Emathe v Republic (Criminal Appeal E025 of 2022)
[2023] KEHC 19796 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19796 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E025 OF 2022

OA SEWE, J

JUNE 30, 2023

BETWEEN

JOSEPH NAKOLE EMATHE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence by Hon. C.L. Adisa, Resident Magistrate, dated 1st December, 2021 in Taveta Magistrate' Court Sexual Offence Case No. E019 of 2021)

JUDGMENT

1. The appellant herein, Joseph Nakole Emathe, was arraigned before the Senior Principal Magistrate's Court on 28th July 2021 in Taveta in Magistrate's Sexual Offence Case No. E019 of 2021: Republic v Joseph Nakole Emathe. He was charged with one substantive count of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the charge were that on the 26th day of July 2021 at about 1900 hours within Taveta Sub-County in Taita Taveta County, he unlawfully and intentionally caused his penis to penetrate the vagina of JKK, a girl child aged 10 years.

2. In the alternative, the appellant was charged with committing an indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act*, in that on the 26th day of July 2021 within Taveta Sub-Count in Taita Taveta County, he unlawfully and intentionally touched the vagina of JKK, a girl child aged 10 years with his penis.

3. The appellant denied those allegations. Whereupon the case was fixed for hearing and determination before Hon. C.L. Adisa, Resident Magistrate. Ultimately, the appellant was found guilty, convicted of the substantive count of defilement on 30th November 2021 and sentenced to life imprisonment.

4. Being dissatisfied with the decision of the trial court, the appellant filed this appeal on 25th April 2022 through the law firm of M/s Waziri Omollo & Co. Advocates on the following grounds:

   (a) That the learned trial magistrate erred in law and in fact in convicting the appellant based on irrelevant evidence and pure speculation.

   (b) That the learned trial magistrate failed in giving directions where the Prosecution Counsel sought to proceed under a section of the law that is totally irrelevant to the vulnerability of the witness as noted in Page 9 of the typed proceedings.

   (c) That the learned trial magistrate erred in law and in fact in over-relying on the complainant's evidence hence failed to point out the glaring disconnect in the statements meant to link the appellant to the alleged immediate act as opposed to the a alleged "habitual sex" whose verification as to the perpetrator, time and place is heavily wanting.

   (d) That the learned trial magistrate failed as an adjudicator of the process in ensuring that the main objective of conducting voir dire examination was achieved; in that the witness ought to have understood the process and the importance of telling the truth.

   (e) The learned trial magistrate erred in relying on the complainant's unsworn evidence holding that "she appeared confident and believable" and holding her as a credible witness hence completely ignoring her condition (cerebral palsy), the contradictory and discrediting evidence, inconsistencies in her statements not mentioning the probability of her being coached.

   (f) The learned trial magistrate erred in fact and in law for convicting the appellant based on ill drawn inferences and ill-founded conclusions to prove the material fact in issue which was penetration.

   (g) The learned trial magistrate erred in law and in fact in relying on circumstantial evidence of PW1 which added no probative value in proving the material facts of the alleged defilement.

   (h) The learned trial magistrate erred in law and in fact in failing to detect the carefree attitude of the mother of a special needs child, noting that on the material day the child had spent a good deal of the day with the babysitter and was thereafter left under the care of her cousins.

   (i) The learned trial magistrate erred in fact in failing to detect the manner in which the child's condition was being swayed to suit the purpose and the situation at hand to the detriment of the appellant.

   (j) The learned trial magistrate erred in law and in fact in placing reliance on oral and documentary evidence of PW3 despite the medical officer having stated clearly that upon examining the complainant she had no bruises, her external genitalia were normal and that the hymen was not freshly torn.

   (k) The learned trial magistrate misdirected herself by relying on the inconclusive evidence of PW3 who is not a specialist in the given area.

   (l) That the appellant's conviction by far outweighs the evidence tendered.

   (m) That the learned magistrate misdirected herself in finding that the Prosecution had proved its case to the required standard of beyond reasonable doubt.

(n) That the learned trial magistrate failed to pronounce herself on the crucial facts noting that save for being with the complainant on the material day, no direct evidence was adduced to link the appellant to the alleged defilement.

(o) That the learned trial magistrate failed as an impartial adjudicator and as an educator of the process by failing to accord the appellant's case equal importance.

(p) The learned trial magistrate erred in law and in fact in failing to discern that the whole charge against the appellant was a matter of pure fabrication.

