Mwangi alias Something v Republic (Criminal Appeal 150 of 2019)
[2024] KEHC 16387 (KLR) (23 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16387 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 150 OF 2019

RN NYAKUNDI, J

DECEMBER 23, 2024

BETWEEN

ISAAC MWANGI ALIAS SOMETHING ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence in the Chief Magistrate Court in Eldoret by Hon. H.O. BARASA (SRM), in Criminal Sexual Offence Case No. 233 of 2018 delivered on 13{{^th}} September, 2019)

JUDGMENT

1. The Appellant herein, Isaac Mwangi was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offenses *Act No. 3 of 2006*. The particulars were that on the 15th day of October 2018 at Trakwa Location, Wareng District within Uasin Gishu County, the Appellant caused his genital organ (penis) to penetrate the genital organ (vagina) of P.N, a child aged 9 years.

2. In the alternative, Appellant was charged with the offence of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006 herein referred to as Sexual Offence Act.

3. The Appellant was tried and in the judgment delivered on 13th September, 2019, the trial court found the Appellant guilty of the offence of Defilement as charged. After considering the Appellant's mitigation, the court proceeded to sentence him life imprisonment.

4. Being aggrieved by both his conviction and sentence, the Appellant filed the present appeal. Vide the Appellant's Petition of Appeal dated 17th September 2019, the Appellant set out some 8 grounds of appeal, which can be summarized as follows:

    a. That the Appellant did not plead guilty during the trial.

b. That the prosecution case was not proved according to the required standards of proof beyond reasonable doubts to determine his guilt.

c. That the trial Magistrate violated the Appellant's rights and fundamental freedoms under the Bill of Rights Chapter 4 in Article 22(1) and hence the Appellant's rights have been infringed, threatened and violated and that Article 28, 27(1), 29 i.e. life imprisonment is inhumane.

d. That the Appellant's rights were being violated when convicted and sentenced to life imprisonment under Article 50(2) and Article 25(c) of *the Constitution* of Kenya 2010.

e. That the Appellant was convicted on false and fabricated medical evidence connecting the Appellant to the offence.

f. That the Appellant defense was disregarded entirely.

5. The Appellant filed Amended grounds of appeal under section 350 (2)(v) of the Criminal procedure code which he averred to be mitigating grounds on appeal against sentence only as follows:

a. That, the Learned Trial Magistrate erred in both law and in fact by failing to conform to the dictates and legal principles stipulated under section 31 of the *Sexual Offences Act* No. 3 of 2006 as read with section 19 of cap 15 Laws of Kenya.

b. That, the Learned Trial Magistrate erred in both law and in fact in imposing a life sentence but failed to note that it is excessively harsh and unjust considering that the Appellant was a first offender.

c. That, the Learned Trial Magistrate failed to appreciate in terms of sections 33 and 36 of the SOA medical evidence was insufficient to link the Appellant to the commission of the offence he faced at trial.

d. That, the Learned Trial Magistrate erred in both law and in fact by failing to note that the imposed sentence is excessive and does not go well with the provisions of the policy sentencing directives 2015 under paragraph 4.1.

e. That, the Learned Trial Magistrate erred in both law and in fact by failing to consider alibi defense raised by the Appellant.

f. That the court considers the provisions of section 333(2) of the Criminal Procedure Code when imposing the sentence to the Appellant.

6. The Appellant prayed for the following from his Amended Grounds of Appeal

a. That the sentence of life imprisonment imposed by the trial court be set aside and the Appellant be set at liberty.

b. That the Court be pleased and find that the circumstances of the case did not call a harsh sentence of life imprisonment.

7. Parties disposed of the appeal by written submissions.

Appellant's Written Submissions

8. The Appellant listed 3 issues for determination from his submissions accompanying the Amended Grounds of Appeal which can be summarized as follows:

Failure to conform to the dictates of section 31 of the *Sexual Offences Act* No 3 of 2006

9. The Appellant submitted that PW2 a medical officer from Moi Teaching and Referral Hospital with years of experience and medical practice as well as the minor's blood mother confirmed to the court that PW1 was mentally retarded but the court failed to declare the minor as vulnerable who could only give evidence through an intermediary put in practice the dictates of section 31 of the *Sexual Offences Act* and this occasioned a miscarriage of justice. He made reference to PW2 at page 9 para 6 lines 8-9 stated that, "she was on a follow up for cerebral palsy which is a movement closure associated with closure of muscle bone and posture as a result of brain damage before birth and that at page 9 line 10-13 the doctor stated that, she was a mentally retarded child. Examination was carried out on 19/10/18. She had no injuries on the head, neck, thorax, lower and upper limbs. She was dragging her left lower limb due to the cerebral palsy."

