Majani v Republic (Criminal Appeal E014 of 2022)
[2023] KEHC 18054 (KLR) (26 May 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E014 OF 2022

JRA WANANDA, J

MAY 26, 2023

BETWEEN

ZACHARIA MAJANI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Kakamega Chief Magistrate's Court Sexual Offences Case No. 55 of 2020 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that the Appellant on the night of 24/04/2020 at Khayega Location within Kakamega County intentionally caused his penis to penetrate the anus of ZL, a child aged 6 years.

2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the same date and same place as above, he intentionally touched the anus of ZL, a child aged 6 years with his penis.

3. After the trial, on 2/02/2022 the trial Court sentenced the Appellant to serve life imprisonment for the charge of defilement. In imposing the sentence, the Magistrate stated that Section 8(2) of the *Sexual Offences Act* provided for life imprisonment as the only mandatory sentence upon conviction.

4. Being dissatisfied with the decision, the Appellant lodged this appeal on 10/02/2022 through the firm of Shaban & Co. Advocates who had now come on record for the Appellant. The Petition contained 13 Grounds of Appeal as follows:

    i. That the learned trial Magistrate erred in law and fact in failing to appreciate that both the main and alternative charges were never proved at all.

ii. That the learned trial Magistrate erred in law and fact in convicting and sentencing the Appellant on a charge that had not been sufficiently proved on a standard of beyond any reasonable doubt.

iii. That the learned trial Magistrate erred in law and fact in convicting and sentencing the Appellant on insufficient and contradictory evidence.

iv. That the learned trial Magistrate erred in law and fact in convicting and sentencing the Appellant based on hearsay.

v. That the learned trial Magistrate erred in law and fact in convicting and sentencing when the ingredients of the offence had not been established.

vi. That the learned trial Magistrate erred in law and fact by making an assumption that it was the Appellant who committed the act of penetration and that he did it willfully.

vii. That the learned trial Magistrate erred in law and fact by failing to comply with the mandatory provisions of Section 124 of the *Evidence Act* Cap. 80 of the Laws of Kenya.

viii. That the learned trial Magistrate erred in law and fact by failing to conduct and record a proper and sufficient voir dire.

ix. That the learned trial Magistrate erred in law and fact by failing to ensure that the trial against the Appellant who was substantially unrepresented was well conducted and/or proper proceedings recorded.

x. That the learned trial Magistrate erred in law and fact by failing to comply with the mandatory provisions of Section 211 of the Criminal Procedure Act, notwithstanding the seriousness of the offence, to the prejudice of the Appellant who was then unrepresented.

xi. That the learned trial Magistrate erred in law and fact by failing to consider and appreciate the Appellant's defence and his continued testimony that he did not commit the alleged offence.

xii. That the learned trial Magistrate erred in law and fact by illegally and improperly convicting and sentencing the Appellant instead of acquitting him.

xiii. That the learned trial Magistrate erred in law and fact by imposing excessive and harsh sentence.

Prosecution evidence

5. The prosecution called 4 witnesses.

6. PW1 testified that he stays in Nairobi, he is a teacher in a private school, the minor was his siter's child, his sister died and left the minor in the custody of the minor's grandmother, the minor was 8 years old, the grandmother passed away in March 2021, since then he has taken charge of the minor, he is now the minor's guardian, the minor has fear for strangers, looks terrified, he is able to communicate with the minor, the minor runs away from home and school due to fear, this is after he was sodomised, previously he did not have the fear but he now has morbid fear, the minor has shared with him what had happened to him and he can talk when PW1 is present.

