MURIITHI v Republic (Criminal Appeal E006 of 2023)
[2024] KEHC 11802 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11802 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E006 OF 2023

DKN MAGARE, J

SEPTEMBER 26, 2024

BETWEEN

JOHN KIHARA MURIITHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. Okuche (CM) in Nyeri CMSO Case No. 20 of 2020 delivered on 13th August, 2023)

JUDGMENT

1. This is appeal from the decision of Hon. Okuche (CM) given on 13/8/2021 in Nyeri SO No. 20 of 2020. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act*. The particulars being that on 11th day of March 2020 at Kieni West sub-county within Nyeri County, he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely anus of AMW a boy aged 6 years.

2. The second count was deliberate transmission of HIV contrary to Section 26(1)(b) of the *Sexual Offences Act*. The particulars being that on 11th day of March 2020 at Kieni West sub county within Nyeri County, he intentionally and knowingly and unlawfully did an act of sexual intercourse with AMW a boy aged 6 years, reasonably knowing that it was likely to lead to him being infected with HIV.

3. There was an alternative count of committing an indecent act with a minor, that on 11th date of March 2020 at Kieni West Sub-county within Nyeri County he intentionally and unlawfully caused indecent act to AMW, a boy aged 6 years, by touching his anus and buttocks using his hands and penis.

4. The appellant was arrested on 2/6/2020 and taken to court on 23/6/2020. He pleaded not guilty. The prosecutor undertook to supply statements to the Appellant. The same were supplied. Further statements were supplied on 23/7/2020.

5. The court indicates the minor as a culprit instead of a victim. The court should be careful with words especially related to children of tender years.

6. He was convicted and sentenced to life imprisonment. He appealed and set forth the following concise grounds: -

    a. That the trial magistrate erred both in law and fact when he failed to consider that prosecution failed to call initial witnesses i.e., JWN and her son namely PNK to testify and be cross-examined by the appellant despite the fact that the appellant had applied for the court to recall some of the prosecution witnesses and thus contravened Article 50(2) of *the Constitution*.

    b. That the trial magistrate erred both in law and fact when again he failed to consider that prosecution tendered contradictory, inconsistent and uncollaborated evidence.

    c. That the trial magistrate erred in law and fact when PW2's evidence before the honourable court was that it was not the appellant who committed the offence in question.

    d. That the trial magistrate erred both in law and fact when the evidence tendered by clinical officer was not done in a required and safe manner since the appellant lives positive with HIV infection which is clear that it is sexual transmission disease which was not in PW1's evidence and PW5's the clinical officer (sic).

    e. That the trial magistrate erred both in law and fact by overlooking the fact that the case was fully null and void as it is because of a grudge between the appellant and PW1's mother over land dispute.

    f. That the trial magistrate erred both in law and fact since the appellant's sworn evidence was rejected without considering that the prosecution was unable to challenge the defence.

7. PW1 was the complainant minor. He was taken though voire dire and was found fit to give sworn evidence. He proceeded with sworn evidence. He stated that the appellant grabbed him from their gate. The Appellant is a neighbour, and had hidden next to the victim's gate. He had to go with another victim, S to N's home.

8. The Appellant took his penis and insert the same into the victim's anus. This was after the Appellant removed panties and the short of the victim. He warned the victims not to say anything. He left home with SM. His anus was feeling pain and he told his mother. The victim was taken to Nyeri PGH and examined. This was a repeat occurrence.

9. The minor did not shake on cross examination. None of the questions related to all the elements of defilement. It related to whether SM was also defiled by someone else.

10. The next witness was SM. He gave sworn evidence after voire dire. He stated on oath that he stayed with his grandmother. He stated that on 11/3/2020, the Appellant stated he was to buy the witness and others biscuits. He was with PW1 NM and ST. He stated that they were told to remove their clothes.

