Musyoka v Republic (Criminal Appeal E046 of 2023)
[2024] KEHC 9835 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9835 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E046 OF 2023

FR OLEL, J

JULY 30, 2024

BETWEEN

JOHN NDAVA MUSYOKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being An Appeal From The Conviction And Sentence Delivered On 19Th April 2022 By Hon L. E.w.wambugu(srm) In Kathimani Sexual Offence No 30 Of 2020)

JUDGMENT

A. Introduction

1. The Appellant was charged with the offence of Sexual Assault contrary to section 5(1) as read with section 5(2) of the *Sexual Offences Act* of 2006. The particulars were that on 28.06.2020 at [particulars withheld]Village, Mavoloni location, Yatta sub County within Machakos County, unlawfully used his fingers to penetrate the vagina of EWM a child of 16 years.

2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* of 2006. The particulars were that on 28.06.2020 at [particulars withheld]Village, Mavoloni location, Yatta sub County within Machakos County, unlawfully used his fingers to penetrate the vagina of EWM a child of 16 years.

3. During trial the prosecution called six witnesses who testified in support of their case. The appellant was placed on his defence, gave sworn evidence and did not call any witness to support his case. The trial magistrate did consider all the evidence adduced and found the Appellant guilty of the offence of sexual assault and convicted him under section 215 of the *Criminal Procedure Code*. The Appellant was sentenced to serve ten (10) years imprisonment.

4. The Appellant being dissatisfied by the conviction and sentence filed his petition of Appeal on 13.06.2023, which he later amended on 07.02.2024 and raised the following grounds of Appeal;

   a. The learned Trial Magistrate erred in law and facts by failing to find that the elements of the offence of sexual assault (identification) was not proved beyond reasonable doubt as required in law.

   b. The learned trial Magistrate erred in law and facts by infringing the appellants right to fair trial as envisaged under Article 50 when he was not supplied with all the documents the prosecution opted to rely on.

   c. The learned magistrate error in fact and law when he convicted the appellant while the appellant's mode of arrest was riddled with doubts and evidence was not enough to sustain a conviction.

   d. The mandatory 10 years sentence meted on the appellant by the learned magistrate was unconstitutional and harsh considering the circumstances of the case.

B. Facts at Trial

5. The prosecution called 6 witnesses. PW1 EWM the complainant testified that she was born on 16.12.2003 (was 17 years old) and was a student in form one at Ngoliba Secondary School. On 28.06.2020 at about 4.00pm her mother sent her to the shop to buy some items. She bought them and on her way back home, the appellant got hold of her, took her to the bush, removed her clothes and inserted his fingers in her private part. She resisted, screamed and her action forced the appellant to release her. When she reached home, she reported the incident to her mother who sent her brother to go look for the assailant. They did not find him and returned home as it was already dark. The next morning accompanied by her father they went to the police station and made a report. She recorded her statement and was referred to Kiwanza dispensary where she received treatment and was issued with treatment notes and P3 form, which were filled and she took the said documents back to the police.

6. It was her further testimony that she had not seen the appellant before the incident, but came to know him on the material day. She had stayed with the appellant in the bush for a sufficiently long time and was able to identify him. Later the police informed her that the appellant had been arrested by members of the public and she was required to go identify him. PW1 identified her birth certificate and medical records from the hospital. In cross examination, PW1 stated that she had given her father the description of the accused person who was dressed in gumboots and a black shirt. Her father together with other people went and effect his arrest.

7. PW2, MG testified that she was the complainant's mother and narrated that on the 28.06.2020 at about 4.00pm, she sent her daughter PW1 to the shop. PW1 told her that a man got hold of her from behind while on her way home from the shop, blocked her mouth and took her to the bush. The assailant started touching her and inserted his fingers in her private part. She called her husband who was not home and when he arrived, he went with PW1 and her brother to look for the appellant, but did not find him on the said evening. The next morning PW1 and her father reported the incident at Kambi Mawe Police. PW1 said she did not know the person who assaulted her but could identify him. She had also stated that her assailant had worn a red t- shirt, black trouser and had boots worn by youth. The appellant was later arrested at their home and she took PW1, to go identify him.

8. Upon cross examination, she further testified that she was at home when the incident occurred and when PW1 informed her of what had transpired, she called her husband and informed him of this

incident. The offence was committed at about 4pm and they did not report this incident immediately to the police as they decided to look for the culprit.