7. PW2 was the minor-complainant (victim). Because of his age, he was taken through a voire dire examination after which the Magistrate recorded that he was too young to understand the effect of taking an oath but he nevertheless was aware of the importance of telling the truth. Under such circumstances, the Magistrate directed that the minor would give unsworn evidence which he then proceeded to do. He then testified that he stays with his uncle (PW1), he is afraid of everybody in Court,

he fears Majani (Appellant), he stays in his rural home, the Appellant called the minor, he injected the minor, the minor went to sleep, he woke up later, he felt pain in his behind, he told his grandmother, grandmother then told his grandfather, Appellant was a leader, he injected the minor on the bottom, he does not know what the Appellant did to him when he was asleep, grandmother went to where Majani (Appellant) was working, the minor was taken to hospital, he could not recall the name of the hospital, they then went to the police station, his grandmother talked with the police, he cannot recall the date, his grandmother died, he now stays with his uncle, Majani (Appellant) used to send the minor on errands, the Appellant used to work for a neighbour by the name Ayuma, it was not far and he now fears Majani (Appellant) because he could do the same to the minor again. In cross-examination by the Appellant, the minor stated that the Appellant had sent him to the shop, the Appellant did what he did.

8. PW3 (Alfred Masika) stated that he is a clinical officer at Shinyalu Health Centre, he has worked there for 2 ½ years, his duties are to examine and treat patients, he knows about the case. He identified the treatment notes book dated 27/04/2020 and stated that he is the one who made the notes, it is for ZL (the minor-PW2) aged 6 years, he examined the minor who had pain in the anus, the minor said that he had been sexually assaulted by someone known to him, he said that the person had been sexually assaulting him over a period of time, it was a neighbour who had been employed as a herdsboy, the minor could not retain urine, he also had pain during long call, he examined the anal area and noticed bruises there, he confirmed the sexual assault, he gave the minor medication, the minor was 6 years old, he gave the minor painkillers and antibiotics. He then produced the treatment book, P3 Form and PRC Form as exhibits and stated that he is the one who filled them. In cross-examination, PW3 stated that he did not know the Appellant before.

9. PW4 (PC Hassan) stated that he is attached to Khayega police station, he is the one who investigated the case, on 26/04/2020 Teresa Achicha came with her grandson called ZL (the minor) aged 6 years, they reported that on 24/04/2020 at 1 pm ZL was outside their home and Zakaria (Appellant) summoned him, Appellant took ZL to his house and told him to pull down his pair of shorts, he then sodomized him, he threatened to beat up ZL if he told anyone, he referred them to Shinyalu Health Centre, ZL was treated and P3 Form filled, they then arrested the Appellant and charged him in the case, ZL was 6 years old, he got a copy of the birth certificate. He then identified the Appellant in the dock.

Defence evidence

10. At the close of the prosecution case, the trial Court made a finding that there was a case to answer and put the accused to his defence.

11. In his defence, the Appellant gave sworn testimony. He stated that he was a herdsboy near the minor's home, the allegations were false, he knew the minor, he did not have any quarrel with the minor or his family and there was no reason for the minor to lie about the Appellant.

Judgment of the trial Court

12. After analyzing the evidence, on 02/02/2022 the trial Court found the Appellant guilty and convicted him. The Appellant was then given an opportunity to mitigate which he did. On the same date, the trial Court sentenced the Appellant to serve life imprisonment for the charge of defilement. In imposing the sentence, as aforesaid, the Magistrate stated that Section 8(2) of the *Sexual Offences Act* provided for life imprisonment as the only mandatory sentence upon conviction.

Hearing of the Appeal

13. It was then directed that this Appeal be canvassed by of written Submissions. While the Appellant filed his Submissions on 16/01/2023 through his Advocates, Messrs Shaban & Co., the Respondent through Prosecution Counsel, Ms Chala, opted to submit orally.