10. The Appellant also submitted that PW3 at page 10 para 3 line 13 stated that, "she has a mental disorder but she can talk. She has had the disorder since birth." He averred that according to MedlinePlus, cerebral palsy (CP) is defined as a group of disorders that affect the brain and can impact movement, learning, hearing, seeing and thinking and that it is therefore clear that PW1 had some mental incapacity. He also made reference to section 31(1) and (2) of the *Sexual Offences Act* which provides that; (1) A court, in criminal proceedings involving alleged the commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is

    a. the alleged victim in the proceedings pending before the court;

    b. a child; or

    c. a person with mental disabilities.

11. The Appellant further submitted that in the present case the learned Trial Magistrate failed to conform to the above stipulated principles. It was his submission that a person with cerebral palsy is a vulnerable witness who deserve protection by the court and that the prosecution knowing very well that PW1 was a person with mental disability should have availed the doctor to testify on the mental capacity of the complainant to give a way for the prosecution of the victim of sexual offence who was mentally unsound as the criminal justice system must be measured by how it protects the most vulnerable members of the society of which persons with mental disability are obvious part.

12. Furthermore, the Appellant submitted that it is in record that he did not cross-examine PW1 (The Minor). Turning to the mode of receipt of the evidence of the minor, it was the Appellant's submission that the Learned Magistrate did not take into consideration section 19 of the *Oaths and Statutory Declarations Act*, Chapter 15 Laws of Kenya as construed and applied by the Court in the case of Johnson Muiruri Vs R (1983) KLR 445 and Mohammed Vs R (2005) KLR.

    Medical Evidence was Insufficient to Link the Appellant to the Commission of the Offence.

13. The Appellant submitted that it is not possible for a minor of 9 years to be defiled by an adult man of 56 years and still remain in her normal state as if nothing abnormal has occurred to her. He stated that if indeed there was defilement and that the minor was indeed defiled then from her own evidence the court would have treated her as vulnerable and was to apply the dictates of section 31 of the *Sexual Offences Act* to declare that PW1 as vulnerable and thus involve an intermediary.

14. The Appellant also submitted to the issue above that PW1 in examination in chief at page 13 para 1 line 8-10 stated that, "I was not hurt. I did not see blood. I told my teacher and other students. I also told the police what happened. I was walking properly. No one told me to mention something. What he did to me was not painful. When I entered something's house no one saw me. Then we were just two

of us in the house." It was the Appellant's submission that PW1 was not competent witness credible to testify on her condition.

Leniency of sentencing on Grounds 4-6

15. The Appellant made reference to the Court of Appeal in the case of Thomas Mwambu Wenyi Vs R (2017) eKLR which cited the decision of the Supreme Court of India in Alister Anthony Pereira Vs State of Maharashtra at paragraph 70-71.

16. From the above, the Appellant submitted that the Judiciary Sentencing Policy Guidelines lists the objectives of sentencing on pages 15 paragraph 4:1 among others the gravity of the offence, the threat of the violence against the victim, the nature and type of weapon used by the assailant to inflict harm. The Appellant also submitted that the circumstances of the case were not so grievous to warrant a sentence of life imprisonment and that the matter based on circumstantial evidence still pointed towards the Appellant and thus the sentence.

17. The Appellant submitted that a lesser sentence is called for and that the sentence of life imprisonment does not serve the objectives listed under paragraph 4:1 of the Sentencing Policy Guidelines. He stated that he fully condemns the action he took, regrets it and he is remorseful and asks for forgiveness to God, the Complainant and to everyone who was involved in his misdeeds and promises never to repeat such a crime. The Appellant further submitted that before his conviction he worked tirelessly to support his family and self and has elderly parents who depend on him. Furthermore, it was the Appellant's submission that he prays to be given another chance in life and while on correction facility, he has fully embraced the rehabilitative work offered in prison and that he is an old man of 62 years and is not a danger to the society owing to the age factor and that he has met Christ in prison therefore a changed man who ought not to serve his entire life in prison.

