ESM v Republic (Criminal Appeal E016 of 2021)
[2023] KEHC 21473 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21473 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E016 OF 2021

FR OLEL, J

JULY 31, 2023

BETWEEN

ESM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant herein was charged with the offence of rape contrary to Section 3(1)(a)(b)(3) of the *Sexual Offences Act* no. 3 of 2006. The particulars were that on the May 28, 2017 in Naivasha Sub county within Nakuru county, intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ namely vagina of ABO without her consent.

2. In the alternative charge, the appellant was charged with the offence of indecent act with an adult contrary to section 11A of the *Sexual Offences Act* no 3 of 2016. The particulars of the offence were that on the May 28, 2017 in Naivasha sub county within Nakuru County, intentionally and unlawfully did cause his genital organ namely penis to come into contact with the genital organ namely vaginal of ABO without her consent.

3. During trial five (5) prosecution witness testified and the appellant was placed on his defence. He gave unsworn testimony and did not call any witness. The trial magistrate considered all the evidence tendered and convicted the appellant. The court further scheduled sentencing on a different date and considered the pre-sentence report placed before court, the appellant's mitigation and proceeded to sentence the appellant to serve twenty (20) years imprisonment which conviction and sentence has given rise to this appeal.

Brief Facts

4. PW1 ABO stated that currently she was residing in Nairobi but previously worked as a beautician in Naivasha. While at Naivasha she was to live with her uncle at the police lines but he was away and had

travelled to Mombasa. She decided to go to the appellant (who was her cousin) and requested him if he could spend a night at his house. A request the appellant acceded to. PW1 further testified that at the material time she was two months pregnant. The appellant carried her on his motor bike and went towards AIC church. He told her that he had moved houses. After a while he stopped by the road side and told PW1 that he wanted to have sex with her. PW1 refused and started to ran away but the appellant ran after her caught up with her and slapped her before ordering her to lie down. He removed his trouser and forced himself on her.

5. PW1 further testified that she tried to scream but the appellant covered her mouth and told her not to scream. She eventually gathered some strength and pushed the appellant off her and ran as fast as she could. She managed to stop a motor bike rider who stopped and helped her. The good Samaritan gave her some milk and they took her back to the scene where they found her 'panty'. PW1 called her aunty who advised her to report to the police. She did so and was taken to Naivasha District hospital and issued with a P3 and PRC form. Later PW1 and her uncle lead the police to where the appellant was and he was arrested.

6. In cross examination Pw1 stated that initially she was to go and stay with the uncle but he was way and had travelled. The appellate had told her that he was using a shortcut when he went off the road and while he was undressing, she could not run as he held her captive. Further, the appellant covered he mouth and prevented her from screaming. Eventually, PW1 managed to push him off and ran away. Previously she had slept at the appellants house before she moved out to rent her own house. She did not have any grudge against the appellant. In re-examination PW1 clarified that she had stayed at the appellant's house when he lived with his family and reiterated that she did not bear any grudge as against the appellant.

7. PW2 SW stated that he was a boda boda rider staying at Nyondia Naivasha. On May 28, 2017 at about 7.30pm he was carrying three people from Nyondia towards Naivasha town. He saw a girl desperately trying to stop the motor cycle. Initially he was apprehensive but decided to stop. The girl (PW1) quickly grabbed him and informed him that she had just been raped. She then led them to a bushy area where they recovered her panty. PW2 clarified that he was with two (2) passengers. He lent PW1 his phone and she called her friend who came and picked her up. PW2 clarified that he never saw anybody at the scene and when PW1 stopped him, she was in panic mode and was panting. He two bags were in the bush, but he never saw the rapist.

8. PW3 Jane Wambui Njoroge stated that she was a clinical officer attached to Naivasha District Hospital. On May 25, 2017, her colleague Mr. S Mosa medically examined PW1 who had a history of being raped by her cousin. The said cousin took her to the forest and raped her. On examination she had soft tissues injuries on the left of the neck about 2 cm. The hymen was broken and she had whitish discharge but no spermatozoa was detected. The features were consisted with rape, though as at then PW1 was two months pregnant.

9. PW3 further stated that the PRC form was also filled on May 28, 2017 as soon as PW1 was attended to at 9.17pm. The incident had taken place 2 hours earlier. PW1 had informed the medical personnel than she knew the perpetrator well since they were cousins. The details in the PRC form were consistent with entries made in the P3 form. It was also noted that no condoms were used. Pw3 stated that she was familiar with the handwriting of her colleagues Mr S Mosa and Mr Andrew Rotich and was allowed to produce both medical documents as exhibits 1 & 2.

