CMM v Republic (Criminal Appeal E035 of 2022)
[2023] KEHC 20025 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20025 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E035 OF 2022

OA SEWE, J

JUNE 30, 2023

BETWEEN

CMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence dated 24th day of May 2022 in Voi Chief Magistrate's Sexual Offence Case No. E001 of 2021 by Hon. T.N. Sinkiyian, SRM)

JUDGMENT

1. The appellant, CMM, was arraigned before the lower court in Voi Chief Magistrate's Sexual Offence No. E001 of 2021: Republic v Chrispin Mwalimo Mwagoya, on 28th January 2021. He was charged with one substantive count of defilement contrary to Section 8(1) as read with Section 8 of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the charge were that on diverse dates between the months of August and September 2020 in Voi Sub-County within Taita Taveta County, he intentionally caused his genital organ (penis) to penetrate the female genital organ (vagina) of RM, a girl aged 15 years.

2. In the alternative, the appellant was charged with indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act*, in that on diverse dates between the months of August and September 2020 in Voi Sub-County within Taita Taveta County, he intentionally touched the vagina of RM, a child aged 15 years with his penis.

3. The appellant denied those allegations. Accordingly, the matter was fixed for trial and was first handled by Hon. F. Nyakundi, SRM, before being taken over by Hon. Sinkiyian, SRM. The appellant was found guilty and convicted of the substantive count in a judgment delivered on 16th May 2022. He was consequently sentenced to 20 years' imprisonment, taking into account that he had served pre-sentence detention for a period of one year and 4 months.

4. Being dissatisfied with the decision of the trial court, the appellant filed this appeal on 1st August 2022 on citing the following grounds, which he referred to as Grounds of Mitigation:

   (a) That he was a first offender and was remorseful for the incident.

   (b) That he used to keep bad company and was engaged in drinking alcohol during the time of the incident.

   (c) That he is a family man married and blessed with children; and that his younger siblings are also dependent on him as their eldest brother; both parents having died.

   (d) That he will never commit such an offence again and therefore prays for forgiveness;

   (e) That if given a second chance to reunite with his family and community, he will be a law abiding citizen and will engage in awareness creation against crime.

   (f) That while doing his term in prison no disciplinary action has ever been taken against him, thus proving the extent of his reformation.

   (g) That he is now a born again Christian and has been awarded Certificates and Diplomas for theological studies undertaken while in custody.

   (h) That the Court be persuaded by the ruling of the High Court at Machakos in Petition No. E017 of 2021 dated 17th May 2022.

   (i) That the Court has discretionary powers under Section 333(2) of the Criminal Procedure Code to reduce his sentence by the period spent in remand.

   (j) That he is suffering from chest and leg pain arising from a motorcycle accident he was involved in before his incarceration.

   (k) That he is a layman, now aged 40 years, and should therefore be placed on community service order or probation for a term deemed fit by the Court.

5. In the premises, the appellant prayed that his appeal be allowed, his conviction quashed and the sentence set aside. He thereafter filed Amended Grounds of Appeal on the 7th November 2022 pursuant to Section 350(2)(v) of the Criminal Procedure Code, which Grounds were deemed duly filed and submissions invited thereon. The Amended Grounds are:

   (a) That the learned trial magistrate erred in law by failing to appreciate that the charge was defective as it did not tally with the evidence adduced.

   (b) That the learned trial magistrate erred in law by convicting and sentencing the appellant and yet failed to find that his constitutional rights to fair trial under Article 50(2)(g) and (h) were violated.

   (c) That the learned trial magistrate erred in law and in fact by failing to conduct a voire dire examination on PW1 and PW2 who were both minors.

   (d) That the learned trial magistrate erred in law and in fact by failing to appreciate that the provisions of Section 200 of the Criminal Procedure Code were not adhered to and as such the appellant suffered prejudice.

   (e) That the sentence imposed was harsh and excessive since it was applied in mandatory terms as provided for by statute without considering the appellant's mitigation or the unique facts and circumstances of the case.

6. The appeal was urged by way of written submissions, pursuant to the directions given herein on 7th November 2022. In his written submissions filed alongside his Amended Grounds of Appeal, the appellant submitted that the evidence as adduced before the lower court was at variance with the charge in so far as the prosecution witnesses conceded that he is the complainant's step-father. He therefore relied on Jason Akumu Yongo v Republic [1983] eKLR, JMA v Republic [2009] KLR 671 and Isaac Nyoro Kimita & Another v Republic [2014] eKLR in urging the Court to find that he was prejudiced by that variance and therefore was not able to put up an appropriate defence.

