Makabila v Republic (Criminal Appeal E44 of 2022)
[2023] KEHC 18052 (KLR) (26 May 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E44 OF 2022

JRA WANANDA, J

MAY 26, 2023

BETWEEN

CHARLES MAKABILA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Butere Chief Senior Principal Magistrate's Court Sexual Offence Case No. 54 of 2020 with the offence of attempted defilement contrary to section 9(1)(2) of the *Sexual Offences Act*. The particulars of the offence are that on the 3/10/2020 at Khwisero sub-County, within Kakamega County, he intentionally attempted to cause his penis to penetrate the vagina of MM, a child aged 11 years.

2. He was charged with the alternative offence of committing an indecent act with the same child at the same place on the same date, contrary to section 11(1) of the *Sexual Offences Act*.

3. The prosecution called 4 witnesses while for the defence, the Appellant was the only witness.

Prosecution evidence

4. PW1 was the complainant (the alleged victim). Since it was stated that she was a minor, she was taken through a *voire dire* examination after which the trial Court concluded that she understood the importance of telling the truth and could be sworn, which she did.

5. She stated that she was a class 7 pupil, she was 12 years old, she recognized the Appellant, his name is Mackavira, she used to see him around [particulars withheld] area in Khwisero, on 03/10/2020 she had come from the river where she had gone to fetch water and was returning to the river for another trip at around 2.00 pm when she heard the Appellant calling out "shika huyo" (catch that one), she immediately dashed back to the house, the Appellant followed her there, he then started touching

her private parts and breasts and told her that he loved her, she managed to free herself and entered the bedroom, the Appellant followed her there, he then told her that he wanted to show her how to soothe her "kitu ya kukojolea" (the thing for urinating), he continued touching her private parts, she screamed and her younger brother emerged, the Appellant left the house from the rear door when he caught sight of the brother, she reported the incident to her mother when she returned home, her mother told her to inform the her whenever she would come across the Appellant, later she spotted the Appellant walking along the road near their house carrying biscuits, her mother confronted the Appellant regarding the incident, the Appellant asked for pardon, the mother and the complainant then reported the matter to the police and later went to the hospital. At this point, the complainant identified the Appellant in Court.

6. In cross-examination by the Appellant, she stated that the Appellant was at the gate to her home when he started shouting "shika huyo" (catch that one), her younger brother was at a neighbours's (Feli) house, the younger brother dashed in when he heard the complainant screaming, she does not think that the neighbour was at home but his son Feli was there with the complainant's said younger brother. In re-examination, she stated that when she screamed only her said younger brother came, after the Appellant left another person by the name Nyasi also came and asked what the problem was, she recounted the incident to him.

7. The next witness, PW2, was the complainant's mother. She stated that she recognized the Appellant, he was her neighbour, he addresses her as "mother" in the clan, on 03/10/2020 she had gone to look for firewood when on her way back at around 11.00 am she met one Nyasiri who was her in-law, he told her that he had unsuccessfully tried to reach her on phone, he told her that he was walking past her home when he heard the complainant crying inside the homestead and when he inquired the complainant told him that Charles (Appellant) had attempted to rape her, the mother then proceeded home where she found the complainant crying, the complainant told her that Mackavere (Appellant) wanted to rape her, that the Appellant had shouted at the complainant "shika huyo" (catch that one) whereupon she ran back to the house, the Appellant followed her and started telling her that he loved her, she screamed and the complainant's younger brother came over and that upon seeing the brother the Appellant fled through the rear door, after a short while the mother spotted the Appellant walking near her home and was calling out the complainant's name, the mother stepped out and confronted him asking him why he was calling out her daughter's name, the Appellant asked to be pardoned and claimed that he was only counselling the complainant to be a decent girl and not to imitate other young girls who were living reckless lives, he had two biscuits, she then called her husband and informed him of the incident, the husband never took action, she therefore on her own reported the matter to the police, they were asked to record statements and were referred to Khwisero Health Centre for examination.