9. PW3, JMN, testified that on 18.06.2020 he was working in Thika when he received a phone call from his wife (PW2) and she requested him to come home immediately. He got home at about 6.00pm and, his wife told him that she had sent PW1 to the shop and on the way back, she met someone who got hold of her, took her to the bush, touched her and inserted his fingers on her private part. PW1 also confirmed what PW2 had told him and further confirmed that she had marked the assailants face and the clothes he had worn. Accompanied by PW1, and his son, they went to the scene and he saw shoe prints of a boot. PW1 told him that the accused was wearing a black cap, red t-shirt, black trouser and black boots similar to those worn by the police officers. He went to [particulars withheld]market in search of the assailant but did not see anyone with similar description.He decided to return home as it was getting late, and while at home during the same evening, his brother (SK) passed by his home and they narrated to him what had occurred and gave the description of the accused including what he is said to have worn. His brother remarked that he had seen a person fitting the said description going to the market and it was someone, he personally knew, called John Ndavu.

10. The next morning, he went to Kambi Mawe police post with his daughter and made a formal report of the incident, and thereafter together with his brother and two village elders went to Ndava's Home. When they reached outside the appellants home, they saw him seated by the roadside with two other boys. He called the police officers to assist in arresting him, and also called his wife (PW2) to come with PW1 in order to identify her assailant.

11. Upon cross examination PW3 stated that he was PW1's father and had not witnessed the incident, but was informed about and PW1 had described the clothes the appellant was wearing. Coincidentally his brother SK (PW4) had also met/seen the appellant on the same evening, wearing the same clothes as he was heading to the market. When PW1 was told to identify the appellant, she went and touched him on the face, and at that moment, the appellant was seated with 5 other boys. The incident occurred on 28.06.2020 and he had filed a report with the police on 29.06.2020. At no point had he been in a relationship with the appellants mother and had no reason to fabricate the case filed. He also noted that there was no home close to the scene of the incident and the closest home to the scene was about 200 meters away.

12. PW4 SKN, testified that on 28.06.2020 he was heading to [particulars withheld]market and on reaching the junction of the market, he met the appellant, who was standing beside the road and looking suspicious. He was wearing a black cap, red t-shirt with sleeves, black boots and black trouser. At about 7.00pm, he went back home and found PW1, PW2 and PW3 talking and looking scared. PW3 narrated to him what had happened to his daughter (PW1) and he noted that he had seen the appellant wearing similar cloths as described by PW1. They did not take any action since it was at night and agreed to report the incident to the police on the following day.

13. The next day after PW3 had reported the incident to the police, they sought assistance from 2 men and went to look for the appellant at their home. They spotted him and called the police together with PW1 and PW2. When the police came, they arrested the appellant, and while at the scene of arrest, which was within the appellants home, Pw1 positively identified the accused amongst six (6) men. On being questioned the appellant stated that he had been in a relationship with PW1 and they were to meet on the material day. The appellant was asked to open the door to his house to enable the arresting party get his national identification card, and therein they saw boots under his bed and the red t-shirt hang on the house wall.

14. Upon cross examination, PW4 stated that he met the appellant besides the road and when they arrested him, he saw the boots and t-shirts in the appellant's house. Further, PW1 had been called to the arresting venue and had positively identified the appellant amongst 6 other men who were there. PW4 further confirmed that he was not present when the assault incident occurred, but noted that the scene was not far from their home and was at a place which did not have houses close by. The appellant was a person he knew by face and their home, was about 1km away from PW1 – PW4. Further he could not tell if anyone else in the village had similar clothes as those worn by the appellant on that material day.

15. PW5 PC JM testified that he was the investigating officer and recalled that on 29.06.2020 at about 7.00am, the complainant in the company of her father reported that the previous day at around 4-5 pm, while the complainant (PW1) was heading home from the market, she met the appellant who led her to the bushes beside the footpath. The appellant tried to defile her and touched her breast and private part with his hands. The report was booked in the OB and PW1 was referred to Kiwanza dispensary for treatment. He interrogated PW1 who told him that she had not known her assailant before, but had given her parents his description and her uncle had confirmed meeting the appellant the same evening wearing similar cloths.

16. Later on the same day, together with PC O they went to look for the appellant, and found him at his house. They escorted him to the patrol base and on interrogating him, the appellant had stated that he knew the complainant (PW1) before and they had earlier agreed to meet on the 28.06.2020. The appellant further admitted to fondle the complainant's breast but denied defiling her. The p3 form however revealed that the appellant had inserted his fingers on the complainant's private part and he therefore decided to charge the appellant with the offence of sexual assault. He also produced the panty she wore on the material day and birth certificate into evidence.