7. The appellant further submitted that, since both PW1 and PW2 were minors, they ought to have been subjected to a voire dire examination before their evidence was taken by the lower court. He relied on Johnson Muiruri v Republic [1983] KLR 445 on the important role voire dire plays in criminal trials, and particularly in sexual offences. He accordingly urged the Court to find that failure by the trial court to conduct voire dire examination in this matter is fatal to his conviction. The appellant further impugned the lower court proceedings on the ground that the trial court failed to inform him of his right to legal representation pursuant to Article 50(2)(g) and (h) of the Constitution. He submitted that the court is the custodian of the law and ought to ensure that the constitutional safeguards are jealously protected and upheld. In this regard, the appellant relied on Pett v Greyhound Racing Association [1968] 2 AllER 545, R 549 and Elijah Njihia Wakianda v Republic [2016] eKLR to buttress his submissions.

8. The appellant's third ground of appeal was that the trial court failed to comply with the provisions of Section 200 of the Criminal Procedure Code and pointed out that 7 witnesses had already testified when the initial trial magistrate was transferred. He therefore submitted that the succeeding magistrate ought to have expressly indicated compliance with Section 200 of the Criminal Procedure Code. In his view, what was done was an indication that he made the decision to continue but not that there was compliance on the part of the succeeding magistrate. In this regard, the appellant relied on Abdi Adan Mohamed v Republic [2017] eKLR and Ndegwa v Republic [1985] KLR 534 in urging the Court to find that his right to a fair trial was violated on account of that omission.

9. Lastly, the appellant impugned the sentence of 20 years' imprisonment imposed on him by the trial court. His submission was that, by imposing the mandatory minimum sentence of 20 years' imprisonment for the substantive count, the trial court infringed his right to fair trial, which is non-derogable under Article 25(c) of the Constitution. He also complained that whereas the lower court had in mind the provisions of Section 333 of the Criminal Procedure Code, it failed to indicate the exact date when the sentence would begin to be computed. He therefore prayed that his appeal be allowed and the sentence meted by the lower court be set aside.

10. In response to the appellant's written submissions, Mr. Sirima relied on his written submissions filed on 2nd December 2022. He set out the ingredients of the main charge of defilement to be age of the complainant, proof of penetration and positive identification of the assailant. In all these three elements, counsel submitted, cogent evidence was presented before the lower court including the complainant's Certificate of Birth and DNA test results. He pointed out that the identity of the appellant was not in issue in that, as a stepfather to the complainant, he was well known to her. Reliance was placed on Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 and Mark Oiruri Mose v Republic [2013] eKLR to back up his assertions.

11. On voire dire, Mr. Sirima took the posturing that neither PW1 nor PW2 were children of tender years to require a voire dire examination. He relied on Section 2 of the *Children Act*. And, on sentence, counsel made reference to Alex Sayalel Kantai v Republic [2021] eKLR. He was of the view that the

sentence imposed was proportionate to the crime committed by the appellant against his own step-daughter.

12. I have given careful consideration to the appeal in the light of the evidence presented before the lower court as well as the written submissions filed herein. I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon; this being a first appeal. (see Okeno vs. Republic [1972] EA 32).

13. The complainant testified that on an unknown date in August 2020, while at home alone, the appellant, who was her step father, came home and told her to sleep with him. He then got hold of her in the kitchen and took her to the bed and defiled her and cautioned her not to tell her mother about the incident. She was 15 years old as at 3rd May 2021 when she testified before the lower court. She produced her Certificate of Birth as the Prosecution's Exhibit 1. She further testified that she got pregnant as a result and eventually had talk to her mother about her situation. She was taken to hospital and tests conducted in respect of which certain reports were prepared. She identified the treatment notes (MFI2), the P3 Form (MFI 3) and the Post Rape Care (MFI 4) before the lower court.

14. The complainant's sister, JM, testified as PW2. She was 13 years old at the time she testified. She told the trial court of an incident in 2019 when she found the complainant in the bathroom with the appellant; and that the complainant was naked. She later asked the complainant what they were doing and the complainant did not answer her. She similarly did not report the incident to their mother, who testified as PW3. On her part, PW3 told the court that she was called by the head teacher of [Particulars Withheld] Primary School and informed that her daughter, PW1, was pregnant. She was in Class 8 at the time and needed to be medically examined to ascertain her condition.

