. Further, Section 361 (1) of the Criminal Procedure Code explicitly bars the Court of Appeal from considering issues of fact and elaborates that the severity of the sentence is a matter of fact and not of law. The provision provides 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.” [Emphasis Added]

[53] In ***Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)*** S.C. Petition No. E018 of 2023 [2024] KESC 34 (KLR) a case raising similar issues and of similar proportions to this case, we held that the Court of Appeal acted without jurisdiction because the High Court

did not in any way address the issue that the appellate court ultimately focused its judgement on. We further held that the severity of the 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 also stated that unless a proper case is filed and the matter escalated to it, a declaration of unconstitutionality of a whole statute or sections of a statute cannot be made in the manner the Court of Appeal did in that case.

[54] Similarly, in ***Gitonga v Republic*** (Petition 11 of 2017) [2020] KESC 61 (KLR) we faulted the Court of Appeal for entertaining the question of legal representation as one of the grounds of appeal despite acknowledging that it was never raised in the Courts below. In our determination, we stated as follows:

“It is in that regard not disputed that the question as to whether the appellant’s right to fair trial was infringed by failure to accord him legal representation at the expense of the state or by failure to inform him of the right to legal representation was raised for the first time at the Court of Appeal. We have also interrogated the record before us and confirmed that the issue was neither raised at the Resident Magistrate’s Court nor at the High Court. None of the articles of the Constitution in the present appeal was also the subject of interpretation and application at the High Court....”

[55] Therefore, we agree with the submissions made by the Appellant that the Court of Appeal acted *ultra vires* when it determined in the first instance whether the life sentence imposed upon the Respondent was constitutional. 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 raised and determined by the High Court and cascaded through the proper channels

iv. Whether the Court of Appeal violated the principles of *Stare Decisis* by misapplying the decision in *Muruatetu* cases in finding the life imprisonment sentence to be unconstitutional.

[56] The ultimate objective in the application of *stare decisis* is to ensure consistency, predictability of the court's decisions and judicial integrity. In ***Rai & 3 Others vs. Rai & 5 others*** (Petition 4 of 2012) [2013] KESC 21 (KLR), this Court recognized the value of upholding the doctrine of *stare decisis*, or binding precedent by stating as follows:

“[42] The immediate pragmatic purpose of such an orientation of the judicial process, is to ensure predictability, certainty, uniformity and stability in the application of law. Such institutionalization of the play of the law gives scope for regularity in the governance of commercial and contractual transactions in particular, though the same scheme marks also other spheres of social and economic relations.”

[57] Article 163 (7) is particular as to the binding nature of the Supreme Court decisions upon courts below as it provides as follows:

“(7) All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.”

[58] In the case of ***Gatirau Peter Munya (supra)***, we were categorical that precedents set by this Court are binding on all other courts in the land. It is also 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.

[59] The **binding** nature of precedents and the place of certainty in law was also explained by the East Africa Court of Appeal in ***Dodhia vs. National & Grindlays Bank Limited and Another*** [1970] EA 195, where it was held that:

“There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and, subject to these decisions, also to the decisions of the High Court in the particular State.”

[60] The Court of Appeal has itself in several decisions cautioned the High Court regarding its failure to abide by its decisions (See; ***National Bank of Kenya Ltd vs. Wilson Ndolo Ayah*** Civil Appeal No. 119 of 2002 [2009] KLR 762, ***Martin Nyaga Wambora vs County Assembly of Embu & 37 Others***, Civil Appeal No. 194 of 2015; [2015] eKLR, ***Deposit Protection Fund Board vs. Sunbeam Supermarket Limited & 2 Others*** HCCC No. 3099 of 1996 [2004] 1 KLR 37, ***Mohamed Abushiri Mukullu vs. Minister for Lands and Settlement & 6 others***, Civil Appeal No. 158 of 2007 [2015] eKLR)

[61] By express provision of the Constitution under Article 163 (7), requiring courts below to abide by decisions of the Supreme Court, a constitutional duty is imposed on all those courts. Failure to adhere to precedent set by the apex court and indeed superior courts may disrupt the uniformity, consistency and predictability of decisions. In ***Wanjohi v Kariuki & 2 others*** (Petition 2A of 2014) [2014] KESC 26 (KLR) *Rawal, DCJ* in her concurring opinion observed that the principles set by this honourable Court in the course of its constitutional adjudication are principled and well considered. Therefore, an argument to consider a departure from these principles or to distinguish either restrictively or un-restrictively must be weighed against the most serious inclinations of justice and social utility. As such, any departure from the decisions of this Court by a lower Court must be based on well reasoned distinction of the facts.

[62] In *the Muruatetu Directions*, this Court pronounced itself on the application of *the ratio in the Muruatetu case* to other statutes prescribing mandatory sentences as follows:

“10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgement in this matter, or indeed the spirit of the Judgement 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.

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.”