Appellant's Submissions

14. In the Submissions, the Appellant's Counsel argued that the only evidence on record on how the alleged incident took place is that of the minor, there being no other eye-witness the Court had a duty to comply with the provisions of Section 124(1) of the *Evidence Act* which it did not, the Court appears to have believed the evidence of the minor but did not give reasons for doing so, the Court did not even attempt to warn itself of Section 124, that PW3 the clinical officer only referred to bruises in the anus as his evidence that the boy was sodomized, he did not explain whether the injuries were caused by a penis and no other weapon and that the P3 indicates that the injuries were "weeks" old yet the charge sheet indicates that the incident took place on 24/04/2020 and the P3 was itself filled on 27/04/2020

15. He further submitted that there was no corroboration of the minor's evidence, the minor was 6 years old which indicates that his anal canal was still developing , the Appellant is a grown up man with all his systems fully grown including his genitalia, if the Appellant indeed penetrated the anal canal his injuries would have been more grievous than just bruises, that the clinical officer was not a specialist in the treatment of children, the clinical officer stated that the Appellant was always sexually abusing him yet the minor did not say so in his testimony, the Investigations officer PW4 did not carry out independent investigations and only relied on the minor's word and that of his relatives.

16. Counsel then submits that insofar as Section 2 of the *Sexual Offences Act* includes the "anus" as part of the male and female genital organs it is unconstitutional since in Counsel's opinion it offends Article 45(2) of *the Constitution*.

17. Finally, Counsel added that imposition of the sentence of life imprisonment as the mandatory sentence under Section 8(2) of the *Sexual Offences Act* meant that the trial Magistrate did not consider the Appellant's mitigation. On this point, he quoted several Court decisions which all emanate from the now famous Muruatetu 1 Supreme Court decision.

Respondent's Submissions

18. On her part, Ms Chala, in her oral Submissions, submitted that all the ingredients of the charge of defilement were proved, the minor's age of 6 years was proved by production of a birth certificate, penetration was proved by production of the treatment notes and PRC Form, identification was proved by way of recognition, issue of corroboration is frivolous since the clinical officer confirmed sodomy, by including "anus" in the categorization of genital organs Section 8(2) of the *Sexual Offences Act* does not in any way offend Article 45(2) of *the Constitution*, Article 45(2) refers to consenting adults and that considering the age of the minor, the Court should not interfere with the sentence.

Analysis and determination

19. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the impugned Judgment. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanor of the witnesses (see Okeno vs. Republic [1972] E.A 32)

Issues for determination

20. In my view, the issues that arise for determination in this appeal are the following;

    i. Whether Section 2 of the *Sexual Offences Act*, insofar as it includes "anus" as part of the genital organs, offends Article 45(2) of *the Constitution*.

    ii. Whether the prosecution proved its case beyond reasonable doubt.

    iii. Whether the imposition of life imprisonment as the mandatory sentence was lawful.

21. Although in Ground 10 of the Petition, it was stated that the learned trial Magistrate erred by failing to comply with the mandatory provisions of Section 211 of the Criminal Procedure Act, I have not included the ground as one of the issues arising for determination. This is because this ground has not been taken up in the Appellant's Submissions at all. In any event, I have perused the record and noted that upon the Court Ruling that the Appellant had a case to answer and put him to his defence, the following was recorded:

> "Court: Ruling delivered. Section 211 CPC explained to accused and he opts to say:
>
> Accused: I shall give sworn testimony and call no witness. I am ready now."

22. The record is therefore clear that indeed Section 211 was complied with.

23. I now proceed to analyse and answer the said issues.

i. Whether Section 2 of the *Sexual Offences Act* insofar as it includes "anus" as part of the genital organs offends Article 45(2) of *the Constitution*

24. "Genital" organs are defined in section 2 of the *Sexual Offences Act* No. 3 of 2006 to include:

> " ... the whole or part of female or male genital organs and for purposes of this act includes the anus."

25. Article 45(2) of *the Constitution* of Kenya on the other hand provides as follows:

> " Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties."

26. In his Submissions, the Appellant's Counsel submitted that Section 2 of the *Sexual Offences Act* is unconstitutional in that it offends Article 45(2) of *the Constitution* because it includes "anus" as part of the genital organs.