17. Upon Cross examination, PW5 stated that he found the accused inside his house, while there were old men outside his house and were consulting. During the arrest he had been accompanied by PC O and the complainant's parents. They did not pick finger prints from the exhibit collected, but had relied on the evidence gathered from the witnesses interviewed.

18. PW6, Geoffrey Mua Mugusu the officer in charge of the Kiwanza dispensary testified that on 29.06.2020, PW1 was brought to the hospital with reported history of having been sexual assault, which incident had occurred on the previous day. She had complained of neck pain and upper limbs pains suggestive of a struggle. Her Labia Majora had no bruises, while the Labia Minora had minor laceration with whitish discharge. There was no need for speculum examination since the hymen was intact. On posterior of PO towards the anus had lacerations, redness and bruises. Her clothes had blood stains and she complained of pain when urinating. Her limbs however had no injuries. He concluded that there was sexual assault and produced the P3 form, treatment note and post rape care form into evidence. The information on the treatment note was similar to that on the P3 form and PRC form.

19. On cross examination PW6 stated that he had 6 years' experience in practice and that in most cases, the complainant and the perpetrator would be brought to hospital together for examination, but however, that was not the case, with this particular case as PW1 was examined alone and had injuries which confirmed the sexual assault.

20. The trial magistrate placed the appellant on his defense and he opted to give sworn evidence. He stated that he was a farmer and on the said 28.06.2020, he was in the farm from 8.00am to 6.00 pm with 2 of his employees/farmhands. Similarly on the next day they went back to the farm from 8.00am to 1.oo p.m before breaking for lunch. While in his house during this break, his door was knocked and 2 men came in, asked where he was the previous day and what he had done to PW1. He was dragged

out, where he found a crowd that beat him up and tied him up. Later the police officers came and took him to Kambi Mawe Police post.

21. The police told him he was being charged with defilement. He did not know PW1 nor had he ever met her before. The first time he saw her was in court. The appellant further stated that there was a family grudge, the genesis being that on 10.12.2019 the complainant's mother (PW2) had quarrelling with his mother over her husband (PW3) but they had later resolved the matter. That on 12.03.2020 PW2 had gone to his house to ask for friendship, but he had declined and she then told him that she would set him up and he would not be able to rescue himself. He concluded his testimony by denying ever committing the offence he had been charged with.

22. Upon cross examination the appellant stated that on 28.06.2020 at 4.00 pm he was at the farm but had no witness to back up his Alibi, as the witness he intended to call had been involved in an accident. He came to know the complainant's father on 10.12.2019 and complainant's mother on 12.3.2020. He reiterated his evidence that PW3 had a relationship with his mother in 2019, but he did not know the complainant. Further he confirmed that he did not have any witness to prove his assertions on the relationships he was alleging. He concluded his testimony by stating that he had no grudge with the complainant, whose home was 1km away from their home.

C. Appeal Submissions

23. The Appellant filed submissions on 07.02.2024 and relied on the case of Charles Wamukoya Karani v Republic to highlight the ingredients of defilement, which the prosecution needed to prove. Further reliance was placed on the case of *Kariuki Njiru & 7 Others v Republic* where the court asserted that identification should be positive and free from any error. The appellant submitted that in this instant case, the prosecution did not prove identification beyond reasonable doubt. PW1 was asked to identify him but no evidence was lead to show that, an identification parade was conducted and if indeed it was, the same was done was in contravention of the Police standing orders guiding the said process. Reliance was placed on the case of *James Tinega Omwenga v R* and *Charles Matu Mburu v Republic* [2014] eKLR to buttress this fact.

24. As a result, the appellant submitted that he was never properly identified and this was a case of mistaken identity. Secondly the complainant gave contradictory evidence as to what he was wearing and this impeached her credibility. The appellant therefore urged the court, to find that PW1 evidence was riddled with inconsistencies and not to rely on the same. Reliance was placed in the case of *Michael Mugo Musyoka v Republic* [2015] eKLR, where the court made a determination, that a case based on mere suspicion could not be sustained.