10. In cross examination, PW3 confirmed that no condom was used and vaginal swab did not detect any spermatozoa. The cells detected were normal. PW1 came to the hospital 3 hours after the incident occurred and medical examination revealed that she was 7 weeks pregnant. PW1 was a sexually active

person. The appellant though was not examined, PW1 had a scratch wound on her neck and it was possible that a situation could arise where a perpetrator penetrated the complainant without ejaculation occurring. There was no consensual sex which occurred between PW1 and the appellant.

11. PW4 Emily Okworo stated that she was a government analyst and held a master degree in Chemistry from University of Nairobi. She had been working with the Government Analyst department since 2012. Her duties included receiving exhibits submitted by investigating officers, analyse samples and prepare reports. On June 6, 2017 she received sample from PC Victoria Mwikali of Naivasha police station to examine exhibits and to ascertain the presence or absence of biological evidential matters. The items received were;

    a. White underpants with red lace and ribbon in a khaki envelope

    b. Blood sample from AB O

    c. High swab in a khaki envelope

    d. Blood sample from ESM

12. PW4 testified that she analysed the samples and her findings were that the underpants had semen stains. High vaginal swab had neither semen nor profile and she generated DNA profile from the underpants and blood sample. The same were tabulated and the conclusion were that the sperm matched the blood sample of ESM with a probability of $1.117x10^{18}$. The epithermal fraction also generated a DNA profile which matched that of A with the same probability. PW4 produced her report as exhibit 3.

13. In cross examination PW4 stated that she received the exhibits from the police who indicated that that the blood samples were taken at the hospital, after which the vacutainers of blood are labelled. She used these and cross checked with the names on the exhibit memo and the tests were conducted procedurally.

14. PW5 CPL Albert Otuka stated that he has attached to traffic headquarters but previously worked at Naivasha police station gender desk. He investigated this case with IP Mwikali who was at Kiganjo. On May 29, 2017, he reported on duty and noted a complaint of rape had been reported by one C O. She reported that her cousin had been raped on May 28, 2017 at around 7.30pm in a forest at Manda area near prisons Naivasha. PW5 met PW1 on the said May 29, 2017 and she narrated to him what transpired on May 28, 2017 and how the appellant had forced himself on her and proceeded to rape her. PW1 was subsequently referred to Naivasha District hospital where she was treated and the P3 and PRC filled.

15. PW5 arrested the appellant who was also examined and both his blood and urine samples were taken together with other exhibits were forwarded to the government analyst. PW5 proceeded to produce the exhibit memo form, and the white panty recovered from the scene. He identified the appellant as the person they arrested.

16. In cross examination PW5 stated that he had been a police officer from 1990 and investigated this case together with inspector Mwikali. He confirmed that he is the one who filled that exhibits memo form forwarding the exhibits and that there were no discrepancies. Further the appellant's blood and urine sample were taken though there was no court order for the same. PW5 also confirmed that the complainant and the appellant were cousins. In re-examination PW5 confirmed that they took samples (blood and urine) from the appellant while they were investigating the case and he did not have any grudge as against the appellant.

17. The appellant did apply to cross examine PW4, Emily Okwero who was recalled for cross examination. She stated that all the details which the appellant sought to know were indicated in the exhibit memo

form and she was aware of the procedure from collecting DNA samples. They had carried out an independent evaluation and arrived at their conclusion. In re-examination PW4 affirmed that they received the underpants from the investigating officer and conducted tests on the same underpants. She clarified that they did not fill in the exhibits memo form but only conducted the analysis.

18. The trial court placed the appellant on his defence and he opted to give unsworn evidence. The appellant denied ever meeting the complainant (PW1). He was arrested on May 30, 2017 in Naivasha town and were not informed of the reason of arrest. Later he was told he had been arrested to answer the charge of rape. The appellant further denied being taken to hospital and stated that no samples were taken from him. He further denied being with PW1 on May 28, 2017.

19. In his considered judgment the trial magistrate did find that the prosecution had proved their case beyond reasonable doubt and convicted the appellant. The trial magistrate called for a pre-sentence report and it was noted that the appellant had been convicted in Naivasha S.O no.37 of 2017 and was serving a term of ten (10) years imprisonment. The appellant pleaded for leniency, but taking into account the prevalence of this type of offences and the fact that the appellant was not a 1st offender the trial magistrate melted out a stiff deterrent sentence upon the appellant and sentenced him to serve twenty (20) years imprisonment.