11. He undressed and someone else inserted his penis into the victim's anus in another room. The assailants told all the children not to say anything after the ordeal. It is PW1's mother who reported to the witness's mother on what happened. The gang used to defile the children in other occasions. On cross examination, the witness stated that there were 5 men in the house. There were 5 children in that house, with a bed and a chair. On re-examination, the witness maintained that PW1 was defiled in a different room.

12. PW3, JW was the mother of PW1. She stated that the minor was born on 13/6/2013. She stated that on 11/3/2020, PW1 had gone to school. The child did not have panties. When he removed his shorts there was white discharge from the anus. She examined him and was surprised. On enquiry the child revealed what happened.

13. The matter was reported and the minor was examined and issued with PRC form and P3 form. She identified the Appellant in the dock. She denied framing the Appellant or having any grudge. Subsequently, Covid-19 delayed the hearing for some time with the doctor locked down on one of the hearing dates. Subsequently an adjournment was sought over the doctor's absence, which was not objected to.

14. On 15/4/2021 PW4 PC(W) 246673 - Susan Wachira testified as the investigating officer. She was instructed to investigate the case on 12/3/2020. She narrated how she received information from the victim that the appellant removed his short and inserted his penis into his anus. The mother found out and after inspection saw some fluids coming out of the victim's anus. The minor was born on 13/6/2013. She produced the PRC form, P3 form and baptism card.

15. She went to the sight but the locus in quo was not secured. She found out that the Appellant was an employee in N's place. She stated that 2 minors were involved. She denied that the Appellant was framed.

16. PW5 Dr. Muchiri William testified on the P3 form he filled on 24/3/2020. He found that the anus was loose and the minor could not control his stool. He classified the injuries as grievous harm. He produced the P3 and PRC forms. On cross examination, he stated that there were no spermatozoa in the discharge. I note that there were no questions touching on the credibility of the expert evidence.

17. The court examined evidence and found there was a case to answer. The provisions of Section 211 of the CPC was explained and the Appellant opted for sworn evidence with no witness.

18. The Appellant testified on oath that he was arrested on 9/7/2020. He stated he was a Mason. He stated that the victim's grandmother bought a parcel of land near their home in 2018. She wanted someone to fix the fence, electricity and build a pit latrine.

19. The mother of the 2 children came to that area in 2018 and were introduced. They wanted to have an affair, in 2019. The mother, he stated that she refused to give evidence and asked someone else to testify. Up to this point he has no names of the grandmother and the mother or the lady he was dealing with.

20. On cross examination, he stated that the lady he was having issues with was JW and not the mother of PW1 and PW2. He stated that he was arrested in June 2020 due to Covid-19. He also knew the minor but denied the charge.

21. The court analyzed evidence and convicted the appellant on one count of defilement. He was acquitted on deliberate transmission of HIV. The Appellant was sentenced to life imprisonment as he was not remorseful.

Submissions

22. Parties filed comprehensive submissions. The Appellant's submissions are undated but were filed on 12/3/2024. He concentrated on the aspect of a retrial pursuant to alleged breaches related to Article 25(C) of *the Constitution*. He stated that a different doctor testified other than the one who filled the PRC form. He sought issues related to the inventory which he allegedly sought and was not given.

23. Lastly, he was lamenting on visit to the scene, his houses were burnt, and a dirty clothe was not produced. The grounds as raised by the Appellant were not at all tackled.

24. Orally before me, he wanted a retrial. He had filed submissions which are undated. He stated that he was not treated fairly. He lamented that he asked for and was not supplied with the first report or OB book. He stated that the doctor who testified was different and not the one who examined the minor. He stated that the evidence was that he did not use a condom but that evidence was not made available. All these questions were being raised for the very first time in the appeal. None of these things were ever requested for at the trial.

25. The Respondent filed submissions on 14/3/2024 stating that the case was proved.

Analysis

26. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

27. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the Court of Appeal therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

28. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

29. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the court on a first appeal as doth:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) 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. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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; it must make its own findings and draw its own 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, see Peters v. Sunday Post, [1958] E. A. 424."

30. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision of Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

31. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme Court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

32. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the

party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

33. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

34. Turning to the case at hand, the state had a duty to prove three ingredients of defilement, that is:

a. Age.

b. Penetration.

c. The perpetrator.

35. In the case of Joseph Kiet Seet v Republic (2014) eKLR while discussing on the aspect of age, the court posited as thus:

> " The age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni – Versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000 it was held thus: In defilement case, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

36. In Edwin Nyambaso Onsongo –Vs- Republic (2016) eKLR the court stated as doth: -

> " ...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." "..we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

37. The age of the minor was not contested. It was proved to be 6 years. The baptism card was used to prove age. It was not required. Common sense was also enough for very young children or children of tender years. It is a different ball game for children to whom Section 8(5) of the *Sexual Offences Act*, could apply. A six-year-old child cannot be mistaken for anything other than a child of tender years. If the child was 16 or 17 years, the court could be strict on proof. In any case, age is not contested in this appeal.

38. The second aspect is penetration. Section 2 of the *Sexual Offences Act*, defines penetration to mean:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

39. Section 2 of the *Sexual Offences Act* defines genital organs to include the whole or part of male or female genital organs and for purposes of this Act includes the anus. In this case there are two organs in issue, that is the Appellant's penis and the victim's anus.

40. As regards penetration, the minors were able to show that the offence was carried out. It is settled law that medical evidence is not the only evidence that can prove a sexual offence. In AML -v- Republic (2012) eKLR, the Court of Appeal stated that: -

> "It was submitted that there was no medical evidence to connect the appellant with the offence as no DNA test was conducted. The position of the law is that the offences of rape and defilement are proved by way of oral evidence and circumstantial evidence and not necessarily by medical evidence."

41. The same court in *Kassim Ali Vs- Republic, Mombasa Criminal Appeal No. 84 of 2005* stated that:

> "(The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence."
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> In the absence of medical evidence to support the offence, the question was whether there was sufficient oral or circumstantial evidence to prove penetration on the complainant."

42. The victim, PW1 testified that the Appellant inserted his penis into the victim's anus. The medical evidence was that the victim was penetrated. The weapon of choice was a penis. Thus penetration was proved. The minor also testified that he was penetrated. The evidence was cogent that penile penetration occurred in the victim's anus.

43. The evidence of PW1, 2 and 3 was that the appellant was in the locus in quo. The minor was penetrated anally. The oral evidence, the birth certificate, PRC and P3 showed the minor was 6 years. The age of being below 11 years for purposes of Section 8(1) of the *Sexual Offences Act* was proved.

44. The medical evidence of the minors proved penetration. Even without the medical evidence, the court is satisfied with the truth regarding penetration

45. The third question was whether the Appellant was the perpetrator. The minor and PW2 maintained that the Appellant was the perpetrator. On the other hand, in his defence, the Appellant chose a grudge with a person who was not a witness. The person was not related to the witnesses before the court.

46. The defence was clearly an afterthought. It did not answer any of the questions raised in the charge sheet of 11/3/2020. It was not an alibi defence.

47. The evidence of the victim was clear on who the perpetrator was. The action was committed in the same house with PW2, who was being defiled in the other room. There was no question put to the children that shook the veracity of their evidence.

48. The evidence tendered by PW1 and PW 2 were believable. The evidence needed to be corroborated. It was not corroborated. Evidence of PW2 corroborated the evidence of PW1 in material details. The medical evidence equally corroborated the occurrence of the offence.

49. Even in absence of the medical evidence, the offence was proved. The court, without saying so in many words, believed the evidence of PW1. The said evidence was cogent and enough to convict. All the other evidence was an addition. Section 124 of the *Evidence Act* provides as follows: -

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

50. The court was satisfied with the truth of the children's evidence. PW1, despite being a small boy, was consistent and gave unshaken evidence. There was not even an attempt to shake the same.