25. The appellant further submitted that his right to fair trial as protected under Article 50(2) (j) of the *Constitution* was violated, as he was not given the entire trial bundle during the trial before the primary court. During arrest, he was also not informed of the reason of his arrest. He relied on the citations in *Thomas Patrick Gilbert Cholmondely v Republic* [2008] eKLR and the case of *George Ngodhe Juma & Two Others v The Attorney General* Nairobi High Court (Misc Criminal Application No. 345 of 2001), *Natasha Sigh v CBI* {2013} 5 SCC 71, *Michael Norman Mbachu Njoroge v Republic* [2016] eKLR & *Gidraph Thuo Ndola v Republic* CA 12 & 13 of 2000.

26. On sentence, it was submitted that the court ought to have considered the mitigating factors before sentencing, and further should have considered that he was only 21 years old and was a first offender and therefore entitled to the least possible sentence. He urged the court to find that the period already served, which was four (4) years was sufficient punishment and he had obtained enough skills to sustain him when released. Reliance was placed in the *R v Otieno* (1983) KLR and the *Sentencing policy*

guidelines at clause 70 and 71. The appellant thus urged this court to allow his appeal as set aside his conviction & sentence.

D. Analysis and Determination

27. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. The Court of Appeal in *Kiilu & Another v Republic*, [2005] 1 KLR 174, stated thus:

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.
>
> It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

28. Also in *Peter's v Sunday Post*(1958) EA 424 it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

29. Having considered the lower court record, the grounds of appeal and the submissions of the parties, I find the following as issues for determination;

    a. Whether the evidence adduced by the prosecution was sufficient to prove the charge of sexual assault preferred against the appellant beyond any reasonable doubt.

    b. Whether the sentence should be reviewed

30. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller v Ministry of Pensions* (1947) 2 All ER, 372 stated as follows:

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

31. On the first issue, the offence of sexual assault is created by Section 5 of the *Sexual Offences Act* No 3 of 2006, which provides that:

    (1) Any person who unlawfully:

        (a) penetrates the genital organs of another person with—

            (i) any part of the body of another or that person; or

(i) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault."

32. The Court of Appeal in the case of *John Irungu v Republic*, [2016] eKLR which was cited by the learned trial magistrate in his judgment pronounced itself on the essential ingredients of the offence of sexual assault as follows:

> "…. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

33. From the foregoing, it is clear that in order to establish the offence of sexual assault, the prosecution must prove that there was penetration into the genital organs of the victim by any part of the body of the person accused of the offence or any other person or objects manipulated by the accused person for that purpose.

34. On the issue of penetration, the same is defined in section 2 of the *Sexual Offences Act* No 2 of 2006 as;

> "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

35. PW1 EWM the complainant testified that 28.6.2010 she was sent to the shop by PW2, her mother and enroute back was attacked by the appellant who got hold of her, dragged her to the bush, removed her clothes and inserted his fingers into her private part. She fought him off and screamed as he was doing so and eventually the appellant released her. She was taken to hospital the following day and PW6, Geoffrey Mua Mugusu confirmed that upon examination, PW1 had neck and upper limbs pain which was suggestive of having been involved in struggle. Her Labia Majora had no bruises but Labia Minora had minor laceration with whitish discharge and there was no need for speculum examination since the hymen was intact. On posterior of PO towards the anus had lacerations, redness and bruises. Her clothes had blood stains and PW1 complained of pain when urinating. He concluded that she had been sexually assaulted and produced into evidence the P3 form, treatment note and post rape care form.

36. PW6 evidence, especially the laceration on the Labia Minora, redness and bruises towards PW1's posterior (towards the anus) and pain on upper limbs and neck sufficiently proved penetration and assault and this evidence corroborated PW1's evidence of having been sexually assaulted.

37. On the issue of identification, the Court of Appeal in the case of *Peter Musau Mwanzia v The Republic* 2008 eKLR expressed itself as follows:-

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a

long time but must be for such time that the witness , in seeing that the suspect at the time of the offence can recall very well having seen him earlier on before the incident"

38. In the case of *Kariuki Njiru & 7 Others v Republic*, Criminal Appeal No. 6 of 2001, (UR) the Court of Appeal also emphasized the need to highlight descriptive features to the police where these were used to identify the suspect and also adduce them in evidence:

> " The law on identification is well settled. ...the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered... Among the factors the Court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in *Mohamed Elibite Hibuy & Another v Republic* Criminal Appeal No. 22 of 1996 (unreported) held that:"If (sic) is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone particularly to the police at the first opportunity. Both the investigation officer and the prosecutor have to ensure that such information is recorded during investigation and elicited in court during evidence. Omissions of evidence of this nature at investigation stage or at the time of prosecution in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence."