15. PW3 further stated that she took the complainant for examination and it was confirmed that she was indeed pregnant. She added that initially, the complainant refused to disclose who was responsible for the pregnancy; but after her sister talked to the complainant, she revealed that she had been defiled by her step father, the appellant. She confirmed that the girl was 15 years old at the time. She consequently reported the incident to the Police and the complainant was issued with a P3 Form which was filled by a doctor and returned to the police station. The appellant was thereafter arrested and charged. She explained that they had cohabited with the appellant as husband and wife for 10 years when the incident took place.

16. PM (PW4) testified before the lower court on 6th July 2021. She stated that she was a teacher at [Particulars Withheld] Primary School; and that when schools opened on 4th January 2021, she observed some physiological signs suggesting that the complainant, who was one of the pupils in the school, was pregnant. Consequently, she called her mother and informed her of her suspicions and when they talked to the complainant together, she denied that she was pregnant. She was however agreeable to a medical examination being done. She added that the mother cooperated and took the complainant for medical examination, which confirmed that she was indeed pregnant. She later got to learn that the minor had been impregnated by her step father, the appellant; whereupon she was called to go and record her witness statement at Voi Police Station.

17. PW5, RK, confirmed that she is the complainant's aunt; and that, at the request of her sister, PW3, she invited the complainant to her home after the medical examination had confirmed her pregnancy. She questioned her as to who was responsible for her pregnancy and she revealed that her step father, the appellant had defiled and impregnated her. She accordingly informed PW3 of what she had unearthed from the complainant.

18. Dr. Ida Nshoma (PW6), a medical officer working at Moi Referral Hospital, told the lower court that she was on duty on 25th January 2021 when the complainant went to see her for purposes of examination. She was about 15 years old at the time and was suspected to be pregnant. She examined her and confirmed that she was about 22 weeks pregnant; an indication that she had been defiled. The general examination revealed that she was otherwise normal.

19. The investigating officer in the matter was PC Mercy Njoroge of Voi Police Station (PW7). She was on duty when the complainant went there in the company her mother to report a case of defilement. The minor was 15 years old and was in class 8. After recording the statements of the witnesses, she looked for and arrested the appellant and charged him with the offence of defilement.

20. The last Prosecution witness was Mwidadi Omar, a Government Analyst based in Mombasa. He testified that a request was made for a DNA test in a defilement case and that samples were taken from the suspect (marked "F") and the complainant (marked "G") as well as the baby (marked "H") and he was required to ascertain if the suspect was the father of the baby. He carried out the test and the result showed a percentage of 99.999% that the suspect was the father. He produced the DNA Report as the Prosecution's Exhibit No. 5.

21. On being placed on his defence, the appellant, in a sworn statement of defence, narrated the circumstances under which he was arrested on 26th January 2021. He added that he was never told that he had been arrested on allegations of defilement until 28th January 2021 when he was taken to court. He denied the allegations and stated that the charge is a frame up due to his differences with PW3 over family property. He explained that theirs is a blended family in that PW3 had 3 children prior to their marriage; and that they had cohabited for 10 years and had other children by the time of his arrest.

22. The appellant explained that in time they started squabbling with his wife over family property; and that at some point he had their dispute reported to the area chief for a lasting solution but even the chief's intervention did not provide the peaceful solution he was seeking. Thus, the appellant doubted the DNA results and suspected foul play on the part of PW3. His contention was that PW3 filed the complaint of defilement with the police with the sole intention of having him fixed for a crime he did not commit.

23. The appellant called Chief Abel Mwangemi (DW2) as his witness and the chief confirmed that the appellant did file a complaint in his office in 2020 against his wife, and that he was of the view that they should separate. He further stated that he summoned PW3 and they had a discussion over their marital issues. Key of the issues was a dispute over a plot they co-owned. Ultimately, DW2 told the couple that their issues were beyond him and asked them to find a solution elsewhere. As for the defilement case, DW2 confessed that he had no knowledge about it.

24. I have carefully considered the appellant's Grounds of Appeal in the light of the foregoing summary of evidence and the written submissions filed herein. For purposes of the substantive charge, with which the appellant was convicted and sentenced to 20 years' imprisonment, Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, stipulates that:

    (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    ...