[Emphasis added]

[63] The Respondent has submitted that the Court of Appeal was cautious not to overturn the *Muruatetu* decision, and that the rationale in the *Muruatetu* decision still stands and nothing precluded the courts below from rationalising it together with the *Muruatetu* directions. The Court of Appeal in the present appeal and in analysing the *Muruatetu* decision held as follows in Paragraph 21:

“..We note that the decisions of this court relied on by the appellant, namely *Evans Wanjala Wanyonyi v Rep [2019] eKLR* and *Jared Koita Injiiri v Republic Kisumu Crim App No 93 of 2014* were decided before the Supreme Court clarified the application of its decision in *Francis Karioko Muruatetu & another v Republic [2021] eKLR* and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section

204 of the Penal Code. This fact notwithstanding, we are of the view that the reasoning in Francis Karioko Muruatetu & another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation....”(our emphasis)

[64] Paragraph 11 to 14 of the *Muruatetu* directions are very clear that the decision in the *Muruatetu* case **did not** invalidate mandatory sentences or minimum sentences in the Penal Code, Sexual Offences Act or any other statute. Further, that the *Muruatetu* case cannot be said to be the authority for stating that all provisions of the law prescribing minimum sentences are inconsistent with the Constitution. Paragraphs 93 to 97 of the *Muruatetu* decision are also explicit that it is not for the court to define what constitutes a life sentence. While we appreciated that a life sentence could mean a certain minimum or maximum time to be set by a judicial officer, this Court made the following recommendations to the Attorney General to develop legislation on what constitutes a life sentence:

“94. We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.

95. We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.

96. We therefore recommend that the Attorney General and Parliament commence an enquiry and develop legislation on the definition of ‘what constitutes a life sentence’; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing.

[65] From the above paragraphs of the *Muruatetu* case any reading of that decision ought to lead to the conclusion that it is upon the Legislature to enact legislation on what constitutes a life sentence and not the courts.

[66] We therefore find that the Court of Appeal violated the principle of *stare decisis* by misapplying the decision in *Muruatetu* and in finding the life sentences of imprisonment to be unconstitutional.

(1) Whether the Court of Appeal erred in law by substituting the life imprisonment sentence with 40 years sentence thereby usurping the legislative powers to define sentences.

[67] Article 94 of the Constitution provides that legislative authority is derived from the people and, at the national level, is vested in and exercised by Parliament, while every court within the constitutional framework has the authority to determine the constitutionality of a statute. Article 165 (3)(b) grants the High Court original jurisdiction to determine the question whether a right or fundamental freedom under the Bill of Rights has been denied, infringed, violated or threatened. The Court of Appeal, when acting within its appellate jurisdiction, is empowered to scrutinize and interpret the constitutionality or otherwise of a statute, the issue equally having been canvassed at the first instance before the High Court. The court's role with regard to the constitutionality of a statute is therefore confined to its interpretation and adjudication.

[68] Courts cannot therefore extend their determination to rectifying or amending the statute in question, as this would contravene the doctrine of separation of powers, which delineates the functions of the judiciary, legislature, and executive. Courts must exercise caution when crafting remedies to avoid overstepping their judicial mandate and intruding upon legislative functions by prescribing or enacting amendments. When courts recognize the need for legislative intervention, it is both proper and imperative for them to recommend such measures to the appropriate authorities for adoption. As a Court we have invoked this remedy in various instances; in ***Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others*** (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) we suggested the consideration of reforms over the recourse parties have upon the declaration of trust by the courts and how to actualize the same, especially regarding the aspect of shareholding. In ***Malcolm Bell v Daniel Toroitich Arap Moi & Board of Governors Moi High School Kabarak*** (Application 1 of 2013) [2013] KESC 23 (KLR) Hon. Justice *Kaplana Rawal, DCJ* in her concurring opinion made recommendations to amend Section 16 of the Supreme Court Act. In ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*** [2014] KESC 53 (KLR) we urged CAK to set a

timeline for the digital migration. In ***National Bank of Kenya Limited v Anaj Warehousing Limited*** (Petition No. 36 of 2014) [2015] KESC 4 (KLR) we suggested appropriate legislative action to be taken to address the gaps and inconsistencies apparent in the Advocates Act.

[69] We therefore find no difficulty in finding that the Court of Appeal erred in law by substituting the life imprisonment sentence with a 40-year sentence, thereby usurping the legislative power to define sentences.

G. CONCLUSION

[70] Our findings hereinabove effectively lead us to the conclusion that the Judgement of the Court of Appeal delivered on 7th July 2023 is one for setting aside. The Court of Appeal did not have jurisdiction to interfere with the sentence imposed by the trial court and affirmed by the first appellate court. Consequently, the life imprisonment sentence remains lawful and in line with Section 8 of the Sexual Offences Act.

[71] Considering the nature of this matter, we are inclined to order that parties bear their own costs, in accordance with the principles enunciated by this Court in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others*** (Petition 4 of 2012) [2014] KESC 31 (KLR).

H. Final Orders

[72] Consequently our final orders are as follows;

(a) The Petition of Appeal is allowed.

(b) The life imprisonment sentence imposed by the trial court and affirmed by the High Court is hereby reinstated.

(c) The Respondent, Julius Kitsao Munyeso should therefore complete the life imprisonment sentence imposed by the trial court.

(d) Parties shall bear their own costs.

(e) 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.

It is so ordered.

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

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

.....
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