8. In cross-examination, she denied that her statement was false, the Appellant's employer dissuaded the said Nyasiri from coming to testify, her younger son also went to the police station but was found to be incoherent and could not recount facts well, a while back the Appellant sold to her a cupboard at a price of Kshs 2,500/- out of which she paid him Kshs 2,000/-, on the material day, the Appellant returned with biscuits and was calling out the complainant's name, she did not owe the Appellant any money, her husband did not get involved in the case because he was a friend to the Appellant, they were drinking buddies, the husband had been persuading her to settle the matter out of Court.

9. Before the 3rd prosecution witness could take the stand, the Appellant made an oral Application seeking that the minor (PW1) and her mother (PW2) be recalled. The application was however rejected. I will revisit the matter when determining the issues.

10. PW3 was Police Officer Sergeant Austin Olali based at Khwisero Police Station. He stated that on 05/10/2020 the complainant - an 11 years old girl - was escorted to the station by her mother, they reported that the complainant was at home by herself when the Appellant emerged and called out "shika yeye, shika yeye" (catch that one, catch that one), the Appellant then made her lie down and touched her private parts, she screamed and her younger brother came over. PW3 referred them to Khwisero Health Centre where they went and were issued with P3 Form, the examination confirmed that there was no penetration. He obtained the complainant's birth certificate and it confirmed her said age. At this point, he produced the birth certificate, P3 Form and treatment notes as exhibits. He then further stated that on 11/10/2020 the Appellant came to the police station in company of a village elder and other members of the public, they had escorted a suspect in a theft case, the complainant's mother then informed him (PW3) that she had spotted the Appellant headed to the police station, she then came to the station and identified the Appellant. He arrested the Appellant and placed him in the cells. He also visited the scene. In cross-examination, he stated that the complainant's younger brother was a child of only 5 years old and was therefore not able to recall facts, for this reason he did not record his statement. He added that the boy was not present when the incident took place as he was playing outside.

Defence evidence

11. At the close of the prosecution case, the trial Court ruled that the Appellant had a case to answer and put him to his defence.

12. In his defence, the Appellant stated that he was not at the scene of crime on the date that the incident is alleged to have taken place, he had gone to Matungu for payment of dowry, on 09/10/2020 a neighbour of his had been threatened by some villagers so he had escorted him to the police station when he was arrested at the station, he was later informed that his arrest was based on allegations that he had attempted to defile a small girl, the name of the girl was not disclosed to him, the complainant's mother was his bosom buddy, she had even sold to her some furniture for which she only paid him a sum of Kshs 2,500/- yet they had agreed at Kshs 10,500/-, he kept on demanding for the balance but she continued to dismiss him with the statement that she would pay him when he is in prison or the morgue. In cross-examination, he confirmed that the complainant is known to her. Regarding the non-payment for his sale of furniture he stated that he has tried to involve PW2's husband for a resolution but the same was not successful.

13. After being cross-examined, the Appellant sought to be allowed to produce two documents as his exhibits. These were a permit and a letter from an assistant chief, both allowing him to move cattle and both dated 03/10/2020, the same date of the incident. He was so allowed and he produced the documents.

Judgment of the trial Court

14. At the end of the trial, the trial Magistrate acquitted the Appellant on the charge of attempted defilement but found him guilty on the alternative charge of committing an indecent act with a child. On 25/05/2022, the Appellant was sentenced to serve 10 years imprisonment.

Grounds of Appeal

15. Being dissatisfied with the decision, the Appellant filed a Petition of Appeal on 08/06/2022. He subsequently filed Amended Grounds of Appeal. The same is however undated and there is also no indication when it was filed in this Court. The document also contains the Appellant's Submissions.