    (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

25. In the premises, and as correctly pointed out by counsel for the state, the Prosecution needed to prove beyond reasonable doubt the three elements of defilement; namely:

    (a) Whether the Complainant was, at the material time, a child for purposes of Section 8(3) of the *Sexual Offences Act*;

    (b) Whether there was penetration of the complainant's genital organ;

    (c) Whether the penetration was perpetrated by the appellant.

26. In addition to satisfying myself in connection with the three elements, I propose to consider whether or not the sentence of 20 years imposed on the appellant by the lower court is excessive in the circumstances.

A. On the age of the Complainant:

27. It is now trite that the age of a minor is a critical component of a defilement charge; and that it is an element which must be proved by the Prosecution beyond reasonable doubt. In Kaingu Kasomo v Republic Criminal Appeal No. 504 of 2010 the Court of Appeal made this point thus:

> Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".

28. At to what amounts to credible evidence, Rule 4 of the Sexual Offences Rules of Court Rules provides that:

> When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

29. Needless to say therefore that, in addition to the documents set out in Rule 4 above, the age of a minor for purposes of the *Sexual Offences Act* can also be proved by the oral evidence of the minor's mother, by way of age assessment as well as by observation and common sense. Hence, in P M M v Republic [2018] eKLR, it was held thus:

> ...whilst the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant..."

30. Accordingly, the complainant testified before the lower court that she was 15 years old as of 3rd May 2021 when she testified before the lower court. Her evidence was buttressed by the Certificate of Birth (the Prosecution's Exhibit 1), which gives the complainant's date of birth as 5th December 2005. There is therefore no dispute that the minor was within the age bracket provided for in Section 8(3) of the *Sexual Offences Act*.

B. On Penetration:

31. The complainant testified that, on the date in question, she was at home alone when the appellant came home and told her to sleep with him. He then got hold of her in the kitchen and took her to the bed and defiled her. He thereafter cautioned her not to tell her mother about the incident. She further testified that she got pregnant as a result and eventually had talk to her mother about her situation.

She was taken to hospital and tests conducted in respect of which certain reports were prepared. She identified the treatment notes (MFI2), the P3 Form (MFI 3) and the Post Rape Care (MFI 4) before the lower court.

32. Regarding those tests, Dr. Ida Nshoma (PW6), testified that she examined the complainant on 25th January 2021 and confirmed that she was about 22 weeks pregnant; and therefore that she had been defiled. She produced the P3 Form she filled as Exhibit 2. She also produced the complainant's the treatment notes as exhibits. In the premises, the trial court cannot be faulted for coming to the conclusion that the complainant's pregnancy and the subsequent birth of her daughter furnished additional proof of penetration. Indeed, in Wayu Omar Dololo v Republic [2014] eKLR, the decision of the trial court that pregnancy was one aspect of proof of penetration was upheld on appeal. Here is what Hon. Mutuku, J. had to say, which I find persuasive:

> The trial magistrate took judicial notice that a pregnancy results from a sexual activity and as such found penetration proved. On my part, I have examined the evidence carefully. At the time of examination by a doctor, the complainant was heavy with child and the pregnancy was visible as observed by the trial court. Indeed, at the time of hearing the complainant said she was nine months pregnant. A pregnancy is a biological condition that results from a sexual activity unless there is evidence that there was artificial implanting of fertilized ova into the uterus of a female human being..."

33. Likewise, in Mbogo Raphael Chengo v Republic [2019] eKLR the Court of Appeal affirmed the position that the fact of pregnancy of a complainant in a defilement case is evidence that sexual intercourse had taken place and is therefore proof of penetration. I am therefore satisfied that penetration was likewise proved by the Prosecution beyond reasonable doubt.

C. On whether the penetration of the complainant was perpetrated by the appellant:

34. The uncontroverted evidence presented before the lower court was that the appellant is the complainant's step-father; and that they had lived together for about 10 years. The issue of mistaken identity is therefore out of the question. Indeed, the appellant expressly admitted in his statement of defence that the complainant is his step daughter. Then there was the evidence of PW8 who conducted a DNA test to determine the paternity of the complainant's daughter. The result showed a percentage of 99.999% that the suspect was the father. The DNA Report was produced before the lower court as the Prosecution's Exhibit No. 5.