51. Further, PW2 was equally honest and consistent. What he left out, that is what happened when he was in the other room, how they left and other surrounding circumstances. It can be concluded that what the complainant testified on was true.

52. This is in line with the position relating to circumstantial evidence. For it to work, it must be inconsistent with the accused's innocence. In this case, the minor PW1, stated that the Appellant penetrated his anus. He was released after being penetrated anally.

53. Both PW1 and PW2 were brought in together and left together after having been defiled. This evidence was unchallenged. The facts irresistibly point to the guilt of the Appellant. There are no co-existing circumstances that will show the Appellant's innocence. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, Court of Appeal had this to say on circumstantial evidence: -

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -
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> > 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

54. . There are no circumstances pointing to the innocence of the Appellant. The entire evidence, in totality, irresistibly point to his guilt. In Boaz Nyanoti Samwel v Republic [2022] eKLR, Justice Njagi stated as follows:

> " The way to treat contradictions in a case was stated by the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017) eKLR where the court cited with approval the

Ugandan case of Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6 where it was held that:

> "with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

55. The Appellant was the perpetrator in the circumstances. It is clear therefore that the perpetrator was the Appellant and the penetration was proved.

56. The Appellant is serious on Article 25(C) of *the Constitution*. I presume he meant Article 25(c) of *the Constitution*. This is a right to fair trial. Article 25 of *the constitution* provides as follows: -

> 25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited-
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> (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
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> (b) freedom from slavery or servitude;
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> (c) the right to a fair trial; and
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> (d) the right to an order of habeas corpus.

57. In the case of Andrew Nthiwa Mutuku v Court of Appeal & 3 others [2021] eKLR, Odunga, J, as he then was stated as follows: -

> "42. It has also been argued that the Petitioner herein was in fact accorded an opportunity to mitigate by the trial court. From the proceedings, it is clear that the Petitioner was afforded an opportunity to mitigate and he stated that he had nothing to say. Though the prosecutor informed the Court that the Petitioner was a first offender, the Court while considering that the offence was serious and it led to a person's death, imposed on him the death sentence which has however been reduced to 25 years. In those circumstances, this is not a case where the Petitioner was not afforded an opportunity to mitigate, but where he simply failed to seize that opportunity. In those circumstances, it cannot be claimed that his rights to mitigate were violated. In Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998 the Court of Appeal held that:
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> > "Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not

that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

58. The Supreme Court of India in the case of Natasha Singh vs. CBI {2013} 5 SCC 741 expressed itself as follows:-

> " Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized.

59. The Supreme Court of India Zahira Habibullah Sheikh & Another vs. State of Gujarat & Others AIR 2006 SC 1367 opined that:-

> " It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted...Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and pretence....The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

60. A fair trial is not a right of the Appellant only but also the victims and other stakeholders. The Appellant must also be vigilant and shout whenever he feels his rights are being trampled upon. However, I have examined this record thoroughly. The court took all steps to ensure both the rights of victim and the Appellant were upheld.

61. The defence was granted a right to cross examine the witnesses. He was also given a chance to mitigate. He stated quite categorically that he had nothing in mitigation.

62. Article 50(2) of *the Constitution* sets forth what amounts to the right to fair hearing. It provides as follows: -

> " (2) Every accused person has the right to a fair trial, which includes the right-
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> a. to be presumed innocent until the contrary is proved;
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> b. to be informed of the charge, with sufficient detail to answer it;
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> c. to have adequate time and facilities to prepare a defence;

d. to a public trial before a court established under this Constitution;

e. to have the trial begin and conclude without unreasonable delay;

f. to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

g. to choose, and be represented by, an advocate, and to be informed of this right promptly;

h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

i. to remain silent, and not to testify during the proceedings;

j. to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

k. to adduce and challenge evidence;

l. to refuse to give self-incriminating evidence;

m. to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

n. not to be convicted for an act or omission that at the time it was committed or omitted was not-

i. an offence in Kenya; or

ii. a crime under international law;

o. not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

q. if convicted, to appeal to, or apply for review by, a higher court as prescribed by law."