27. First, I note that although the Appellant's Counsel raised as much as 13 grounds in the Petition of Appeal, this point does not appear in any of the grounds and was brought up for the first time in the Submissions. Should the Court entertain the ground in such circumstances? The Court of Appeal, when confronted with a similar scenario in Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto, [2018] eKLR, stated the following:

> " Rule 104 of the Court of Appeal Rules, among others, prohibits an appellant from arguing, without leave of the Court, grounds of appeal other than those set out in the memorandum of appeal. The appellant did not seek leave of the Court to raise the new ground of appeal but rather belatedly, and literally from the blue, raised it in the written submissions. It needs no emphasis that submissions must be founded on the issues before the court and the evidence

on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage.

It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015 and Openda v. Ahn [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court.... As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance."

28. I associate myself fully with the above holding and for this reason, I decline to entertain this new ground for the reason that the same has been raised for the first time in the Appellant's Submissions and without prior notice to the Respondent.

29. In any event and even if I were to entertain the said issue, I note that apart from simply submitting generally that Section 2 of the *Sexual Offences Act* offends Article 45(2) of *the Constitution*, Counsel did not make any attempt to develop his argument further, he neither demonstrated the nexus between the two provisions nor demonstrated how exactly Section 2 offends Article 45(2) of *the Constitution*. While Article 45(2) deals with the "right to marry", Section 2 of the *Sexual Offences Act* deals with the very different matter of "definition of genitals". Considering the heavy impact of a finding such as the one being sought by Counsel to the wider criminal jurisprudence on the offence of defilement in this country, there needed to have been a serious and extensive presentation of the argument.

30. I hope in future there will arise an opportunity in which a formal Constitutional Petition on the issue shall be raised before a competent Court for proper canvassing and determination. For now, my finding is that the alleged unconstitutionality of Section 2 of the *Sexual Offences Act* has not been demonstrated. I therefore reject the ground.

ii. Whether the prosecution proved its case beyond reasonable doubt

Elements of the offence of defilement

31. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* which provides:

> " 8
>
> (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

32. The specific elements of the offence of defilement arising from Section 8(1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are the following:

a. Age of the complainant.

b. Proof of penetration.

c. Identification of the assailant.

33. The above was reiterated in the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013 where it was stated as follows:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

a. Age of the complainant

34. In a charge of defilement, the age of the victim is important for two reasons: (i) defilement is a sexual offence against a child; and (ii) age of the child is also used as an aggravating factor for purposes of determining the sentence to be imposed, thus the younger the child the more severe the sentence.

35. The issue of age is not seriously contested in this Appeal. In any event, the birth certificate produced as exhibit indicates that the minor was born on 02/01/2013 which means on 24/04/2020 the date that the offence is alleged to have been committed, he was about 7 years old. From the foregoing, I am satisfied that the child's age of "eleven years or less" as required under Section 8(2) of the *Sexual Offences Act* was proved.

b.Penetration

36. Section 2(1) of the *Sexual Offences Act* defines "penetration" as:

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

37. The complainant-minor, PW2, testified as follows:

> "..... Yes I fear the accused. He is Majani. He stays in rural home. He called me. He injected me. I went to sleep. I woke up after. I felt pain in my behind. I told grandmother. Grandmother then told grandfather. Accused was a leader. He injected me on my bottom. I don't know what he did to me when I was sleep ....."

38. In as much as the minor was not very coherent, it is clear that he was emphatic that he had been injected with some unknown substance then sodomized when he fell sleep. Although his grandmother died before the trial and did not therefore testify, this is what the minor is said to have told the grandmother on the same day - 24/04/2020 necessitating the grandmother to report the incident to the police two days later - 26/04/2020. He again repeated the same account to the clinical officer 3 days later on 27/04/2020. Despite his age, the minor was therefore very consistent on his reporting of what had been done to him.