35. It is also significant that PW2, the appellant's other step daughter once found the complainant naked in the bathroom in the presence of the appellant. I am therefore satisfied that there was credible evidence placed before the lower court connecting the appellant with the crime.

36. The appellant took issue with the main charge as laid, contending that it was defective. In his view, the evidence adduced before that lower court was at variance with the charge and that since it was alleged that the appellant was the complainant's step-father, the proper charge ought to have been incest. The offence of incest by a male is provided for in Section 20(1) of the *Sexual Offences Act*; which provides thus:

> Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece,

aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

> Provided that, if it alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

37. Hence, the question to pose is whether the omission is so grave as to vitiate the proceedings of the lower court; and my answer to that question is in the negative. Indeed, Section 382 of the Criminal Procedure Code provides that:

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

38. Moreover, Section 134 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, is explicit that:

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with particulars as may be necessary for giving reasonable information to the nature of the offence charged."

39. Accordingly, having looked at the Charge Sheet, at pages 3 and 4 of the Record of Appeal, it is clear that the Charge along with the applicable provisions of the law have been explicitly set out. It is manifest too that the particulars set out therein are in accord with the charge. Thus, in Obedi Kilonzo Kevevo vs. Republic [2015] eKLR, the Court of Appeal made it clear that:

> The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants' conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of JMA v. Republic (2009) KLR 671, it was held inter alia that:
>
> It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."

40. In the instant case, the main charge and the particulars thereof were clearly stated and the appellant well knew the charge he was facing. The record of the lower court further shows that he responded thereto effectively and defended himself to the best of his ability. I am therefore of the view that no prejudice was occasioned to the appellant in the circumstances. If anything an incest charge would have exposed him to the more severe sentence of life imprisonment. Indeed, in M K M v Republic [2018] eKLR, the accused was in a similar relationship with the victim; and was nevertheless charged and penalized under

Section 8(4) of the *Sexual Offences Act*, and the relationship treated as an aggravating factor. Here is what Hon. Ngugi, J. (as he then was) had to say on that occasion:

> Although the minimum sentence imposed under section 8(4) of the *Sexual Offences Act* is fifteen years imprisonment and the Appellant was a first offender, I have imposed a higher sentence since there is a glaring aggravating circumstance in this case: the victim literally called the Appellant her father. Although not a biological father and even though no evidence was tendered to prove that the Appellant was legally married to the victim's mother, there was enough evidence to suggest that the Appellant was in a position of loco parentis with the victim. He took advantage of that position of trust to sexually assault the victim. This calls for a higher sentence than the minimum provided for in the statute."

D. On the failure by the trial court to conduct voire dire:

41. Section 19(1) of the *Oaths and Statutory Declarations Act*, Chapter 15 of the Laws of Kenya, provides that:

> Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."

42. Accordingly, it is imperative that before the evidence of children of tender years be preceded by a *voire dire* examination to determine whether or not the child understands the meaning of oath and is possessed of sufficient intelligence to justify the reception of his/her evidence. A perusal of the record of the lower court confirms that both PW1 and PW2 were minors at the time their evidence was taken. It is also plain that no *voire dire* examination was undertaken by the trial magistrate; and therefore the question to pose is whether the omission was fatal to the prosecution case.

43. The question to pose, is whether the complainant was a child of tender years for purposes of Section 19(1) of the *Oaths and Statutory Declarations Act*. In Maripett Loonkomok v Republic [2015] eKLR, the Court of Appeal posed the question as to who is a child of tender years and held thus:

> The question therefore is, who is a child of tender years? The *Sexual Offences Act* and the *Oaths and Statutory Declarations Act* are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R,Criminal Appeal No.137 of 2014 and in Samuel Warui Karimiv R Criminal Appeal No.16 of 2014 stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination..."

44. It is manifest therefore that the key witness, namely PW1, did not require a voire dire examination at all as she was already above 14 years of age. As the evidence of PW2 was merely peripheral to the complainant's, I find no basis at all for the appellant's argument that failure by the trial court to conduct voire dire vitiates his conviction.

E. On whether the learned magistrate complied with Section 200 of the Criminal Procedure Code:

45. In his 4th Ground of Appeal, and at pages 7-9 of his written submissions, the appellant complained that the learned trial magistrate erred in law and in fact by failing to adhere to the provisions of Section 200 of the Criminal Procedure Code; and that as a result he suffered prejudice. He argued that the record only indicates that he opted to continue with the remaining witnesses but does not show that he was informed of his right to recall witnesses.