5. Accordingly, the appellant prayed that the appeal be allowed, his conviction quashed and the sentence imposed on him by Hon. C.L. Adisa, RM, be set aside. He also prayed for any other or further orders that the Court may deem fair and just to grant.

6. Upon the appeal being admitted to hearing, directions were given on 8th November 2022 that it be disposed of by way of written submissions. Accordingly, Ms. Wanjiku for the appellant relied on her written submissions dated 29th November 2022. She proposed the following two main issues for determination:

(a) Whether penetration as one of the main ingredients of defilement was proved to the required standard, and

(b) Whether the appellant's trial was conducted fairly.

7. On penetration, counsel made reference to Section 2 of the *Sexual Offences Act* and the case of Mercy Chelangat v Republic [2022] eKLR to underscore her submissions that it was imperative that this ingredient be proved to the requisite standard, either through the evidence of the child as corroborated by medical evidence or the circumstances. She pointed out that the medical officer who examined the minor soon after the alleged incident did not observe any fresh bruises in her genitalia; and therefore did not provide the needed corroboration. Reference was made by Ms. Wanjiku to Woolmington v DPP [1935] AC 462 and the Nigerian case of Bakare v State [1985] 2NWLR as to the standard of proof. She accordingly urged the Court to find that the respondent's case as set out before the lower court did not satisfy the threshold to support criminal culpability in respect of the alleged offence of defilement.

8. On whether the appellant's trial was conducted fairly, counsel relied on Articles 25(c), 50(1), (2)(c) and (k) of the Constitution. She emphasized the contention that the appellant had the right to adequate time and facilities to prepare his defence as well as the right to adduce evidence in support of his defence. Ms. Wanjiku cited Andrew Nthiwa Mutuku v Court of Appeal & 3 Others [2021] eKLR and Muruatetu & Another v Republic [2017] eKLR to buttress her arguments. Counsel added that, although the appellant had intimated to the trial court that he wished to call two witnesses, he was neither accorded the opportunity to call them nor adequately educated on the procedure. Thus, counsel urged the Court to find that the appellant's right to fair trial was violated; and therefore that the conviction is untenable by reason of that very fact.

9. Further to the foregoing, Ms. Wanjiku submitted that the voir dire examination conducted by the trial court was done in futility, granted the complainant's condition. She postulated that a medical report ought to have been obtained beforehand on the complainant's mental capability and her ability to comprehend the circumstances surrounding the alleged offence. She surmised that there is a high probability that the complainant was coached to provide fabricated evidence against the appellant. Moreover, Ms. Wanjiku was of the posturing that the learned magistrate over-relied on the evidence of the complainant in spite of the inconsistencies and contradictions therein.

10. As for the sentence imposed by the lower court on the appellant, counsel submitted that the Court has wide and unfettered discretion to allow the appeal and set aside the sentence imposed on the appellant. She made reference to Nephat Kinyua Kathiomi v Republic [2021] eKLR as highlighted in the case of Bernard Kimani Gacheru v Republic [2002] eKLR for the proposition that sentence is a matter that rests entirely in the discretion of the trial court and that an appellate court will not easily interfere with the sentence unless the sentence is manifestly excessive in the circumstances; or where the trial court overlooked some material factor, or acted on a wrong principle. Thus, Ms. Wanjiku urged the Court to allow the appeal and set aside the sentence meted on him by the lower court.

11. Mr. Sirima, learned counsel for the State, relied on his written submissions dated 30th November 2022 which he filed herein on 2nd December 2022. He made reference to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* for the essential elements of the offence of defilement, namely, age of the complainant, proof of penetration and positive identification of the assailant. He accordingly urged the Court to find that all these elements were proved beyond reasonable doubt before the lower court. He relied on Section 2(1) of the *Sexual Offences Act* for the definition of penetration and the cases of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 and Mark Oiruri Mose v Republic [2013. eKLR for the proposition that penetration need not be full insertion of the offender's genital organ into the genital organ of the victim. Counsel urged the Court to find that, in this regard, the evidence of the minor was duly corroborated by the evidence of her mother and the medical officer.

12. On identification, Mr. Sirima pointed out that the appellant is the complainant's cousin, and that, in her evidence the complainant referred to him as her brother, and was therefore he is well known to her. Counsel further pointed out that, in her evidence, the complainant pointed out that this was not the first time the appellant had defiled her. He also urged the Court to note that the complainant's mother caught the appellant flagrante delicto; and therefore that there was credible evidence to connect the appellant with the crime.