39. It was the minor's evidence and also that of his uncle PW1 that since the incident, the minor has become fearful and afraid of people. I believe that his slight incoherency could be contributed to by this condition which is common with children and even adults who have been sexually molested. Despite this slight incoherency, there was no contradictions or inconsistencies in the minor's evidence.

40. On his part, PW3, the clinical officer testified about his examination of the minor as follows:

> " ..... I examined him. He had pain in the anal area. He said that he had been sexually assaulted by someone known to him. He said that the person had been sexually assaulted over a period of time by a neighbour who had been employed as a herdsboy ..... the complainant could not retain urine. He also had pain on long call. I examined him on the anal area and noticed bruises in the anal area. I confirmed the sexual assault. The complainant was 6 years old ...."

41. I have looked at the P3 Form produced in evidence and note that in Section B thereof, at Part 5, to the question, "what were the immediate clinical results of the injury sustained and the assessed degree, i.e. harm, main or grievous harm?", the answer entered is "grievous harm".

42. I have carefully considered the above testimonies and find them to be consistent and believable. Taken together, the evidence proves penetration. I therefore find that the minor, in all his innocence, gave a truthful, vivid and graphic account of the ordeal that he went through.

43. The Appellant's Counsel has argued that there was contradiction in the medical evidence presented because the P3 Form referred to the age of the bruises as "weeks" yet it was filled in only 3 days after the alleged incident. On this point, I note that the clinical officer in his testimony stated that the minor told him that the defiler had been regularly defiling him for some time even before the latest incident that took place on 24/04/2020. I believe this explains why the bruises appeared "weeks" old in the opinion of the clinical officer,

44. In any event, whereas proof of penetration is a requirement in proving a sexual offence, the same need not necessarily be proved by way of medical evidence alone. Penetration can be proved by other methods of evidence among them circumstantial evidence. This point was handled in E E v Republic [2015] eKLR where the Court stated as follows;

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence."

45. Regarding the trial Magistrate's belief of the minor's evidence, Section 124 of *Evidence Act* provides as follows:

> " ..... in a criminal case involving a sexual offence, where 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 if, for reasons recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

46. In sexual offences therefore, corroboration of a child victim's evidence is not mandatory.

47. I am aware that Section 124 should be applied with extreme caution. On this point, I refer to PMG v Republic [2022] eKLR where Onyiego J stated as follows:

> " It is my finding that had the trial court taken into account PW1's contradictory evidence, it would have arrived at a different conclusion. Although a court has the power to convict under Section 124 of the *Evidence Act*, the same section should be tested with the greatest care and only be applied against the clearest of the victim's evidence without an iota of doubt. That provision is not a panacea to rescue otherwise a weak prosecution case. It is also not a sympathy nor a tears' wiping provision. I do agree with the prosecution counsel

that reliance on Section 124 of the *Evidence Act* was not appropriate in the circumstances of this case."

48. I am also aware of the case of Fappyton Mutuku Ngui v Republic [2020] eKLR where it was observed as follows:

> " 32. The appellant has also questioned the conviction because it was based on the "uncorroborated" evidence of a minor. Indeed, courts should be cautious before convicting on the uncorroborated evidence of minors. There are many reasons for this. In J Heydon Evidence: Cases and Material 2nd ed Butterworth's London 1984, 84, the reasons were put thus:

First, a child's powers of observation and memory are less reliable than an adult's. secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children. One lying child may influence others to lie; anxious parents may take a child through a story again and again so that it becomes drilled in untruths. Most dangerously, a policeman taking a statement from a child may without ill will use leading questions so that the child tends to confuse what actually happened with the answer suggested implicitly by the question. A fifth danger is that children often have little notion of the duty to speak the truth, and they may fail to realize how important their evidence is in a case and how important it is for it to be accurate. Finally, children sometimes behave in a way evil beyond their years. They may consent to sexual offences against themselves and then deny consent. They may completely invent sexual offences. Some children know that the adult world regards such matters in a serious and peculiar way, and they enjoy investigating this mystery or revenging themselves by making false accusations." (Emphasis added).