16. In the Amended Grounds of Appeal, he cited 7 grounds as follows:

    i) That the learned trial magistrate erred and/or misdirected himself in law and facts by failing to make a finding that the prosecution failed to prove its case beyond reasonable doubt.

    ii) That the learned trial magistrate erroneously based the conviction and sentence on a single witnesses' evidence without considering the need for corroboration.

    iii) That the learned trial magistrate erred in law and fact by failing to note and consider that the prosecution failed to call crucial witnesses.

    iv) That the learned trial magistrate erred in law and fact by failing to attempt to deal with contradicting and doubtful evidence by the prosecution.

    v) That the learned trial magistrate failed to accord and/or ensure that the Appellant was accorded a fair trial as set under Article 50(2)(e) and (k) of the *Constitution*.

    vi) That the learned trial magistrate misdirected himself in law and facts by failing to properly evaluate the Appellant's defence of Alibi.

    vii) That the learned trial magistrate erred in law and fact by failing to consider that mandatory minimum sentence was unconstitutional and further failed to take into account the period of time spent in custody prior to sentence.

Appellant's submissions

17. In his Submissions, the Appellant basically reiterated the grounds above and added that the prosecution did not prove the case beyond reasonable doubt, the Court relied on the evidence of a single witness without considering the need for corroboration, crucial witnesses were not called, the evidence of the prosecution witnesses was contradictory, his plea for recall of witnesses was unfairly rejected, his defence including the one of alibi was not considered, the imposition of a mandatory minimum sentence was unlawful and that the time that he spent in custody during the trial was not factored in the sentence.

Respondent's submissions

18. On its part, the Respondent relied on the Submissions filed on 01/12/2022 by Learned Prosecution Counsel Loice Nyaboke Osoro. Basically, it is submitted that the victim's age was proved, the identity of the Appellant as the perpetrator was also proved since the Appellant was well-known to the victim, the incident occurred during the day and the victim recognized the Appellant, the minor testified that the Appellant followed her into the house and touched her breasts and private parts, there was no contradiction in the evidence of the prosecution witnesses, the Appellant's defence was not supported by evidence and the defence of alibi was an afterthought.

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 v 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 the trial Court's refusal of the Appellant's prayer for recall of witnesses was proper.

    ii) Whether the charge of committing an indecent act with a child was proved case beyond reasonable doubt.

    iii) Whether imposition of the maximum sentence of 10 years imprisonment was proper.

    iv) Whether the trial Court ought to have taken into account the period of time spent by the Appellant in custody prior to sentence.

21. I now proceed to analyze and answer the issues:

i. Whether the trial Court's refusal of the Appellant's prayer for recall of witnesses was proper

22. As already stated, before the 3rd prosecution witness could take the stand, the Appellant made an oral Application seeking that PW1 and PW2 be recalled. His application is recorded to have been made as follows:

> "I wish to recall the complainant and PW2 (her mother). I would wish for them to come and testify afresh. Reasons being that I was freshly from remand and I was nervous. In addition, I had not read and understood their statements"

23. In rejecting the Application, the trial Court held that the Appellant had been supplied with all the material that the prosecutor intended to rely on, the Appellant had the opportunity to subject the witnesses to cross-examination, there was nothing in the record to suggest that the accused alluded to being nervous or tense, the application was a delaying tactic, the matter involved a complainant who is a minor and the Court is enjoined to look out for the best interests of such minors and it would therefore be unfair to subject the minor to testify afresh as this would amount to re-traumatizing the minor.

24. I understand the Appellant to be submitting that by rejecting his plea for recall of the witnesses, the trial Court violated his rights under Article 50(2)(g) and (k) of the *Constitution*. It is true that under Article 50(2) an accused person has a right to fair hearing which includes the following:

> "(g) right to choose and be represented by an advocate, and to be informed of this right promptly;
>
> .....
>
> (k) to adduce and challenge evidence;"

25. In line with this right to a fair trial, Section 146(4) of the *Evidence Act* Cap. 80 provides as follows:

> "The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so the parties have the right of further cross-examination and re-examination respectively."