13. In response to the submissions by Ms. Wanjiku that the appellant was not accorded a fair hearing, Mr. Sirima made reference to page 4 of the proceedings of the trial court to demonstrate that his age was ascertained beforehand to ensure his rights as a youth were protected. He however submitted that it was upon the appellant to give the indication that he was indigent and therefore in need of legal representation at state expense. Mr. Sirima urged the Court to find, from the record of proceedings that the appellant actively participate in the trial and was given ample opportunity to cross-examine witnesses and to avail witnesses in support of his defence.

14. Mr. Sirima relied on case of Kimanzi Mwanzia v Republic [2021] eKLR, in which Hon. Nyakundi, J. held that the right under Article 50(2)(h) of the Constitution is not absolute but is dependent on the accused showing that substantial injustice would be occasioned if legal representation was not provided for at the States expense. In the same vein, counsel submitted that Section 31 of the *Sexual Offences Act* was duly complied with and PW1 allowed to act as the intermediary for the complainant granted that she was a vulnerable child. He made reference to Salim Said Mkoseko v Republic [2020] eKLR on the role of an intermediary and Alex Sayalel Kantai v Republic [2021] eKLR to back up his submission that the sentence was merited in the circumstances.

15. I have given careful consideration to the appellant's Grounds of Appeal as well as the written submissions filed by and on behalf of the appellant and the respondent, which were highlighted on 15th February 2023. 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, but bearing in mind that I did not have the benefit of seeing and hearing the witnesses as did the lower court. (see Okeno v Republic [1972] EA 32).

16. Accordingly, a perusal of the record of the lower court shows that the Prosecution called 4 witnesses. The complainant's mother testified as PW1. She told the lower court that on the 26th July 2021 she left the complainant with the appellant at her sister's house and went to her house a block away. When she went back to her sister's house after about 30 minutes, she found the complainant's shoes at the door; that she came from one of the rooms in the house with teary eyes and her dress was above the knee and she was struggling to wear her tights. She entered that room from where the complainant had emerged and found the appellant, who is her nephew, trying to dress. She pointed out that he was in a light inner garment and she could see his erect manhood. She confronted him and asked him what he had done but the appellant denied doing anything.

17. PW1 further told the lower court that she questioned the complainant and got to learn from her that the appellant had defiled her and that this was not the first time. PW1 informed her sister about the incident and together they reported the matter to the police for appropriate action.

18. The minor testified as PW2 and told the lower court that the appellant "...did bad manners..." to her and that he removed his "dudu" and inserted in her with reference to her vagina. She further told the lower court that this was not the first time.

19. PW3 was George Ombayo, a clinical officer at Taveta Sub-County hospital. His testimony was that the complainant, JK, a 10-year-old minor visited their facility in the company of her mother and that she complained of having been defiled. He further testified that the minor lives with cerebral palsy and was in general fair condition. On examining her he noted that her hymen was missing. A high vaginal swab was conducted which showed epithelial cells. She was accordingly put on appropriate treatment. PW3 produced the P3 Form that he filled in respect of the complainant as an exhibit before the lower court.

20. PW4 was PC Ann Kimani of Taveta Police Station. She was on duty on 27th July 2021 when a case of defilement was reported at their station. She escorted the minor to hospital for examination and for completion of the P3 Form. He later arrested the appellant and charged him accordingly.

21. In his sworn statement of defence, the appellant stated that the was 18 years old at the time. He confirmed that the complainant visited their home in the company of her mother on the evening of 26th July 2021; and that she remained behind to assist in washing the dishes. He however denied the allegations of defilement. According to him he went to his mother's bedroom to get the complainant's sweater for her when her mother returned to pick her up. He further confirmed that he was arrested the following day on allegations of having defiled the complainant.

22. In the premises, the issues for that arise for determination in this appeal are: -

    (a) Whether penetration, an element of defilement was established beyond reasonable doubt by the prosecution.

    (b) Whether the sentence of life imprisonment imposed was both harsh and excessive.

    (c) Whether the appellant's fair trial rights were violated by the lower court.

A. On whether penetration was proved to the requisite standard:

23. Penetration is defined under section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another person. As an important ingredient of the offence, it must be proved beyond reasonable doubt. This is either through the evidence of the victim, corroborated by medical evidence or in other circumstances, through the sole evidence of a victim as provided for under Section 124 of the *Evidence Act*, Cap 80 of the Laws of Kenya.