20. The appellant did file his petition of appeal and raised eight (8) grounds of appeal namely that;

    a. That the trial magistrate erred in law and fact by convicting the appellant but failed to note that the ingredient for the offence was not proved.

    b. That the learned magistrate erred in law and fact by convicting the appellant yet he failed to appreciate that there was no proper medical evidence linking the appellant to the commission of the offence.

    c. That the learned trial magistrate erred in law and fact by convicting the appellant yet he failed to find that his defence was cogent and believable

    d. That the learned trial magistrate erred in law and fact by convicting the appellant yet he failed to find that the prosecution did not discharge the burn of proof.

    e. That the learned trial magistrate erred in law a fact by convicting and sentencing the appellant without putting into consideration the appellant's mitigation thus imposing the maximum sentence which was harsh and excessive, and not informed by the unique facts and circumstance of the offence.

    f. That I pray to be supplied with copy of the original trial court's proceedings and the judgement.

    g. That further grounds be adduced at the hearing of this appeal.

    h. That I wish to be present during hearing and determination of this appeal.

21. The Respondent did file grounds of opposition in their opposition to this appeal and stated that the offence the appellant was charged with was sufficiently proven and that this appeal was devoid of merit, misconceive and was fit for dismissal.

Appellant's Submissions

22. The appellant did file his submission on December 18, 2022 and submitted that the prosecution failed to prove the Rape charges due to the fact that the element thereof as defined under Section 3(1) (c) (6) (3) were not established. In particular the prosecution failed to prove that there was no consent, and

this could be deduced from PW1's conduct as she severally sought to withdraw this case and told court that in doing so she was not induced or threatened.

23. The appellant further submitted that, PW1 and PW3 evidence did not clearly show that penetration occurred. PW1 was a single witness and her evidence ought to have been taken with caution, In absence of further evidence and details as to what actually occurred and also considering that the medical evidence tendered was not sufficient to corroborate the evidence of PW1.The trial court further erred in admitting the P3 form and PRC form, without complying with provisions of Section 77 of the *Evidence Act*, which require the appellant to be informed of his right to require the maker of the said document/report to be called for cross examination as this did prejudice the appellant. Reliance was placed on *Joseph Kioko Kivuva -vs- Republic* [2015] eKLR and *Remmy Wanyonyi Wanjoki -vs- Republic* [2020] eKLR.

24. The appellant further faulted the trial magistrate for failing to consider his evidence tendered in defence, where he testified that on May 28, 2017, he never met PW1 and therefore could not have raped her. The prosecution had failed to prove that he was the culprit who raped PW1 and that burden could not be passed on to him. Reliance was placed on Victor Mwendwa Mulinge -vs- Republic.

25. The final issue raised by appellant was that the sentence meted out was extremely harsh as the mandatory minimum sentence was ten (10) years. It was an error for the magistrate to melt out a punitive sentence, yet PW1 was 24 years and had already reconciled with him.

    PW1 was an adult who had capacity to continue to propose termination of the case and forgive the appellant. The trial court ought to have considered this "Reconciliation aspect" and be guided by provisions of Section 216 and 329 of the *Criminal Procedure Act*. Reliance was placed on *Victor Cheruiyot Alias Kibenjili -vs- Republic* [2019] eKLR, *John Muthoka Ndolo* [2022] eKLR, A*lex Kwassi –vs- Republic and Chemegong -vs- Republic*.

26. The final issue raised by the appellant was that the trial magistrate erred in failing to apply provisions of Section 333 (2) of the *Criminal Procedure Code* and to find that he was arrested on May 30, 2017 and spent 4 years and 3 months in remand. This period ought to have been considered and/or factored in while sentencing him to enable him benefit from the same.

27. The appellant urged this court to find that this appeal has merit and set aside the judgement delivered on April 17, 2021 by Hon. K. Bidali (P.M.) as it was not based on sound evidence.

Respondent's Submissions

28. The Respondent did file their submissions on December 13, 2022 and urged this court to uphold both the conviction and sentence as passed. They submitted that it was sufficiently proved that it was the appellant who committed the heinous act of Rape. PW1 knew the appellant, being her cousin. Her evidence was corroborated by PW2 who confirmed finding PW1 at the scene of the incident while in distress and PW3 and PW4 who produced the medical evidence and DNA evidence that conclusively nailed the appellant as the culprit.

29. On the second issue of identification, the same was proper and strengthened by the fact that appellant was well known to PW1. PW4 the Government Analyst also produced the Government Report (DNA Analysis) which corroborated the evidence of PW1. The final issue to be proved was 'lack of consent". PW1 testified that the appellant attacked her, slapped her and had sex with her without her consent.