49. I am well guided by this need for extreme caution when receiving the evidence of a minor.

50. It is true as alleged by the Appellant's Counsel that the trial Magistrate did not formally or expressly record his reasons for believing the minor as stipulated under Section 124. However, during the viva voce trial and evaluation, the learned trial magistrate found the minor to be an intelligent child who knew why he should speak the truth. He also found that the minor had made an early report to the grandmother. The record also shows that on account of the report made by the minor, bruises and grievous harm was found in his anus upon medical examination. The Appellant himself also confirmed that there was no animosity of any kind or reason for the minor or his family to frame up the Appellant.

51. Consequently, in my view, the minor's evidence was corroborated in a material particular. Even if it is deemed that there was no satisfactory corroboration, still I will agree with the Learned trial Magistrate that the minor was a truthful witness and his evidence was safe for a conviction to be based thereon.

52. I also refer to the case of Dennis Osoro Obiri v. Republic [2014] eKLR where the Court of Appeal quoted its decision in Geoffrey Kioji v Republic, Crim. App. No. 270 of 2010 (Nyeri) where it held as follows:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under

the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

53. On authority of the above holding therefore, even if the medical evidence of PW3 were to be excluded, still that action per se will not be fatal to the prosecution case. The law is that the Court could still safely convict if it was satisfied that the other prosecution evidence proved, beyond reasonable doubt, that the appellant committed an act which caused penetration with the child.

54. In view of all the above, I agree with the trial Magistrate's finding that penetration was proved.

c. Identification of the Appellant

55. Both the minor and the Appellant confirmed that they knew each other even before the incident and live in the same neighbourhood. There was therefore no element of mistaken identity. Although upon being injected with an unknown substance the minor fell asleep and did not see the person who defiled him, it has been established that the defilement took place during the day in the house where the Appellant was the only male adult. The minor's evidence on this issue was not shaken during cross-examination by the Appellant. The evidence was therefore more of "recognition" than mere "identification".

56. In the case of Anjononi & Others –vs- Republic [1981] KLR 594, it was stated as follows:

> " recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

57. I am also guided by the principles that a Court ought to take into consideration when relying on visual identification to sustain a conviction. On this point, I refer to Wamunga –vs- Republic [1989] KLR 424 where the Court of Appeal stated as follows:

> " It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

58. The Appellant also confirmed that there was no grudge of any kind between him and the minor or his family that would give rise to any suspicion of them framing him up.

59. Since I had already found that the minor's testimony, taken together with that of PW1, PW3 and PW4 was consistent, candid and credible, I find that the Appellant was positively identified as the defiler herein. There was no mistaken identity or error. In view of the foregoing, I find that the evidence by the prosecution left no doubt that the Appellant is the person who sodomized the boy.

Finding

60. Accordingly, I find that all the elements of the offence of defilement, namely, minority of the victim's age, penetration and identity of the assailant were all proved against the Appellant. I therefore find that the prosecution proved its case beyond reasonable doubt and that the trial court did not err in convicting the Appellant for defilement. The conviction was proper. The appeal on conviction therefore lacks merit and is hereby dismissed.

iii. Whether the imposition of life imprisonment as the mandatory sentence was lawful

61. Section 8(3) of the *Sexual Offences Act* provides as follows:

> " 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."

62. While imposing the sentence, the Magistrate stated as follows:

> " There is only one mandatory sentence under Section 8(2) of SOA. I sentence the accused to life imprisonment. 14 days right to appeal explained"

63. In the case Shadrack Kipkoech Kogo - vs - R, Eldoret Criminal Appeal No. 253 of 2003, the Court of Appeal stated as follows:

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered."