18. Moreover, the Appellant submitted that he is fully rehabilitated and ready to be productive in building the nation and that may this court find that the sentence awarded is long, harsh and indeterminate and reference to the case of Douglas Muthaura Ntoribi Vs R (2018) eKLR. The Appellant opined that his concern was whether an indefinite life imprisonment sentence is constitutional and can be justified given the emerging norms of human decency and human rights reflected in our emerging jurisprudence. He further opined that this emerging jurisprudence is a purposive reading of Articles 27 and 28 of our Constitution as applied in sentencing and made reference to the Court of Appeal in the case of Julius Kitsao Manyeso.

19. The Appellant further submitted that the qualitative survey of how different jurisdictions have treated life imprisonment in the recent past provides objectives indicia of the emerging consensus that life imprisonment is seen as being antithetical to the constitutional value of human dignity and as being inhuman and degrading because of its indefiniteness and the definitional impossibility that the inmate would ever be released.

20. The Appellant further prayed that upon sentencing, may this Court put into consideration the time of arrest and the time the Appellant spent in custody before being convicted and sentenced by the subordinate Court. He made reference to the case of Ahamad Abolfathi & Another Vs Republic (2018) eKLR

Analysis and Determination

21. The appellant has cited 6 grounds of appeal which all form one issue, that is, whether the prosecution proved its case beyond any reasonable doubt.

22. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated: -

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

23. Similarly, in the case of Okeno vs Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows: -

> " 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 vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 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 finding 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, see Peters vs Sunday Post [1958] EA 424." This was also set out in the case of Kiilu & Another vs Republic [2005] KLR 174.

24. On 23rd October 2018, the appellant's trial in the lower court opened. The record of appeal shows that a detailed voire dire examination of the complainant was conducted. The questions and answers are on the record. The record in part states as follows:

> " Court: What is your name? (stammers) My name is [minor's name withheld].
>
> Court: How old are you? I do know how old I am.
>
> Court: Do you go to school? Yes [particulars withheld] Primary school in [standard] 1.
>
> Court: Who is your teacher? Her name is Alona.
>
> Court: Do you attend church? Yes- I attend church on Sundays.
>
> Court: What are you taught in church? We are taught how to sing
>
> Court: Are you taught anything about lying? Yes. We are normally taught lying is bad.
>
> Court: The Minor is young but intelligent. She has a speech problem (she stammers) but she is coherent and able to communicate. She appreciates the need to speak the truth. I am satisfied that she understands the need to speak the truth and she may be sworn."

25. The minor then proceeded to give sworn evidence. The true purpose of a voire dire examination is to establish whether a child of tender years understands two things: the nature of an oath and the need to tell the truth. In sum the court would be trying to establish whether the child possesses sufficient

intelligence to understand the duty of speaking truthfully. In Peter Kiriga Kiune, Criminal Appeal No. 77 of 1982 (unreported) the court held that said: -

> " Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, *Oaths and Statutory Declarations Act*, Cap. 20. The *Evidence Act*, (s. 124, cap. 80)."

26. If the court proceeds to take unsworn evidence, the accused should not be convicted in the absence of corroborating testimony. There is an exception for sexual offences. From the above verbatim record of the court, I am satisfied that the court complied fully with the procedure of taking evidence of a minor. In Johnson Muiruri v Republic [1983] KLR 445, the court cited the case of the Court of Appeal in R. v Lal Khan (1981) 73 Cr. App. R. 190) made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen.... There Lord Justice Bridge said:

> 'The important consideration .... when a judge has to decide whether a child should property be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.'

27. As I will discuss shortly, the evidence of the minor was not the sole convicting evidence. I cannot then say that there was non-compliance with section 124 of the *Evidence Act*. There is something else arising from the voire dire. It revealed that the child possessed sufficient intelligence. It is thus not true as alleged by the appellant that her cerebral palsy materially affected her testimony. On the contrary, the child (PW1) gave a vivid account of the events of 15th October 2018. She knew the appellant; she knew him by the name something and testified that, that's how they call him at home and she used to see him on the road. PW1 testified that that the Appellant took her to his house and gave her kshs. 5 coin and she didn't take the coin and told her to remove her clothes and panty. Further, she testified that the Appellant told her to lie down very well and did it to her as she had removed all her clothes. After doing the act, PW1 testified that the Appellant chased her from his house.