24. In the case of Bassita v Uganda S.C. Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda had the following to say in respect of proving penetration:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable, it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

25. In the instant matter, the appellant's main contention was that penetration was nor proved beyond reasonable doubt. I have looked at the decision of the trial court and noted that the trial court was cognizant of the provision of Section 124 of the *Evidence Act* which allows the court to solely rely on the evidence of a victim as sufficient proof in sexual offences cases. The trial court correctly indicated that PW2 was the key witness; and that she had narrated that she had been defiled and that this was not the first such incident. She explained that, on this particular occasion, the court the accused undressed her and took his "dudu" and inserted it in her vagina. The trial court observed that PW2 would point to her vagina while describing the defilement.

26. In addition to the evidence of PW2, the lower court analyzed and relied on the evidence of PW1 and PW3. In particular, the trial court found that credible the evidence of PW1 that on entering her sister's house, she met the complainant trying to pull up her tights; and that she was teary-eyed. She confronted the appellant and noted that he only had his innerwear on and that his manhood was still erect. As the appellant's aunt, PW1 had no reason to tell lies in respect of such a serious allegations. She added that she immediately informed the appellant's mother about the matter and that she accompanied her to the police station to file the complaint. That goes to show that indeed the evidence of PW1 was credible.

27. In addition to the evidence of PW1 and PW3, the prosecution called the clinical officer who examined and treated the complainant soon after the incident. He testified that the complainant's hymen was missing and that this was not a recent occurrence; and that yeast and epithelial cells were noted from the analysis carried out on test samples obtained from the complainant. Thus, from his observations, the minor had been defiled. It was therefore significant that the complainant had revealed that this was not the first time for the appellant to defile her. It is therefore not correct to say, as did Ms. Wanjiku that the evidence of PW2 was uncorroborated and therefore worthless. In Kassim Ali v Republic [2006] eKLR, the Court of Appeal pointed out that:

> " ...It is apparent that the trial magistrate, with respect, misdirected herself on the law on corroboration in sexual offences and the nature of such corroboration. It is clear that the appellant was acquitted of the charge of rape solely on the ground that the evidence of the complainant required corroboration as a matter of law.
>
> The correct legal position is stated in the case of Chila v. Republic [1967] E.A 722 at page 723 para C:
>
> "The Judge should warn ... himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice."

Moreover, as the superior court correctly held, the commission of a sexual offence can be properly corroborated by circumstantial evidence (see Ongweya v. Republic [1964] EA 129).

So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence..."

28. I note that Ms. Wanjiku discredited the evidence of PW3 contending that he was not qualified to examine and fill the complainant's P3 Form. However, it is now settled that a clinical officer is a practitioner in his/her own field; and therefore is sufficiently competent in terms of conducting examinations and filling P3 Forms in cases where they happen to treat the patients concerned on their initial call. In Fappyton Mutuku Ngui vs. Republic [2014] eKLR, for instance, the Court of Appeal held that:

> " We do not think much turns on the appellant's complaint that PW5 was not competent to fill in a P3 form under Section 48 of the *Evidence Act*. PW5 is a clinical officer who testified on behalf of his colleague, Alfred Toronke who examined and treated PW2 at Matuu District Hospital. In our opinion a clinical officer is qualified to fill in a P3 form. This is an area of his competence.

29. Likewise, in Raphael Kavoi Kiilu vs. Republic [2010] eKLR, the Court of Appeal was of the view that:

> The challenge touching on the clinical officer's qualification is in our view taken care of by a scrutiny of the Act governing the affairs of clinical officers bearing in mind that the appellant did not lay any factual basis for his allegation in the first place. Under section 2 of the Clinical Offences Act (Training, Registration and Licensing Act Cap 260 (LoK) a clinical officer means:-
>
> " a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act. ....."
>
> Section 7(4) of the Act states:-
>
> " A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette."
>
> The Act goes further to provide that such officers may engage in private practice "in the practice of medicine, dentistry or health work for a fee." It follows that the clinical officer did testify in this case on his area of competence.
>
> We have examined the provisions of *Sexual Offences Act*. There is no such requirement that a P3 form must be produced only by a medical doctor."

30. Accordingly, in Mark Wanjala Wanyama vs. Republic [2008] eKLR, the Court of Appeal raised the poignant concern that:

> " If the evidence of the clinical officers were to be declared inadmissible in law, then we are at a loss as to how many such cases of rape, and assault, would see justice done to them in Kenya? We say so because we take judicial notice of the fact that in Kenya, very few medical facilities are manned by qualified doctors. We do not see any merit in that ground."

