Kimanthi v Republic (Criminal Appeal E031 of 2022)
[2023] KEHC 21457 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21457 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E031 OF 2022

FR OLEL, J

JULY 31, 2023

(CORAM: F. RAYOLA J.)

BETWEEN

CHRISTOPHER MUINDE KIMANTHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against conviction and sentence imposed by Hon. E Wambugu Senior Resident Magistrate while sitting at Kithimani Law Courts in Criminal Case No. (SOA) No.48 of 2020 on 6th June 2022)

JUDGMENT

1. This appeal arises from the conviction and sentence imposed by Hon. E Wambugu Senior Resident Magistrate while sitting at Kithimani Law Court in Criminal Case (SOA) No 48 of 2020, where he sentenced the appellant to 12 years imprisonment for the offence of rape.

2. The appellant had been charged on September 2, 2020 with the offence of rape contrary to Section 3(1)(a),(b) and (3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on the 25th day of August 2020 at about 17.32hours in Masinga Sub County within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of EN without her consent.

3. In the alternative, the appellant was charged with committing an indecent act with an adult contrary to section 11(A) of *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on August 28, 2020 at around 17:32 hours at in Masinga Sub County within Machakos County intentionally touched the vagina of EN with his penis against her will.

4. During trial the prosecution called six (6) witnesses to testify in support of the prosecution case. The appellant was placed on his defence and elected to give sworn evidence. The trial court considered the

entire evidence presented and convicted the appellant on June 6, 2022. Sentence was reserved for 13th June 2022 and after considering the victim impact statement, the appellant's mitigation, period served by the appellant in remand and court's discretion on sentencing, the trial court sentenced the appellant to twelve (12) years imprisonment.

Facts at Trial

5. PW1 ENM testified that she lives at [Particulars Withheld] village. On August 28, 2020 at 5.30pm, she went to collect firewood on the lower side of their home. Two people emerged and greeted her. They asked for directions to Makua's resident. She knew one of the persons she met. He was the appellant, while she did not know the other person he was with. PW1 stated that she showed them the way and went on collecting firewood. While at it, the 2 men came and held her from behind, blocked her mouth and pointed a knife at her.

6. The appellant removed her cloths and fell her down. He further pulled down his shorts upto the knee level and proceeded to rape her. Both the appellant and the other unknown person raped her. During the incident, the unknown person held her firmly down while the appellant lay on her and inserted his penis in her vagina. The appellant also once done held her down while the unknown person also raped her. After they were done, both accused and his accomplice ran away. PW1 saw "Muthoki" who was a neighbour passing on a nearby road. He came and carried her clothes and took PW1 home. Thereafter 'Muthoki' called PW1's mother to come assist.

7. At the same time 'muthoki's mother' called PW1's Mother who came and she in turn called her father. The assistant chief was called and he directed that she be taken to hospital in [Particulars Withheld] where she was treated and later went to Kikula police station and made her report and recorded her statement. She was thereafter referred to Masinga Hospital and the appellant was arrested at his home at 11.00pm by the sub chief of Makuti. The other person was not arrested as she did not know the said person. PW1 identified the P3 and PRC form and stated that the appellant was a person well known to her.

8. In cross examination, PW1 stated that as at the date of the offence, she knew the appellant and had seen him and the co assailant before they attacked her. None of her assailant had dreadlocks. After the incident, the appellant went into hiding at Ekalakala and later when he came back to [Particulars Withheld] the member of the public on instructions of the chief arrested him.

9. PW2 was RN, she stated that she was 37 years old, was married and had children. On August 28, 2021 at about 5.45pm she went to [Particulars Withheld] market to do shopping and when she went back home, she found VM, M's mother in her house. PW1 was lying down on the sand and Victoria told her what had transpired. She was informed that 2 people had raped PW1. She asked her daughter (PW1) who confirmed the same. PW1 further told her that she knew one of the persons, who had raped her and he was called "Christopher Muindi". She knew Christopher, the appellant as he hailed from the same area. PW2 called PW1's father who came and they took her to Ndithini Mission hospital for treatment.