46. Section 200 of the Criminal Procedure Code provides as follows:

(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummons the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

47. Hence, in Richard Charo Mole v Republic [2010] eKLR, the Court of Appeal took the firm position that:

> Section 200 (3) (supra) requires in mandatory tone that the succeeding magistrate shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. The duty is reposed on the court and there is no requirement that an application be made by the accused person. The failure to comply with that requirement would in an appropriate case render the trial a nullity. In the case before us, we agree with both Mr. Kenyariri and Mr. Kaigai that the omission to comply with the section was grossly prejudicial to the appellant and the trial was thus vitiated."

48. The aforementioned decision was followed by the Court of Appeal in John Bell Kinengeni v Republic [2015] eKLR, in which it was held that:

> ...the duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and that failure to comply with that requirement would in an appropriate case render the trial a nullity as section 200(3) requires in a mandatory tone that the succeeding magistrate ... shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. In Cyrus Muriithi Kamau and another versus Republic Nyeri Criminal Appeal No. 87 & 88 of 2006 the Court added that the use of the words "shall inform the accused person of that right" in section 200(3) (supra) was clearly meant to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial magistrate and the burden to inform an accused person of the right to have the previous witnesses re-summoned and reheard is placed on the magistrate in mandatory terms...In the light of the above principles the learned succeeding judge's failure to inform the appellant of his rights under section 200 (3) of the Criminal Procedure Code as was mandatorily required of him vitiated the appellant's trial as well."

49. The rationale for the strict stance was well explained in Ndegwa v Republic [1985] KLR 534 thus:

1. The provisions of section 200 of the Criminal Procedure Code (Cap 75) ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.

2. The provisions of section 200 should not be invoked where the part heard trial is a short one and could be conveniently started de novo. Furthermore, it should not be invoked where witnesses are still available locally and the passage of times was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution.

3. No rule of natural justice, statutory protection, evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration.

4. The statutory and time honoured formula that the magistrate making the judgment should himself see, hear and assess and gauge the demeanour and credibility of witnesses should always be maintained.

5. A magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanour of all the witnesses."

50. It is with the foregoing in mind that I have perused the record of the lower court. It is indeed the case that although the trial commenced before Hon. Nyakundi, SRM, who took the evidence of 7 of the Prosecutions 8 witnesses, the hearing was thereafter taken over by Hon. Sinkiyian, SRM, upon the transfer of Hon. Nyakundi. The succeeding magistrate acknowledged as much in her ruling on no case to answer (at page 40 of the Record of Appeal). Accordingly, it was imperative that Section 200(3) of the Criminal Procedure Code be complied with. As to whether there was compliance, the proceedings of 18th October 2021 are pertinent. The lower court proceeded as hereunder:

> Court: Section 200(3) CPC Kiswahili

Accused: Ningependa tuendelee na walio baki

Court: Matter to proceed from where it had reached. Mention for confirmation of typing of proceedings on 1/11/2021. Typing be expedited as accused is in custody.

Signed

18/10/2021

51. It is therefore evident from the foregoing that the learned trial magistrate complied with the provisions of Section 200(3) of the Criminal Procedure Code. I am not persuaded by the appellant's argument that compliance was limited to the appellant's indication of his willingness to proceed with the remaining witnesses and had nothing to do with the magistrate discharging the duty of explaining to the appellant his right to have any of the witnesses who had testified recalled. To my mind, the appellant could not have otherwise made an election to proceed with the remaining witnesses. His complaint in this regard is therefore untenable.

F. On whether the appellant's right to fair trial under Article 50(2)(h) of *the Constitution* was violated:

52. The appellant also submitted that his right to fair trial under Article 50(2)(h) of the Constitution was violated, in that he was not informed of his rights to legal representation. I have given due consideration to his written submissions, including the case of Pett v Greyhound Racing Association (supra). I have likewise taken into account the response made by Mr. Sirima for the State. Indeed, Article 50(2)(g) and (h) of *the Constitution* stipulates that:

> Every accused person has the right to a fair trial, which includes the right:-
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> ...
>
> (g) to choose and be represented by, an advocate, and to be informed of this right promptly;
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> (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

53. A perusal of the record of the lower court shows that the on the date of plea no indication was given to show that the appellant was duly informed of his right to legal representation. Indeed, it was the constitutional duty of the trial magistrate to ensure the appellant was informed of his right to legal representation, which right is a fundamental element of the right to fair trial. It was for this reason that the appellant relied on Elijah Njihia Wakianda v Republic (supra) for the proposition that:

> "The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often-intimidating judicial process."