31. In the premises, I find no merit in the appellant's attempt to discredit the medical evidence adduced by PW3. In my view, PW3 gave credible evidence that was given its proper weight by the trial magistrate. That evidence, taken together with the evidence of PW1 and PW2 confirms that the complainant was subjected to penetration of her genital organ for purposes of Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. I therefore find no reason to fault the finding of the trial court that penetration had been proved beyond a reasonable doubt.

B. On whether the sentence of life imprisonment imposed by the lower court was harsh or excessive:

32. In the guideline judgment of the Court of Appeal in Bernard Kimani Gacheru v Republic [2002] eKLR it was held thus:

> "...It is now settled law, following several authorities by the court and by the High Court, that sentence is a matter that is in the discretion of the trial court.
>
> Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist..."

33. In the case before the trial court, the appellant was charged under Section 8(1) as read with section 8(2) of the *Sexual Offences Act*, which provides that:

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

34. With the foregoing in mind, I have perused the record of the proceedings of the lower court; particularly the proceedings of 1st December 2021 when the appellant was sentenced. The lower court proceeded on the basis that the sentence prescribed for the offence is the mandatory minimum sentence and imposed life imprisonment on that basis. That was an error, coming as it did after the decision of the Court of Appeal in Dismas Wafula Kilwake v Republic [2019] eKLR, in which it was 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..."

35. Similarly, I am persuaded by the position taken by Hon. Odunga, J. (as he then was) in Yawa Nyale v Republic (supra) 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:
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> > " 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."

36. It is now trite that life imprisonment is lawful and is to be treated as the maxim sentence under Section 8(2) of the *Sexual Offences Act*. It is equally trite now that a trial court has room to exercise discretion on sentencing and that in appropriate cases it can impose the sentence of life imprisonment if warranted. While there may be need for certainty as to what amounts to life sentence, I subscribe to the view that that such certainty can only be furnished by way of legislative intervention. Indeed, in the Muruatetu Case, the Supreme Court expressed itself on the matter and had the following observations to make:

> (87) In the United Kingdom, the Criminal Justice Act, 2003 provides for guidelines for sentencing those serving different categories of life imprisonment. It is noteworthy that the Act has not scrapped the whole life sentence and it is only handed down to those who have committed heinous crimes.
>
> (88) Unlike some of the cases mentioned above, the life imprisonment sentence has not been defined under Kenyan law (see the Kenya Judiciary Sentencing Guidelines, 2016 at paragraph 23.10, page 51). It is assumed that the life sentence means the number of years of the prisoner's natural life, in that it ceases upon his or her death.

(89) In order to determine whether this Court can fix a definite number of years to constitute a life sentence, we first turn to the provisions on the rights of detained persons as enshrined under Article 51 of *the Constitution*, which reads:

> "51.
>
> (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.
>
> (3) Parliament shall enact legislation that—
>
> (a) provides for the humane treatment of persons detained, held in custody or imprisoned; and
>
> (b) takes into account the relevant international human rights instruments."

[90] It is clear from this provision that it is the Legislature, and not the Judiciary, that is tasked with providing a legal framework for the rights and treatment of convicted persons. This premise was also attested to by the High Court in the case of Jackson Maina Wangui & Another v. Republic Criminal No. 35 of 2012; [2014] eKLR (Jackson Wangui), where the Court held at paragraph 72 and 76 that—

> "As submitted by the petitioner, however, what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life sentence; whether one's natural life or a term of years. In our view, that is also the province of the legislature.
>
> 76. .... As to what amounts to life imprisonment, that is a matter for the legislative branch of government. It is not for the courts to determine for the people what should be a sufficient term of years for a person who has committed an offence that society finds reprehensible to serve."

37. The appellant submitted that at the time of his conviction and sentence, he was a Form 2 student at Soweto Secondary School in Taveta and he was seventeen (17) years old and he tried to inform the court of his age but the same was ignored by the trial court. It was further contended that that the appellant's mother had sworn an affidavit to the effect that at the time of the issuance of his birth certificate it had a typographical error and that his mother was denied an opportunity to present this fact to the court. I have looked at the proceedings and I have not seen any such affidavit. What is on record is a copy of

the appellant's birth certificate; which was rightfully taken into consideration by the trial court. It is evident therefrom that the appellant was born on the 7th December, 2000 and was therefore twenty (20) years old at the time when he committed the crime. Taking into consideration that the victim was a special needs child aged 10 years, I find no reason to interfere with the sentence imposed on the appellant by the lower court.