10. Later they went to Kikula police station and were referred to Masinga Police station. PW1 was examined and treated at Masinga Level 4 hospital and thereafter went home. PW1 was student at [Particulars Withheld] High School and was born on 24.07.2001. Her birth certificate was marked as MFI 3. When the appellant was arrested she was not present, but had known him before the incident for 10 years. His home and their home were close and they never had any grudge. In cross examination PW2 confirmed that two other people were arrested in connection to this incident but were released as they were not

involved. PW1 told her that it was the appellant and another unknown person who raped her. After the incident the appellant hid and was later arrested. She was not present during arrest.

11. PW3 DMM, testified that PW1 was his daughter and they reside at [Particulars Withheld] town. On 28.08.2020, he was called by PW2 and asked to go home. On arrival he found neighbours and her daughter. He was informed that her daughter had been raped by 2 men. He did not talk to PW1 as she was crying. The neighbours told him to call the village headman or village elder and the sub chief. They took PW1 to Ndithini mission hospital and the next day they reported to Kikula police post and were referred to Masinga level 4 hospital where the P3 form and PRC form were filled and returned to the police. Later on Saturday evening PW1 told him that the appellant and another unknown assailant had raped her. PW3 stated that he had known the appellant for over 10 years and he had no grudge with him. When the accused was arrested, he was present together with 2 community policing members and 2 civilians. The appellant had no question for the witness.

12. PW4 Eric Kioko Mwikya stated that he was a Clinical Officer working at Masinga Sub County Hospital and had 11 years' experience as a Clinical Officer. He filled the P3 form of PW1 on 31.08.2020. The history presented was that she had been raped on 28.08.2020. She was approximately 19 years old and on examination the hymen was absent and she had fresh lacerations on labia minora. He ordered for laboratory test for HIV and pregnancy and the results were negative. High vagina swab showed few sperm cells. He formed an opinion that there was penetration due to fresh lacerations on vagina and spermatozoa. PW1 was placed on prophylaxis. PW3 produced both the P3 and PRC forms as exhibit 1 and 2. The appellant had no questions for him.

13. PW5 RK stated that she was the village manager. On 28.08.2020 at 7.30pm she received a call from PW3 who asked her to come to his home. She went and found him with his wife and a female neighbour. He informed her that two people found his daughter collecting firewood in the bush and they held her and raped her. She asked PW1 what happened and she narrated the same. Initially she said she did not know the person who raped her but on persisting about 3 times, PW1 started to cry and PW2 informed her that PW1 knew her assailant. She called the assistant chief who directed that the child be taken to hospital. PW3 looked for a car and they went to Ndithini hospital where they were admitted and told to get a police abstract.

14. The following week on Thursday, PW5 received a phone call and was told that PW1 had revealed the name of one of the perpetrators and further that the said perpetrator had been escorted to the police post the previous night. She inquired for PW3 who told her that the known perpetrator was the appellant. In cross examination the appellant confirmed that PW1 did not tell her that it was the accused who raped her. When she persistently asked her, she started crying. PW1 had told her one of the assailants had shaved box but she was not aware if the other assailant had dreadlocks.

15. PW6 PC James Toroitich stated that on 28.08.2020 he was working at report office, Kikulu police station and received a report from PW3 that his daughter PW1 had been raped while fetching firewood and she had identified one of the assailants. They had taken her to [Particulars Withheld] hospital for immediate treatments and were told to make a report at the police station. On 31.08.2020, PW3 came with PW1. He issued them with a P3 form and referred then to Masinga level 4 hospital, where the P3 form was filled and returned to him. The perpetrator who was known by PW1 was arrested by members of the public on 31.08.2020 and brought to the police post. He re-arrested him and charged him in court. PW5 also established the age of the PW1 and produced her birth certificate as exhibit 3. In cross examination PW6 stated that it was PW1 who identified the appellant as the perpetrator, together with another unknown person whom she could identify.

16. The appellant was placed on his defence and gave sworn evidence. He stated that he was a businessman, who resided in [Particulars Withheld]. He had heard the evidence presented and it showed that there was a grudge between the complainant's family and him for reasons that he did not understand/know. PW1 had stated that she was defiled by two people. One had raster and the other had shaved box. On the said date he was away in Ekalakala where he had taken food. Enroute back he got a customer who wanted to be transported back to [particulars withheld] and since he operated a bodaboda business he carried the customer and reached [particulars withheld] at about 7pm.