63. The charges were read to him in a language he understood. I do not see any procedural lapse on part of the court. When the Appellant requested for medical attention, he was given. Indeed, only the victim has a right to complain as the court kept referring to him as a victim.

64. The issue of the visit to the land is irrelevant as first, it was not requested for, nor necessary. A dispute after the offence had occurred can be dealt with in relevant forums.

65. I dismiss the Appeal in limine on conviction. The grounds are untenable. What the defence calls evidence was not evidence at all. It was worthless as it did not answer the charge. A defence that does not answer the elements of the charge or even raise alibi, is not a defence. Further, from the foregoing,

the Articles said to be violated were not violated. There was no scintilla of evidence of violation of the sections. The Appellant was clutching, as he is entitled, to straws.

66. In this case the evidence irresistibly pointed to the guilt of the Appellant. There was no appeal on sentence. This means the Appellant was satisfied with the sentence. In the end the court found that life imprisonment was ideal. I cannot fault the court.

67. The sentence was well deserved. However, there has been 2 decisions of the Court of Appeal which interpreted what life imprisonment is. In Evans Nyamari *Ayako v Republic Kisumu CACRA No. 22 of 2018* (Okwengu, Omondi & J. Ngugi, JJA)(unreported) translated life imprisonment to 30 years.

68. In the case of Barasa *v Republic (Criminal Appeal 219 of 2019*) [2024] KECA 324 (KLR) (15 March 2024) (Judgment), the Court of Appeal stated as follows: -

> "Given the circumstances in which the offence was committed, the complainant being a young girl whom the appellant as the stepfather ought to have protected but instead violated, the appellant deserved a deterrent sentence. The sentence of life imprisonment was an option which was available in the exercise of discretion in sentencing and would in our view have been appropriate.
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> 13. In accordance with our decision in Evans Nyamari Ayako v Republic (supra), translating life imprisonment to a term sentence of 30 years' imprisonment, we allow the appellant's appeal; on sentence to the extent of substituting the sentence of life imprisonment that was imposed on the appellant with a term sentence of 30 years' imprisonment. The sentence of 30 years shall be calculated from the date the appellant was first arraigned in court in accordance with Section 333(2) of the Criminal Procedure Code.

69. In *Manyeso v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR) (7 July 2023) (Judgment), the Court of Appeal sitting in Malindi (Nyamweya, Lesiit and Odunga, JJA) held that life imprisonment was unconstitutional and substituted the same with 40 years. They stated as follows: -

> "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...
>
> ... We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We, therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction."

70. Subsequently, the Supreme Court stated that the Court of Appeal has no authority to interpret *the Constitution*. The Supreme Court (Koome CJ & P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ) in Petition No. E018 OF 2023 Republic Joshua Gichuki Mwangi and 4 Amicii, held as follows: -

> (61) Having so stated, we are aware that mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently,

various apex courts of several countries such as Canada, USA, Australia, South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed. That is why the Supreme Court of the United States, which has actively challenged mandatory death sentences since the early twentieth century, ruled in Miller v. Alabama, 132 S. Ct. 2455 (2012) that imposing mandatory life imprisonment without parole for juvenile offenders at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. Similarly, the European Court of Human Rights has on several 30 SC Petition No. E018 of 2023 occasions applied the "grossly disproportionate test," for instance in the cases of Harkins and Edwards v. United Kingdom, 2012 ECHR 45 and Murray v. Netherlands, 2016 ECHR 408 where the court found that mandatory sentences of life imprisonment without the possibility of parole go against Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms on the prohibition from torture and inhuman and degrading punishment. Canada has also actively struck down minimum mandatory sentences and recently a 9 Judge bench of the Supreme Court of Canada in R. v. Safarzadeh Markhali, 2016 SCC 14, reiterated its Constitutional commitment for proportionality in sentences. In Australia, in the case of Magaming v. The Queen, (2013) 253 CLR 381 the High Court struck down minimum mandatory sentence in the Migration Act finding that the statute usurped judicial power by granting the prosecution office the discretion to determine the minimum penalty to be imposed by allowing them to elect which offences to charge suspects with.