28. PW3 confirmed her daughter was nine (9) years. She produced a birth certificate card (PMF2). It showed that the complainant was born on 15th April 2010. The age of the minor was thus not in doubt. The Age of the complainant is material in offences of this nature. See John Wagner v Republic [2010] eKLR, Macharia Kangi v Republic Nyeri, Court of Appeal, Criminal Appeal 346 of 2006 (unreported), Kaingu Kasomo v Republic, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported), Felix Kanda v Republic Eldoret, High Court Criminal Appeal 177 of 2011(unreported). The reason is that section 8 of the *Sexual Offences Act* provides for graduated minimum sentences. I am satisfied that in this case the age of the minor was well established by oral and documentary evidence.

29. PW2 testified that PW1 has a problem, she has a mental disorder but she can talk; she remembers things; she does not target things and that she has had the disorder since birth. Moreover, from my reading of the court record from the trial court, one thing need to be said from that evidence: the fact that the complainant had cerebral palsy did not take away her rights as a child. As I stated earlier, she came across from the voire dire examination and her evidence as a fairly intelligent child.

30. A report of the defilement was made by PW2, Dr. Taban Lilian Tokosan, a medical officer from MTRH. PW2, Florence Jaguga, is medical officer at Moi Teaching and Referral Hospital where the complainant was taken on 19th October 2018. She filled in the P3 form. She testified as follows- "On examination of her genitalia [complainant], it was documented that there was redness of the labia of the minera. There was no post vaginal discharge. HIV test was done. It was negative. On Urinalysis, there were leucocites which showed there was an infection. These findings showed that there was defilement. The labia of the minera was indicative of penetration. I wish to produce the P3 form in evidence PMFI-1 produced as PEXh1."

31. The appellant was not medically examined. However, the injuries to the minor's private parts were consistent with penetration. Penetration is defined in section 2 of the *Sexual Offences Act* as follows- "penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person".

32. There was redness of the labia of the minera. There was no post vaginal discharge. HIV test was done. It was negative. On Urinalysis, there were leucocites which showed there was an infection. The evidence of the complainant was thus corroborated by PW2 and the P3 examination report. When I add the evidence of PW2, I am left in no doubt about the veracity of the complainant's evidence. The totality of that evidence points strongly to the guilt of the appellant.

33. Granted her condition and that the appellant told her not to reveal her ordeal, it may be understandable. It would have been preferable to examine the complainant immediately. The appellant could also have undergone examination. But too long a period had passed and it is doubtful that it would have added significant value. However, the available medical evidence on the complainant established penetration. The complainant clearly identified her assailant as the appellant.

34. I have then considered the defence proffered by the appellant at his trial. He the appellant called one witness. I have not seen anything to suggest the complainant was an unreliable or untruthful witness. Although she had cerebral palsy, her evidence was clear and consistent.

35. From the passages of the judgment of the lower court I have set out, the appellant's defence was considered but rejected. The burden of proof, subject to section 111 of the *Evidence Act*, rested entirely with the prosecution. But from the totality of the evidence tendered at the trial, it pointed strongly to the appellant's guilt. The complainant's evidence was corroborated. All the ingredients of the offence of defilement, for the offence that took place on 15th October 2018, were thus proved beyond reasonable doubt. I have reached the same conclusion as the trial court that the evidence of defilement was clear-cut and pointed to the accused. That evidence was inconsistent with the innocence of the appellant.

Whether the sentence is harsh and excessive

36. I take note that the Appellant was sentenced to serve life imprisonment. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

37. It bears repeating that, the High Court has the mandate under Article 165 (3) of *the Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in *the constitution* ,A further leapfrog development; under article 50(2)(p) of *the Constitution*:

> 50(2) Every accused person has the right to a fair trial, which includes the right—(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

38. In Philip Mueke Maingi & Others Vs Rep, Petition No E17 of 2021 specifically outlawed mandatory minimum sentence. It stated;

> There is nothing which prevents the court from applying decisional law and ordering sentence review in cases where the penalty imposed was mandatory penalty in law even if the cases are finalized. To me, denying an accused the benefit of court's discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine and/or review sentence's where appropriate.

39. Further, the Court of Appeal sitting in Malindi in Manyeso v Republic Criminal Appeal No. 12 of 2021 [2023] kECA 827 (KLR) held that mandatory life sentences are unconstitutional and are "an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the constitution*. The said decision is supported by the case of Vinter and others v UK, in which the European court of human rights (ECHR) reasoned that indeterminate life sentence with no hope of parole was degrading and inhuman.