C. Whether the trial against the Appellant was conducted fairly:

38. the Appellant has alleged that his rights under Article 50(2) (c) and (k) of the Constitution were violated as he was not given an opportunity to call his witnesses nor was, he adequately educated on the procedure noting that he was unrepresented by legal counsel. He relied on Francis Karioko Muruatetu & another v Republic [2017] eKLR and Andrew Nthiwa Mutuku v Court of Appeal & 3 others [2021] eKLR. He contended further that he was not given adequate time to defend himself.

39. Article 50(2)(c) of *the Constitution* provides that an accused has the right to have adequate time and facilities to prepare his defence; while Article 50(2)(k) guarantees an accused's right to adduce and challenge evidence. I have perused the trial court's record and seen that on 29th July, 2021 the trial court directed that the accused be supplied with the charge sheet and witness statements which the state indicated had already been supplied. The record further shows that the accused confirmed that he had received the documents.

40. The record also shows that the appellant was given adequate time to defend himself. Other than being furnished with the charge sheet and witness statements a day before his plea was taken, the court listened to his application for adjournment on 6th September 2021 when he said he was not ready to proceed and needed to retain an advocate to act for him. He was likewise released on bond upon satisfying the conditions for such release and was therefore afforded the opportunity to instruct and liaise more closely with his advocate. The record also shows that when the matter thereafter came for hearing on 29th September 2021, the lower court ascertained that the appellant was ready to proceed and a record thereof made. The same was the case on the subsequent hearing dates.

41. A perusal of the record also shows that, although the appellant indicated that he would call two (2) witnesses, and was allowed time from 1st November 2021 to prepare and make his defence and call the witnesses, he later indicated that he did not have any witnesses to call and closed his case. I am therefore satisfied that indeed the appellant was given adequate time and facilities to prepare his defence and to adduce evidence to challenge the prosecution case. In the circumstances, the assertion that his rights under Article 50(2)(c) and (k) were breached is untenable.

42. Lastly, the appellant submitted that the objectives of the voir dire examination conducted on the victim were not achieved as it was only conducted to determine the intelligence of the child as opposed to establishing whether she understood the importance of telling the truth. It was further the submission of counsel that the victim's mental incapacity was ignored and thus minor's evidence was erroneously admitted. In this regard, the record of the lower court shows that before PW2, gave her testimony, the Prosecution Counsel informed the court that she was a vulnerable witness and indicated that they wished to proceed under Section 31 of the *Sexual Offences Act*. In addition, the minor's mother, PW1, also told the court that although she was a special needs child, her memory was okay. To prove that, PW1 indicated that PW2 was attending a Timbila Primary School, a special needs school.

43. Section 31 (1) and (2) of the *Sexual Offences Act* provides: -

Vulnerable witnesses

(1) A court, in criminal proceedings involving alleged the commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is

(a) the alleged victim in the proceedings pending before the court;

(b) a child; or

(c) a person with mental disabilities.

(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of -

(a) age;

(b) intellectual, psychological or physical impairment;

(c) trauma;

(d) cultural differences;

(e) the possibility of intimidation;

(f) race;

(g) religion;

(h) language;

(i) the relationship of the witness to any party to the proceedings;

(j) the nature of the subject matter of the evidence; or

(k) any other factor the court considers relevant.

44. In this case, the complainant's vulnerability was declared before the voir dire examination was conducted. It is noteworthy that 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."

45. Accordingly, it is imperative that before the evidence of a child of tender years, such as the complainant herein is taken, the same be preceded by a voir dire examination to determine whether or not the child understands the meaning of oath and the duty of speaking the truth; and whether the child is possessed of sufficient intelligence to justify the reception of his/her evidence. In this instance the trial court observed that the child was intelligent enough to testify without an intermediary, but could not

comprehend the meaning of an oath. The minor was thus allowed to give unsworn evidence and was duly cross-examined by the appellant. It is, therefore, my finding that the voir dire was properly done and the right conclusion drawn therefrom by the learned trial magistrate, in the circumstances.

46. In the result, the appeal herein lacks merit and is, therefore, hereby dismissed in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH JUNE 2023

OLGA SEWE

JUDGE