17. He went to bed and the next day while passing by a neighbour's house, he was informed that PW1 had been defiled the previous day. On Sunday he went to the complainant's home to buy vegetables (which they usually sell) and no issue was raised. The following day which was a Monday, he was arrested and informed that he used to have sexual intercourse with PW1. After his arrest, he was taken to [Particulars Withheld] police station, and later transferred to [Particulars Withheld] police station before eventually being charged in court.

18. In cross examination the appellant stated that on the material day he was away at Ekalakala. He left home at 3.30pm and came back after 9.00pm. He was not at the scene of the incident on the material day and got to know of the incident the next day. He did not have witness to prove his alibi. Further the complainant family knew him well and there was a grudge between them but did not know its genesis and/or what kind of grudge it was. On Sunday when he went to the complainant home to buy vegetables nobody chased him away from the homestead and the complainant mother (PW2) had plucked vegetables for him. PW1 had lied to court as he was not at the scene of the incident when it occurred and did not commit the offence.

19. In re-examination the appellant stated that PW1's uncle was with him in a club in Ekalakala a day before the incident together with another person, who alleged he had committed the offence. He left them and the next day, the offence was committed. They spent the whole day looking for the person who raped PW1 but did not find him. On Sunday night PW1 uncle called PW3 (complainant's father) and other neighbour's and told them to say that it was the appellant who had committed the offence. This was a cooked-up story to justify for him to be arrested. It was the complainant's uncle who engineered his arrest and hence his belief that he has no differences with the complainant and her parents.

20. The appellant was given opportunity to call other witnesses but failed to do so. His case was closed and upon considering the facts of the case and evidence presented the appellant was convicted and sentenced to serve twelve (12) years imprisonment.

21. The appellant filed his memorandum of appeal on July 1, 2022 and raised four (4) grounds of appeal namely that;

    a. That the learned trial magistrate erred in both fact and law by convicting me on evidence that did not meet the minimum threshold to uphold a conviction.

    b. The learned trial magistrate erred in both fact and law by not considering my sworn defence.

    c. The appellant was not accorded the right to fair trial as per Article 50(c) (j) and (k) of the *Constitution of Kenya*.

    d. That I wish to be furnished with the trial proceedings recorded for more grounds before hearing of the appeal.

Appellants Submissions

22. The appellant's counsel filed his submissions on January 25, 2023 and stated that the learned magistrate erred in law and in fact in convicting the appellant when the offence was not proved beyond reasonable doubt. Penetration was not proved as the 'few spermatozoa' allegedly noticed by PW4 was not linked to the appellant. The libia minora was 'outside' the vaginal opening and therefore there was no penetration of the vagina as envisaged under Section 3(1),(c) of the *Sexual Offences Act*. Reliance was place on *Benjamin Mugo Mwangi and another v Republic* (1984)eKLR and *Joshua Muthiani Mutiso v Republic* Machakos Criminal Appeal No3 of 2002.

23. The appellant further submitted that the evidence of PW1, PW2 and PW5 were contradicting. While PW1 stated she was defiled by person well known to her, PW5 stated that PW1 told her that she did not know those who raped her. To implicate the appellant was thus an afterthought and PW1 should have been treated as untruthful and unreliable witness.

24. The appellant further submitted that the trial magistrate erred in failing to consider the appellant defence of alibi without giving any reason thereof. Reliance was placed on *Wangombe v Republic* 1976 – 80 volume 1 KLR at page 1683 and *Kilonzo v Republic* (1084) KLR 739.

25. Finally, on sentencing the trial magistrate erred by considering irrelevant facts and wrongly imputed that the appellant was not remorseful simply because in mitigation he had stated that he had not committed the offence. The trial magistrate was also alleged to have considered the period the appellant was in remand before he secured release on Bond. Reliance was placed on *Shadrack Kipchoge Kego v Republic* Criminal Case No253 of 2003 and *Wanyama v Republic* (1971) EA 493.