71. The power to interpret is reposes in this court. Article 165(3) of *the Constitution* provides as follows: -

(3) Subject to clause (5), the High Court shall have-

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation-

72. It must be recalled that Section 348A of the Criminal Procedure Code provides as follows: -

a. When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

b. If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately

73. I will not wade into the debate relating to the interpretation of life sentence. Further, I do not find it necessary to interpret whether the Supreme Court's decision applies to the two decisions. It is therefore necessary to go to the root of *the Constitution*, as the High Court, to consider the constitutionality of the life sentence.

74. This is informed by the unnecessary turbulence in the criminal sector that has existed since the supreme court decision in *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015* (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment) (DK Maraga, CJ, PM Mwilu, DCJ & V-P, J.B Ojwang, S.C Wanjala, N.S ndungu & I. Lenaola, SCJJ).

75. There appears to be a subsequent commentary known as Muruatetu 2, Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), M. K. Koome, (CJ & P), P.M. Mwilu (DCJ & V-P), M. K. Ibrahim, S. C. Wanjala, I. Lenaola, Njoki Ndungu and W. Ouko, JJSC). The decision set post judgment limits the Muruatetu judgment. This was neither a ruling inter partes nor a judgment but it is a precedent for the court. I leave it to the scholars of law, to deal with that issue as it is academic for this case.

76. The Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015* (Consolidated) [supra]stated as follows: -

> " 77. We have perused and analyzed the Petition and the written submissions and it is clear that the petitioners have not sufficiently argued and illustrated the particulars of why the indeterminate life sentence should be declared unconstitutional. Indeed, counsel for the 1st petitioner upon being asked by the Court to elaborate on this issue was not able to provide adequate submissions. A critical issue such as this, where legislation is to be examined is deserving of the reasoned and well-thought arguments of the petitioners, the Director of Public Prosecution and other interested parties or amicus curiae and input of the High Court and the Court of Appeal. This will allow this Court to benefit from the reasoning of these superior Courts and the parties will not be disadvantaged by this Court's holding which will in effect make this Court a court of first and last instance. It is therefore our view that the submissions made did not canvass the issue to our satisfaction. Consequently, we will not make a determination on it."

77. The issue of life sentence has not been decided by the supreme court. It declined to determine the same. The court stated as follows; -

> " 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."

78. The supreme court had already determined that life imprisonment should not be the natural life of a prisoner. However subsequently, the same court, differently constituted, held that their decision should be limited to offences under Section 203 as read with 204. It stated as doth: -

> " It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.
>
> 15. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

79. Consistency is a hallmark of judicial decisions. This court has been left in a state it has to comb through a myriad of decisions to determine, if there is another decision to the contrary. There needs to be a concerted effort to settle the law on this area once and for all.

80. In *Manyeso v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR) (7 July 2023) (Judgment), the Court of Appeal stated as follows: -

> " In The Supreme Court, in recommending that Attorney General and Parliament commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'; further noted and found as follows:
>
> 92 The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows: "Sentences are imposed to meet the following objectives: 1. Retribution: To punish the offender for his/her criminal conduct in a just manner. 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other

people from committing similar offences. 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person. 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs. 5. Community protection: To protect the community by incapacitating the offender. 6. Denunciation: To communicate the community's condemnation of the criminal conduct."

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.

93. In addition, and in accordance with article 2(6) of *the Constitution*, "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution". In 1972, Kenya ratified the International Covenant on Civil and Political Rights of 1966, and for that reason, the Covenant forms part of Kenyan law. Article 10(3) of the Covenant stipulates that—"[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

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.

93. 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."