39. PW1 did not know her assailant by name, but told her parents that she could recognize him as she had marked his face and further gave her parents the description of how the assailant was dress. During the same evening and within a few hours of the assault, PW4 came back home and on being informed of what had transpired, confirmed to have meet the appellant putting on similar clothing and the appellant was a person known to him and knew their home. The following day the matter was reported to the police and PW3 & PW4 while accompanied by two (2) other elders went to the appellants home, where they found him accompanied by his friends. They called the police, PW1, PW2 to the appellants home and PW1 was able to positively identified the appellant as the person who assaulted her.

40. What is clear and undisputed by the evidence adduced was that PW1 did not know the appellant but could recognize him, on the other hand PW4 knew the appellant by name and also knew their home, and true to his word when they went to the appellant home, they did find him. The appellant submitted at length that he was not properly identified and that no identification parade was carried out. Under the circumstances herein, that was not necessary as the evidence of PW4 was that of recognition by persons, with whom they resided together within the same vicinity/village.

41. The appellant herein was convicted based on the evidence of PW1, which was strongly corroborated by PW4 and PW6. corroboration evidence must affect the accused by connecting or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that it was the accused who committed it. This was succinctly stated in the case of *Musili v Republic* CR A No.30 of 2013 (UR)

> " to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt." The chain must never be broken at any stage. In other words, there "must be no other co-existing circumstances weakening the chain of circumstances relied on" and the circumstances from which the guilt inference is drawn must be of."

42. Considering the totality of the evidence presented and after considering the appellants defence there is no doubt whatsoever that the prosecution proved their case beyond reasonable doubt based on the cogent evidence presented. PW4 by coincidence meet the appellant putting on the same cloths as later narrated to him by PW1. He was a person well known to PW4 and looking at the chain of event, which was never broken, the evidence unerringly pointed to the appellant as being the aggressor who assaulted PW1. This appeal as against conviction therefore fails.

43. The appellant did raise the issue that his rights to fair trial as protected under Article 50(2),(q) of the constitution were breached as he was not given the trial bundle and that did place him in a place of disadvantage. Further he was not informed of the reason of his arrest. The proceeding does show that on 21.09.2021, the appellant did raise the issue of not having witness statements and stated the same got lost while the police were searching his house. Later on the same day he was supplied with the entire trial bundle and confirmed that indeed he had been supplied with the same. Secondly while testifying, the appellant stated that during his arrest by members of the public he was asked about what he did to PW1 and was dragged outside and assaulted. This shows that he knew why he was being arrested and was only re arrested by the police.

44. As regards the sentence, the appellant urged this court to find that the sentence passed was excessive and prayed for the same to be reduced. He stated that he was 21 years old and being a first offender, the court ought to have considered and granted him a lenient sentence. He urged the court to find that the four (4) years already spent in remand during trial and in prison was enough punishment and he prayed that he be released. This Court is guided by the principles in the Court of Appeal case of *Bernard Kimani Gacheru v Republic* [2002] eKLR where it was stated as follows:

> "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

45. Sentencing is a discretion of the court of law but the court should look at the facts and the circumstances in the entirety so as to arrive at an appropriate sentence. The Court of Appeal in *Thomas Mwamba Wanyi v Republic* (2017)eKLR cited the decision of the Supreme Court of India in *Alister Antony Pereira v The state of Maharastra* at paragraph 70 – 71 where the court held;

> "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence

in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

46. In *Republic v Scott* (2005) NSWCCA 152 Howie J Grove & Barn J J it was stated;

> " There is a fundamental and immutable principle of sentencing, that is, sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed... one of the purposes of punishment is to ensure that an offender is adequately punished... a further purpose is to denounce the conduct of the offender.

47. Having considered the sentence meted out and circumstances of this case and also having considered that the court proceedings which show that the appellant had also been charged with a sexual offence matter before Ngong court, being Ngong MCSO E068 of 2021, it has also not been shown that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. I do find that the sentence handed down was reasonable given proportionality between the sentence passed and the crime committed.

Disposition

48. The appeal as filed both against conviction and sentence therefore lacks merit and is hereby dismissed.

49. Right of Appeal 14 days.

50. It is so ordered.

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 30TH DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 30th day of July, 2024.

In the presence of:-

Appellant present for Kamiti prison

Ms Otulo for O.D.P.P

Susan/Sam Court Assistant