26. Section 3(3) of the *Sexual Offences Act* gives a minimum of ten years upon consideration of the offence and there is no reason as the why the learned magistrate did not go by the minimum sentence instead of sentencing the appellant to twelve (12) years.

27. The appellant urged this court to find that the appeal is merited and set aside the conviction and sentencing as unsafe and proceed to unconditionally release the appellant.

Respondent Submissions

28. The respondent filed their brief submission on 27.04.20213 and stated the appellant was properly convicted, based on ample evidence presented. As regards the appellant contention that his defence was not considered, that was incorrect as the trial court meticulously considered the same and found that it was an afterthought and could not shake the prosecution water tight evidence.

29. On the appellant allegation that he was not accorded a fair trial under Article 50(c),(j),(k) of the *Constitution of Kenya*, the Respondent submitted that the appellant was given a whole month to prepare for his defence and the proceedings also indicate that he was supplied with witness statements, P3 form, post rape form and birth certificate (See the trial proceedings page 3) the appellant was given ample time to cross examine all prosecution witnesses and thus cannot be heard to allege that any of his rights were violated.

30. Finally on proof beyond reasonable doubt, the appellant was properly identified (by way of recognition) as he was a well-known neighbour and the appellant too acknowledged this in his defence. Penetration too was proved by the medical evidence presented by PW4 who confirmed that PW1 suffered lacerations on the labia Minora and still had spermatozoa which were seen when vaginal swab was done. The Sentence melted out was also appropriate and sufficient.

31. The Respondent urged this court to uphold the conviction and sentence and 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-Republic* (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 initially filed four (4) grounds of Appeal, but raised new grounds in his submissions. The issues brought raised can be summarised;

    a. If the burden of proof was adequately discharged.

    b. Did the court fail to consider the appellants defence of Alibi without giving any reasons?

    c. Was the Appellants right to fair trial violated by the court in contravention of Article 50(c), (j), (k) of the *Constitution of Kenya* 2010.

    d. Whether the sentence melted out was harsh and excessive in the circumstance.

Burden of Proof

36. The appellant submitted that the trial magistrate erred in convicting him yet the allegation of rape was not proved beyond reasonable grounds. Penetration was not proved and the few spermatozoa allegedly noticed by PW4 was not linked to the appellant. The bruised libia majora was also outside the vaginal opening and therefore further proved that there was no penetration.

37. The appellant also submitted that PW1 and PW5 gave contradictory evidence and thus benefit of doubt ought to have been given to the appellant. In her testimony PW1 had said she was raped by a person well known to her, while the information on the P3 form states that she was raped by two people well known to her. PW1 also told PW5 that she did not know the persons who raped her and therefore to change tune and later implicate the appellant as the assailant was an afterthought and made her unreliable witness.

38. 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."

39. 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.

40. 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."

41. 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 means 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

d. 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."

42. Section 3{1} of the *sexual offences Act* should be read jointly with sections 42 and 43{1} of the same act, which sections explain the meaning of consent, coercive circumstance's, and false pretence.

43. PW1 testified that on August 28, 2020 at about 5:30pm, she was collecting firewood and was approached by two people who sought directions to Makau's home. She showed the way and continued to collect firewood. The said persons turned and came back, held her captive under knife point and forcefully raped her in turns. Her verbatim evidence was that;"

> the accused removed my cloths and fell me down, the two of them raped me. Accused pulled down his shorts up to the knees.
>
> At that time the other man was holding me while I was down. Accused lay on me and inserted his penis in my vagina. Then accused got hold of me and the other man did the same act to me. They ran away and left me there."

44. In cross examination PW1 stated that as at the date for the offence, she knew the appellant and had seen him before. Immediately she was rescued PW1 told their neighbour "VM" that she knew one of the persons who had raped her and specially said she was raped by "Christopher Muinde". PW3, the complainant's father also testified that initially when he was called home, he found PW1 to be in a hysterical state and could not talk . She was continuously crying, but later after she had been taken to the hospital and had calmed down, she told him that she was raped by "Christopher Mwinde" and another man who she did not know.