64. One cannot discuss the issue of mandatory sentences in Kenya without mentioning the case of Francis Karioko Muruatetu & Another vs Republic [2017] eKLR (commonly referred to as Muruatetu 1). It had been interpreted by many that the decision was authority to the effect that those who were convicted of sexual offences and whose sentences were passed on the basis that the trial courts had no discretion but to impose the said mandatory sentences are now at liberty to petition the High Court for orders of resentencing in appropriate cases.

65. However, in Francis Kariuki Muruatetu & Another vs Republic: Katiba Institute & 5 Others (Amicus Curiae) (2021) Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola SSJJ) (otherwise referred to as Muruatetu 2), the Supreme Court has now clarified that its directions given in Muruatetu (1) regarding the unconstitutionality of mandatory sentences was limited only to cases of murder and do not necessarily extend to sexual offences (see also Juma Abdalla v Republic, Court of Appeal Criminal Appeal No. 44 of 2018 (2022) KECA 1054 (KLR) (7 October 2022).

66. It is however also true that emerging jurisprudence is to the effect that in spite of mandatory sentences having been stipulated by some statutes, including the *Sexual Offences Act*, nevertheless the Courts are free to exercise judicial discretion while imposing sentences. The emerging view, which I wholeheartedly embrace, is that the Courts cannot be constrained by statute to impose the provided sentences if the circumstances do not demand it.

67. For the above proposition, I refer to the recent Court of Appeal decision in Joshua Gichuki Mwangi Mwangi v R, Criminal Appeal No. 84 of 2015, Nyeri, delivered on 7th October 2022 in which the Court quoted its earlier decision in Dismas Wafula Kilwake v Republic [2019] eKLR where the following was stated:

> "..... Being so persuaded, we 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 .....)

68. In light of the above, I feel justified to interfere with the sentence of life imprisonment wrongfully imposed by the trial Court as a mandatory sentence. I take into account the sentencing guiding principles, the authorities cited and also circumstances of the offence. Although I agree that the crime was heinous to say the least, that there was injection of an unknown substance that sent the minor to sleep and that the minor was an innocent child of only 6-7 years, I am nevertheless persuaded to alter the sentence downwards. The Appellant should serve a sentence that will still allow him to return to normal life outside prison and get re-integrated into the society. I hereby reduce the sentence of life imprisonment to 20 years imprisonment.

69. On the issue of whether the sentence should run from the date of arrest or the date of conviction or sentencing, I note that the trial magistrate did not mention whether he took into consideration the time spent by the accused person in custody as required by law.

70. Section 333(2) of the Criminal Procedure Code provides as follows:

> "(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include 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."

71. On the same issue, the Court of Appeal in Bethwel Wilson Kibor vs. Republic [2009] eKLR stated as follows:

> "By proviso to section 333(2) of Criminal Procedure Code, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

72. On its part, The Judiciary Sentencing Policy Guidelines (2014) also provides guidance on this as follows:

> "The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

73. The Charge Sheet does not state when the Appellant was arrested. However, I note that he was presented to the Court on 30/04/2020. Assuming that he was presented to Court within 24 hours as required by *the Constitution*, I presume that he was arrested on 29/04/2020. Although he was granted bail, it seems that he never paid the bail and therefore remained in custody even after the bail was reviewed downwards. He was then convicted and sentenced on 02/02/2022.

74. The period between arrest and sentence is therefore about 1 year and 9 months. This period ought to be therefore factored and reduced from the 20 years prison sentence that this Court has now imposed.

Final Orders

75. In the end, I issue the following orders:

    i. The conviction is upheld.

    ii. On the sentence, I set aside the sentence of life imprisonment imposed by the trial Court and hereby substitute it with a sentence of 20 years imprisonment.

    iii. The 20 years prison sentence shall be computed as from the date of the Appellant's arrest which this Court has put at 29/04/2020.

DATED AND SIGNED AT ELDORET THIS 26TH DAY OF MAY 2023

.....

WANANDA J. R. ANURO

JUDGE