26. Further, Section 150 of the *Criminal Procedure Code* states as follows:

> A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:
>
> Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

27. A reading of the above provisions reveals that the Court has the discretion to recall any witness who has already testified. However, a good reason must be given before the court recalls any witness. Each case has to be considered on basis of its facts as opposed to proceeding from a point of speculation. A perusal of case law in Kenya reveals that an application to recall a witness can be denied for reasons such as where the request is based on ulterior motive or meant to be a delay tactic or the witness has travelled out of the country and it would lead to unnecessary travelling expenses or where the witness cannot completely be traced.

28. In the present case, the Appellant did not specify the exact areas on which he wished that the witnesses be recalled. Did he want them to be recalled so that the trial could begin *de novo* or did he want them to be recalled for cross-examination on specific areas of their testimony or did he want them recalled for cross-examination on all areas? He did not specify. On this point I refer to the holding of Warsame J (as he then was) in *Elijah Omondi Owino v Republic* [2010] eKLR in which he stated as follows:

> " The criteria for recalling a particular witness is that if the evidence appears to be essential to the just determination of the case and for the best interest of justice. In this case the trial court considered the application and found the same to be wanting. It was incumbent upon the advocate for the applicant to state the reasons why it was necessary to recall the two witnesses who had given evidence and who were cross examined by the applicant. The court is guided by reasons and without stating the reasons for recalling the two witnesses it is not open to the applicant to expect the court to merely recall the two witnesses simply because there was a request or an application made for their recalling. I think the magistrate was right in refusing to recall the witnesses without being given sufficient explanation for the said cause. It is clear that the applicant was given an opportunity to cross examine the two witnesses and in the absence of any basis to say that the applicant may have been prejudiced or is likely to suffer by reason of further cross examination by his advocate, then the court had no option but to refuse the application for recalling the two witnesses. Having considered the material that was presented before me, I am satisfied that the trial court exercised its discretion properly and that there was no ground to enable the said court to allow the application for recalling the two witnesses. The application has no foundation and the trial court was absolutely right in holding the same had no merits. I too agree. The application dated 9th November 2009 is rejected.

29. Further, the trial Magistrate noted that PW1 (the complainant), one of the two witnesses sought to be recalled was a minor and the Court is enjoined to look out for the best interests of such minors. I find that he correctly held that it would be unfair to subject the minor, the victim in the alleged sexual offence, to testify afresh as this would amount to extending the minor's trauma.

30. For the said reasons, I find that no good reasons were presented to the trial Court to support the request for recall of PW1 and PW2. I accordingly reject this ground of Appeal.

ii) Whether the charge of committing an indecent act with a child was proved case beyond reasonable doubt

31. It is not debatable that evidence in support of a criminal case must not leave any doubt in the mind of the Court and that criminal cases must be proved beyond all reasonable doubt.

32. I now turn to Section 8(3) of the *Sexual Offences Act* which provides as follows:

> " indecent act" means an unlawful intentional act which causes-
>
> (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
>
> (b) Exposure or display of any pornographic material to any person against his or her will."

a) Age of the complainant

33. The Appellant's age is not seriously contested. In any event, the copy of her birth certificate produced as exhibit shows her date of birth as 23/04/2009. This is sufficient evidence of her age and means that on 03/10/2020 the date when the offence is alleged to have been committed, she was 11 years. I therefore find that the complainant's age was proved

b) Identity of the perpetrator

34. There is on record evidence of the minor that the Appellant is the person who committed the act. The trial Court handled this issue and found the evidence of the complainant credible. The Appellant argued that crucial witnesses were not called to testify. He cited the complainant's younger brother who was alleged to have been the first person to respond when the complainant screamed and also a neighbour by the name Nyasiri who came afterwards. Regarding the complainant's younger brother, it was stated by both the police officer (PW3) and the complainant's mother that he was a young child of 5 years and when brought to the station, he was found to be incoherent and could also not recall all the facts. As regards the said Nyasiri, the complainant stated that the Appellant's employer had prevailed upon him not to testify. In my view, these were plausible reasons.