40. Article 50(6) of *the Constitution* of Kenya 2010 states that; A person who is convicted of a criminal offence may petition the High Court for a new trial if—(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and (b) new and compelling evidence has become available.

41. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it's entirely so as to arrive at appropriate sentence. The Court of Appeal in Thomas Mwambu Wenyi v Republic [2017] eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira v State of Mahareshtra at paragraph 70-71 where the court held the following on sentencing:

> "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence 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 ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing 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."

42. Also in the case of Francis Karioko Muruatetu & Another v Republic (Supra) where the Supreme Court stated the guidelines and mitigating factors in a re-hearing on sentence were discussed. The judiciary has also developed Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 which should be considered.

43. A glimpse of the Appellant's Appeal clearly calls for a re-hearing of the sentence imposed. Article 50 (2) (p) of *the constitution* provides as follows: Every accused person has the right to a fair trial, which includes the right—

    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

44. Article 50(6) further provides for conditions under which one can petition for a new trial, which in this case is a new trial only on sentence. The provision speaks in the following terms.

    (6) A person who is convicted of a criminal offence may petition the high court for a new trial if: -

        a. The person's appeal, if any, has been dismissed by the highest court to which the person is entitle to appeal, or the person did not appeal within the time allowed for appeal; and

        b. New and compelling evidence has become available.

45. The foregoing provisions are instructive in matters brought before the high court for a new trial. The Appeal before me seeks a new trial on sentence. So that then my mandate is to view the application through the lens of Article 50 (2)(p) and (6) and determine whether the same is proper for a new trial only on sentence.

46. There are circumstances under which the court can alter or decline to vary the sentence meted out. That is entirely at the discretion of the court. I have gone through the record of the court's decision in the criminal trial, the judgment and sentence. I have noted the circumstances under which the offence was committed. I have also read the sentencing record of the court. The Appellant offered mitigation which the court considered before it sentenced the petitioner to the only sentence then allowed in law. In other words, the mitigation did not mean anything and that is precisely what the Supreme Court called unfair trial since with or without mitigation the court would still impose death penalty.

47. The Court of Appeal in the case of Manyeso *v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR)

> " 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. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application Nos 66069/09, 130/10 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 inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

48. In R v Bieber [2009] 1 WLR 223 the Court of Appeal of the United Kingdom had held as follows:

> " The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. 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. He may 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 a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment...".

49. From the foregoing authorities, it is evident that mandatory sentences are unlawful. Having said so, I have considered The Sentencing Policy Guidelines, 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.

50. In Dismas Wafula Kilwake v Republic [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the Act. It observed as follows:

> [W]e hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

51. Therefore, in sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors. Under section 8(2) of the *Sexual Offences Act*, A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. I have said that the age of the complainant was well established at the trial. She was 9 years old. She had cerebral palsy. This is a grave offence perpetrated against a defenseless child. She is a vulnerable person as defined in section 2 of the Act. She will carry the scars for life. The sentence handed down to the appellant was the minimum provided by the law. However, from the emerging jurisprudence such as the Muruatetu Case (supra), I will be inclined to interfere with the sentence imposed in the trial Court.

52. Section 333(2) of the Criminal Procedure Code provides that in sentencing, where an accused person was in remand custody the period spent in custody should be taken into account. It reads:

> " Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to conclude the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

53. I have considered the Appeal and all the information available. Given that mandatory sentences are now outlawed same as indeterminate sentences, I am inclined to interfere with the life imprisonment imposed and substitute it with a lesser sentence of 25 years' imprisonment and in considering the provisions of section 333(2) of the CPC the sentence shall run from the date of arrest being 18th October 2018.

54. In the end, I uphold the conviction but review the life imprisonment sentence taking into account the constitutional imperatives of Articles 22, 23, 24, 25, 26, 27, 28 and 50 of *the Constitution* to impose a custodial sentence of 25 years imprisonment. The sentences shall take effect from the date of arrest being October, 2018 to give effect to the period spent in pre-trial detention before the hearing and determination of the criminal charge.

55. 14 days right of Appeal

56. It is so ordered.

DATED AND SIGNED AT ELDORET THIS 23RD DECEMBER, 2024

…….

R. NYAKUNDI

JUDGE

In the presence of:

The Appellant

Mr. Mugun for the state