30. Finally, on sentence the Respondent submitted that the 20 years imprisonment was proper given that the appellant had been convicted and was serving 10 years imprisonment for another sexual offence

handed down to him in Sexual Offence No. 35 of 2017. The sentence was thus in accordance with the law and this court was urged to consider enhancing the said sentence.

31. The Respondent urged this court to uphold the conviction and sentence and proceed to dismiss this Appeal.

Analysis and Determination

32. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See *Okeno-Vrs- Republic* (1972)EA 32 & *Pandya Vs. Republic* (1975) EA 366.

33. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala-Vrs-R* (1975) EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings should be supported in doing so, it should make allowance for the fact that the trial Court has made the advantage of hearing and seeing the witnesses.

34. In the case of *Republic Vs Edward Kirui* (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of *Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another* (2008) INSC 1688 where the case of *Bhagwan Singh Vs State of M. P.* (2002)4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

35. The appellant filed Eight (8) grounds of Appeal, which could be summarised into two issues for determination ;

    a. Whether the burden of proof was properly discharged by the prosecution.

    b. Whether the sentence melted out was harsh and excessive and whether the trial magistrate erred by failing to put into consideration the appellants mitigation as to the unique facts and circumstances of the case.

A. Burden of Proof

36. It is trite law that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller vs. Ministry of Pensions* (1947) 2 All ER, 372 stated as follows;

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is

possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

37. The conceptual framework for burden of proof to be discharged by the prosecutor is beyond reasonable doubt. Viscount Sankey LC in the case of *H.L Woolmington Vs DPP* {1935} A.C. 462 pp 481 did describe burden of proof in criminal matters as;

> " Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilt subject to what I have already said as to the defendant's insanity and subject also to any statutory exception. If at the end and on the whole of the case, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether {the offence was committed by him} the prosecution has not made out the case and the prisoner is entitled to be acquittal. No matter what the charge or where the trial, the principal that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

38. Under section 3(1) of the *sexual offences Act* No 3 of 2006,

> " A person commits the offence of rape if;-
>
> a. He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs
>
> b. The other person does not consent to the penetration; or
>
> c. The consent is obtained by force or by means of threats or intimidation of any kind."

39. The ingredients of the offence of rape includes intentional and unlawful penetration of the genital of one person by another, coupled with absence of consent. In *Republic Vs Oyier* {1985} KLR pg. 353 the court of Appeal held that;

a. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not state of mind. The mental element is to have intercourse without consent or not caring whether the woman has consented or not.

b. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.

c. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the facts."

40. Section 3{1} of the *sexual offences Act* should be read jointly with sections 42 and 43{1} of the same act, which sections provide that;

> 42 For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.
>
> 43(1) An act is intentional and unlawful if it is committed;
>
> a. In any coercive circumstances;

b. Under false pretence or by fraudulent means; or

c. In respect of a person who is incapable of appreciating the nature of an act which causes the offence.

(2) The coercive circumstance's, referred to in sub section (1)(a) include any circumstances where there is-

(a) use of force against the complainant or another person or against the property of the complainant or that of any other person;

(b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person;

41. PW1 testified that the appellant was her cousin and was he person she knew quite well. On May 28, 2017, she called him and requested to spend a night at his house as her uncle, who was to accommodate her was away and had travelled to Mombasa. The appellant picked her up using his motor bike and instead of taking her to his house, branched off into a forest at Manda area near prisons area. He stopped the motor bike and forcefully demanded to have sex with PW1, who refused and attempted to run away, but the appellant caught up with her, slapped her and forcefully had sex with PW1.

42. PW1 evidence was that, "I was wearing a dress. He approached me and I started running. He chased me and caught me. He slapped me and told me to lie down. He removed his trouser and forced himself on me. He raped me. I tried t0 scream. He covered my mouth and nose. I had difficulty breathing." PW1 eventually manged to disentangle from the appellant and ran away as fast as she could before meeting PW2, who was with two other passenger's and they manged to rescue her.

43. PW2 also testified that PW1 stopped him on May 28, 2017 at about 7.30pm while he was riding his motor bike and had two passenger's. She desperately grabbed him and told him she needed help as she had just been raped. She led them to a bushy area, where they recovered her panty and two bags. He lent PW1 his phone and she called her friend to come pick her up. PW3 did produce the P3 and PRC forms filed at Naivasha county hospital. The said report noted that PW1 had been raped by her cousin and she had a soft tissue injury on the left side of her neck about 2 cm long. On examination, the hymen was broken, she had whitish discharge, but no spermatozoa were seen. PW4 also produced the DNA analysis/ result, which conclusively placed the appellant at the scene of the crime but the same was rightly not considered by the trial magistrate for the appellants sample was not procedurally extracted.