35. It is clear that the Appellant resides in the same locality and neighbourhood as the complainant and her mother. The Appellant himself confirmed this fact and even added that the complainant's mother was his friend. He is therefore a person well-known to both of them. The identification was therefore more of recognition. There was no element of mistaken

identity of the Appellant. On this point, I am well guided by the principles set out in *Wamunga v 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."

36. In the case of *Anjononi & Others v 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."

37. I therefore agree with the trial Court's finding that the Appellant was sufficiently identified.

38. In any event, although Kenyan law requires corroboration of evidence by minors under Section 124 of the *Evidence Act*, there is a proviso that in sexual offences, there need not be corroboration if the Court believed that the minor told the truth and recorded its reasons for believing the minor. The section and the proviso are premised as follows:

> "Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim 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 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."

39. In *Erick Onyango Ondeng' v Republic* [2014] eKLR, the Court of appeal held as follows:

> "In Bukenya & Others v Uganda (supra), the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case; .....
>
> While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso to Section 124 of the *Evidence Act* and the medical evidence must be borne in mind as well as Section 143 of the *Evidence Act* (Cap 80) which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In this appeal, it is not clear to us what value the evidence of V would have added to the evidence of PW2, which the court found trustworthy, as well as the medical evidence. In our opinion, V would have been a peripheral witness as she was

said to merely have happened by when the appellant was with PW2 on a different occasion."

40. From the foregoing, it is clear that the proviso to Section 124 of the *Evidence Act* allows the Court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

41. The trial Magistrate found that the minor truthfully identified the appellant as the person who was responsible. I too agree that indeed the minor was very consistent noting that she mentioned and identified the Appellant to her mother, to the police, to the medical staff and also to the Court. Her testimony was not shaken and her explanations were also very vivid and candid. She had the same version for anyone who cared to ask. The Appellant was someone known to her. I have perused the record and I too find that the complainant's evidence was clear, precise and consistent as to what happened. I too believe that she was telling the truth.

42. The Appellant alleges that he was framed by the complainant's mother because of a grudge arising from a dispute that they had over unpaid money for purchase of some furniture that the Appellant had sold to her. I am not convinced that such dispute, if any, was sufficient for the complainant to be so easily convinced by her mother to conjure such grave allegations against the Appellant. I also take into consideration the mother's testimony that the Appellant and her husband were great friends.

43. Regarding the Appellant's alleged alibi allegation that he was away on the material date having taken dowry to Matungu, I note that he did not call any witness to support the alibi. Considering the gravity of the charges that he was facing, did he not see it fit to call at least one person who either accompanied him in taking the dowry or those to whom he took the dowry?

44. Although he produced a permit and a letter from his local chief authorizing him to move cattle, it is curious that both the letter and the permit were issued on the same date of the incident for use on the same date. There is also no evidence that he actually moved the cattle as permitted in the letter. The question that arises is, did he purposely obtain the permit and the letter so to cover his tracks for the day? Like the Magistrate, this Court too, is not persuaded by the alibi defence

45. The Appellant also alleged that there were contradictions in the evidence of the Prosecution witnesses. He pointed out two instances. The first is that while the minor (PW1) told the Court that the incident happened at around 2 pm, her mother (PW2) stated that it happened at around 11.00 am. The second is that while the minor told the Court that her younger brother who responded to her screams was outside as he was playing at a neighbour's home, the investigating officer (PW3) told the Court that the brother was in the home.

46. The first example given is true. While the minor referred to 2.00 pm, her mother referred to 11.00 pm. The second example is however not true. Nowhere did the investigating officer state that the younger brother was inside the house.

47. In *Twehangane Alfred v Uganda*, Crim. App. No. 139 of 2001, [2003] UGCA, 6, it was held as follows:

> "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."