54. I however do not think that the failure to comply resulted in substantial injustice in this instance. In this connection, I am of the same mind as Hon. Nyakundi, J. who, in Polycarp Simon Mchore v Republic [2018] eKLR, held that:

> In this case the court has to ascertain whether broadly speaking there was a failure of justice in absence of counsel at the trial of the appellant. Reliance was placed on right to counsel ...

This court holds that in so far as the rights expressed in Article 50 2(b), (c), (d), (e), (f), (i), (j) (k) (h) of *the constitution*. The trial magistrate acted within the requirements of the law.

There is always a presumption that court processes and procedures are complex and difficult to interpret and apply. It was in light of this the drafters of *the constitution* introduced right to counsel. Article 50(g) and (h). I think what trial courts have not done is to effectively carry out an inquiry to establish whether the individual before court has the ability to conduct his or her own defence... This court takes judicial notice that there are instances where self-represented litigants in both criminal and civil proceedings are able to sieve relevant evidence, challenge the adverse party case with such vigour ... that at the end of it all no incalculable injustice or prejudice is occasioned. To me what trial courts fail to do is to enforce Article 50(g) and (h) on right to counsel by determining the following: The personal circumstances of the accused, his level of aptitude or ineptitude to navigate the trial by himself or herself, the extent to which he or she can cross-examine witnesses, peruse and appreciate both documentary and other exhibits and their materiality to the charge likewise whether he understands the rights governing right to silence and right against self-incriminating evidence. The other appropriate inquiry is whether by virtue of being served with witness statements and detailed information on what the case entails he or she possesses sufficient knowledge and understanding of the various legal aspects of the process of criminal justice...

In the instant case based on the severity of sentence the capacity of the accused to defend himself has not been impugned. Due to the determinative weight to this element evidence on his inadequacy to appreciate the rules of evidence, role of cross-examination and even more importantly the elements of the charge preferred against him by the state.

As to the merits of this ground I am satisfied that the irregularity in the court proceedings did not result in a failure of justice to render the trial unfair as canvassed by the applicant counsel.

G. On the Sentence imposed by the lower court:

55. Turning now to the sentence imposed on the appellant, his basic argument was that the sentence imposed on him was harsh and excessive. He relied on the decision of the Supreme Court in Francis Karioko Muruatetu v Republic [2017] eKLR and

56. The same stance was taken in a host of other cases before the Supreme Court stepped in with further directions as to the applicability of Muruatetu. The directions are dated 6 July 2021; and, at paragraphs 11, 12 and 14 thereof the Supreme Court stated thus:

(11) The ratio decidendi in the decision was summarized as follows;

> Consequently, we find that Section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".

(12) We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute.

...

(14) It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court."

57. It is nevertheless instructive that, in Dismas Wafula Kilwake v Republic [2019] eKLR, the Court of Appeal held: -

> ...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.
>
> The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful..."

58. Similarly, I am persuaded by the position taken by Hon. Odunga, J. (as he then was) in Yawa Nyale v Republic [2018] eKLR that:

> 43. The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in S vs. Malgas 2001 (2) SA 1222 SCA 1235 paragraph 25 as follows:
>
> "What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."
>
> 44. Therefore the provisions of a legislation that was in force before *the Constitution* of Kenya, 2010 such as the *Sexual Offences Act*. No. 3 of 2006 must be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences to not take into account the dignity of the individuals as mandated under Article 27 of *the Constitution* as appreciated in the Muruatetu Case."

59. In the premises, the sentence imposed on the appellant is lawful, taking into account the circumstances of his case, and there is no justification to interfere with it. The result therefore is that the appeal against sentence is also untenable.

60. In the result, it is my finding that this appeal is utterly devoid of merit. It is consequently dismissed in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA VIA MICROSOFT TEAMS PLATFORM THIS 30TH DAY OF JUNE 2023

OLGA SEWE

JUDGE