44. Though the appellant, tried to poke holes in the evidence produced especially the medical evidence, the fact remains that the evidence presented concretely proved that indeed he did rape PW1. The appellant was properly identified, PW2 evidence corroborated the evidence of PW1 that he found her at the scene, and she was hysterical, in panic and was panting. They went back to the scene and recovered her panty and two bags.

45. On the issue of penetration, PW1 was clear that the appellant forced himself onto her and raped her. It was therefore not a coincidence that, when PW1 stumbled upon the good Samaritans (PW2 and his two passenger's) they returned back to the locus in quo, and found her inner pant of PW1 in the bush. The appellant did submit and rightly so, that PW3 was not the author of the P3 form and the PRC form and thus was un-procedurally allowed to produce the said documents without the court complying with provisions of section 77 of the *Evidence Act*, thereby occasioning great injustice upon the appellant.

46. It is however settled law that medical evidence is not the only evidence that can prove a sexual offence. In *AML -v- Republic* (2012) eKLR the Court of Appeal stated that:-

> "It was submitted that there was no medical evidence to connect the appellant with the offence as no DNA test was conducted. The position of the law is that the offences of rape and defilement are proved by way of oral evidence and circumstantial evidence and not necessarily by medical evidence."

The same court in *Kassim Ali Vs- Republic*, Mombasa Criminal Appeal No.84 of 2005 stated that:

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

47. The prosecution thus did prove the identity of the appellant as the perpetrator of the crime, he was well known to the appellant as they were cousins and the evidence of PW1 as corroborated by the evidence of PW2 clearly proved as a fact that this incident did occur. It is thus this courts clear finding that the burden of proof was appropriately discharged and all the elements of the offence established.

Whether the sentence melted out was harsh and excessive and whether the trial magistrate erred by failing to put into consideration the appellants mitigation as to the unique facts and circumstances of the case.

48. The appellant submitted that the trial magistrate erred in not taking into account his mitigation and further did not consider the fact the fact that they had reconciled with the complainant and she came to court and attempted to terminate the suit. The prosecution also did not oppose the said application. Further the appellant submitted that the court ought to have taken into account the 4 years and 3 months which he spent in remand and factored it in when he was sentenced, thereby causing an injustice.

49. The Court of Appeal in the case of *Benard Kimani Gacheru Vs Republic* (2002) eKLR stated;

> "It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist.

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

> "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence

and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

51. In *MMI Vs Republic* (2022) eKLR the court referred to the case of *S Vs Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that;

> "A court exercising appellate jurisdiction cannot, in absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court..... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

52. The trial magistrate upon conviction of the appellant did set a different date for sentencing and called for a pre-sentence report, which revealed that the appellant was a repeat offender. He had also been convicted and sentenced to serve 10-year imprisonment in S/O No 35 of 2017. The trial magistrate allowed the appellant to make length mitigation and upon considering the same did find that the appellant was a repeat offender and an appropriate deterrent sentence would be appropriate. The court therefore proceeded to sentence the appellant to serve 20-year imprisonment.

53. The appellant has not pointed out, which error, or material misdirection which the trial court did not consider or which wrong material or wrong principal was cited by the trial court. The issue of the complainant wanting to withdraw the case and forgiving the appellant was captured in the in the pre-sentence report and the court did consider that fact before he sentenced the appellant.

54. The law is that "Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist. "see *Benard Kimani Gacheru Vs Republic* (2002) eKLR.

55. The final issue raised by the appellant was that he was arrested on May 30, 2017 and spent 4 years and 3 months in remand as the case was heard. By virtue of the provisions of section 333(2) of the criminal procedure code, the said period ought to have been factored in his sentence. This point is merited as provisions of the said section 333(2) are clear and the appellant is entitled to benefit from the same as application of the law has to be equal.

Disposition

56. Having considered all grounds of appeal as presented in this appeal I do find that all the grounds of appeal raised on conviction are without merit and is hereby dismissed.

57. The appeal as against sentence is partially upheld (on account of the provisions of section 333(2) of the *CPC*). The period of 4 years and 3 months which the appellant was held in custody from May 30, 2017

to when he was sentenced on August 17, 2021, will be included and considered when computing, the sentence of 20 years imprisonment handed down to the appellant.

58. Right of Appeal 14 days.

59. It is so ordered.

Judgement written, dated and signed at Machakos this 31st day of July 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 31st day of July 2023

In the presence of;

Appellant

.....For O.D.P.P

.....Court Assistant