48. The above authority therefore recognizes the reality that there are many reasons for witness' evidence to display minor "innocent" contradictions in giving accounts of the same incident. One of these reasons is the possibility of memory loss due to lapse of time. This is human nature. Therefore, the contradiction in timings in this case is minimal and does not qualify to be considered as having the possibility of occasioning injustice. In my view the only one contradiction correctly pointed out was not so material as to vitiate the conviction.

c) Finding

49. I therefore find that all the ingredients of the charge of committing an indecent act with a child were established against the Appellant.

iii) Whether imposition of the maximum sentence of 10 years imprisonment was proper

50. I now consider whether to revise the sentence of 10 years imprisonment imposed herein. In *Shadrack Kipkoech Kogo v 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."

51. Section 11(1) of the *Sexual Offence Act* provides as follows:

> "Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years (emphasis court)."

52. 10 years imprisonment is therefore the maximum sentence provided under the said Section. While the trial Magistrate did not expressly mention it, it appears that he may have construed the above provision as compelling him to impose the 10 years imprisonment as a mandatory sentence. One cannot discuss the issue of mandatory sentences in Kenya without mentioning the now famous Supreme Court of Kenya case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR (commonly referred to as Muruatetu 1). It had been interpreted by many that the decision is authority for the view 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 mandatory sentences are now at liberty to petition the High Court for orders of resentencing in appropriate cases.

53. However, in *Francis Kariuki Muruatetu & Another vs Republic: Katiba Institute & 5 Others* (*Amicus Curiae*) [202] 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 (*supra*) regarding the unconstitutionality of mandatory sentences was limited only to cases of murder and did 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).

54. 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*, the Courts are nevertheless free to exercise judicial discretion while imposing sentences. The emerging view, which I wholeheartedly embrace, is that the Courts cannot be constrained to impose the provided sentences if the circumstances do not demand it.

55. 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 7/10/2022. In the decision, 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 .....)"

56. In any event, the use of the word "liable" in Section 11(1) *supra*, connotes that the trial court has discretion to impose a lesser sentence where the circumstances so dictate. This was the holding in the case of *Daniel Kyalo Muema vs Republic* [2009] eKLR where the Court of Appeal stated that the words "shall be liable to" did not in their ordinary meaning require the imposition of the stated penalty but merely expressed the stated penalty which could be imposed at the discretion of the court. In my view therefore, the Section does not stipulate a mandatory minimum sentence, the Court has discretion to impose a lesser sentence.

57. The Learned Trial Magistrate did not give reasons for imposing the maximum sentence. In the absence of extraneous circumstances, this Court takes the view that the Appellant ought to have benefitted from a lower sentence. In light thereof, I feel justified to interfere with the sentence of life imprisonment imposed by the trial Court.

58. I have taken into account the circumstances of the offence, the sentencing guiding principles, the authorities cited and the maximum sentence of 10 years provided in the Act. I have also taken into account the emerging jurisprudence encouraging exercise of judicial discretion even where mandatory and minimum sentences are stipulated. I have also considered the

Appellant's mitigation before the trial Court. Having done so, I am persuaded to alter the sentence downwards. I therefore hereby reduce the 10 years prison sentence to 5 years.

iv) Whether the trial Court ought to have taken into account the period of time spent by the Appellant in custody prior to sentence

59. 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 also mention whether he took into consideration the time spent by the accused person in custody as required by law.

60. 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."

61. On the same issue, the Court of Appeal in *Bethwel Wilson Kibor v 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.

62. 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."

63. In his Submissions, the Appellant states that he was arrested on 11/10/2020, released on bond on 18/06/2021 and remanded back in custody when he was convicted on 27/04/2022. The sentence was then passed on 25/05/2022. The total period that he spent in custody between arrest and sentencing is therefore about 9 months. This period ought to be therefore factored and reduced from the 10 years prison sentence that this Court has now imposed.

Final Order

64. In the end, I make the following final Orders:

i. I uphold the conviction by the trial Court.

ii. I set aside the sentence of 10 years' imprisonment imposed by the trial Court and substitute it with a sentence of 5 years imprisonment.

iii. The period of 9 months that the Appellant spent in custody between the date of arrest and the date of sentencing shall be factored in the computation of the sentence of 10 years imprisonment.

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

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WANANDA J. R. ANURO

JUDGE