81. In another matter, involving the current Appellant, reported as Muriithi v Republic (Criminal Appeal E067 of 2023) [2024] KEHC 6536 (KLR) (3 June 2024) (Judgment), this court noted as follows: -

> " The sentence was deserving. However, there has been 2 decisions of the Court of Appeal which interpreted what life imprisonment is. In Evans Nyamari *Ayako v Republic Kisumu CACRA No. 22 of 2018* (Okwengu, Omondi & J. Ngugi, JJA) (unreported) translated life imprisonment to 30 years.
>
> 61. In the case of Barasa *v Republic (Criminal Appeal 219 of 2019*) [2024] KECA 324 (KLR) (15 March 2024) (Judgment), the court of Appeal stated as

follows: -"Given the circumstances in which the offence was committed, the complainant being a young girl whom the appellant as the stepfather ought to have protected but instead violated, the appellant deserved a deterrent sentence. The sentence of life imprisonment was an option which was available in the exercise of discretion in sentencing and would in our view have been appropriate.13.In accordance with our decision in Evans Nyamari Ayako v Republic (supra), translating life imprisonment to a term sentence of 30 years' imprisonment, we allow the appellant's appeal; on sentence to the extent of substituting the sentence of life imprisonment that was imposed on the appellant with a term sentence of 30 years' imprisonment. The sentence of 30 years shall be calculated from the date the appellant was first arraigned in court in accordance with Section 333(2) of the Criminal Procedure Code."

82. In another matter, *Theuri v Republic (Criminal Appeal 32 of 2021)* [2024] KEHC 8232 (KLR) (1 July 2024) (Judgment) this court stated as follows: -

> " 63. It is therefore my understanding that in each case we shall translate what life imprisonment means. In this case a sentence of 40 years translates to life imprisonment.
>
> 64. I therefore substitute the life sentence, with its equivalent, that is 40 years. The period shall run as per Section 333 (2) of the Criminal Procedure Code from date of arrest
>
> 65. In the circumstances the appellant's conduct is heinous and deserves rightfully a life sentence. The Court of Appeal has directed that the sentences be translated. The appellant's life sentence in court only is equated to 40 years."

83. It is therefore my understanding that in each case we shall translate what life imprisonment means. While life sentence is a sentence in our books, it is a sentence capable of being meted out. The only question, which does not require legislative intervention, is to interpret what life imprisonment is. In the current matter, the Appellant penetrated a 6-year-old boy destroying the anal sphincter muscles. The minor was left without stool control.

84. The PRC indicated that this was a third incident. A more severe sentence was thus needed. The Appellant had no remorse, and nothing in mitigation. He was asking for a retrial. In Pius Olima & another v Republic [1993] eKLR, the Court of Appeal stated as follows: -

> " Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- Ahmed Sumar v Republic, (1964) EA 481; Manji v The Republic, (1966) EA 343; Mujimba v Uganda, (1969); and Merali and Others v Republic, (1971) 221. The principles that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case."

85. However, no basis was laid for a retrial. There was no other proper sentence other than life. The said life sentence shall be translated to 40 years. The Appellant shall therefore serve 40 years imprisonment.

86. I therefore substitute the life sentence, with its equivalent, that is, 40 years. The period shall run as per Section 333(2) of the Criminal Procedure Code from date of arrest, that is 2/6/2020.

87. In the circumstances the Appellant's conduct is heinous and deserves rightfully a life sentence. The Court of Appeal has directed that the sentences be translated. The Appellant's life sentence is equated to 40 years. The life sentence in the second count is also translated to 40 years.

88. The Appellant is already sentenced to two life sentences. The sentences in this matter shall run consecutive with the sentence in Criminal Appeal E067 of 2023.

Order

89. The consequence upon the foregoing is that I make the following orders:

    a. The appeal on conviction is dismissed.

    b. The life sentence is translated to 40 years for each count. The sentence shall run consecutive with the sentence in Nyeri Criminal Appeal E067 of 2023.

    c. Right of appeal 14 days.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF SEPTEMBER, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of

The Appellant in person

Ms. Kaniu for the State

Court Assistant – Jedidah