45. PW3 confirmed, that he examined PW1 and filled the P3 & PRC form. His findings were that hymen was absent and she had fresh lacerations on the libia minora. Further high vaginal swab revealed that there were a few sperm cells seen.

46. The fact that PW1 knew the appellant, too was confirmed by the appellant himself, when during his defence hearing, at cross examination he stated that; "complainant is my neighbour and she knows me well." Given the circumstance herein where the rape occurred at 5.30pm and she immediately told her rescuer and neighbour who had violated her, it leaves no doubt at all that this was a case of recognition and the identity of the perpetuator was not in doubt. The evidence of PW1-3 looked at in totality and corroborated with the medical evidence produced conclusively proved that indeed the prosecution present cogent evidence to indeed prove that the appellant was one of the assailants who raped the complainant.

47. The appellant's submission that PW1 told PW5, that she did not know the persons who defiled her, must be looked at from the point of view that PW1 was distraught by what had happened. She kept on crying, when asked to narrate what had transpired and this holds true for even her own father, PW3 who was unable to get through to her until the following day in hospital after she had calmed down. That is when she told her father (PW3) that the appellant was one of the persons, who had violated her. Even PW5 in her own testimony told PW1 mother that from her observations PW1 knew who violated her.

48. The appellant also submitted that injury to the labia minora are outside the vaginal opening and therefore no penetration was proved. Penetration as defined by section 2 of the *Sexual Offences Act* mean that means the partial or complete insertion of the genital organs of a person into the genital organs of another person." The evidence adduced clearly showed that the appellant was violated by two

persons and this court has no reason whatsoever to doubt her version of events, which was corroborated by medical evidence including spermatozoa found in her after high vaginal swab was done. Penetration was thus proved. { see *Erick Onyango Ondeng Vs Republic* CRA No 5 of 2013 (2014) eKLR

49. 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 was thus fully established by the evidence presented by the prosecution and the burden of proof properly discharged.

Did the court fail to consider the appellants defence of Alibi without giving any reasons.

50. The appellant further submitted that the trial magistrate erred in law and fact by failing to consider and/or dismissed the appellant's defence of alibi without giving any reasons thereof. The appellant in his defence had alleged that on the material day, he left home at 3.30pm for Ekalakala where he had taken food, he was a boda boda operator and got a client who needed to be transported back to Kikule. He took the said client and reached Kikule market at 7pm and left the market for home at 9pm. The following day he passed by a friend's house, and was informed that the complainant had been defiled the previous day. In cross examination the appellant stated that," I know I am required to prove my defence of alibi. I has spoken to the seller of the maize this morning on phone. I have nothing to demonstrate I was in Ekalakala or kikule".

51. In the court of Appeal case of *Erick Otieno Meda Vs Republic* (2019) eKLR the court stated that the critical issues to consider regarding a defence of alibi was that ;

    a. An alibi needs to be corroborated by other witnesses', and not just a mere regurgitation of the events from the accused's point of view.

    b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross examination of the trial.

    c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

    d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond reasonable doubt so as to allow the alibi to fail.

52. The appellant alibi defence was not corroborated, it was not introduced early in the proceedings and it came as an afterthought during the defence case. It did not displace the cogent evidence placed before court by the prosecution.

Was the Appellants right to fair trial violated by the court in contravention of Article 50(c), (j),(k) of the *Constitution of Kenya* 2010

53. Article 50(2) of the *Constitution of Kenya* 2010 accords every accused person a right to fair trial, which right included;

    (a) To have adequate time and facilities to prepare a defence

    (b) To be informed in advance of the evidence the prosecution intents to rely on, and to have reasonable access to that evidence.

    (c) To adduce and challenge evidence

54. The appellant was given a whole month to prepare his defence from February 9, 2022 to March 9, 2022. Prior to the hearing the appellant was supplied with a copy of the trial bundle including P3 form, PRC form and a copy of the birth certificate (page 3 of the proceedings). The appellant was given ample

time to cross examine all the prosecution witnesses and challenge their evidence in court. Finally, after he had testified, the appellant sought for more time to call more witnesses. The appellant was granted three adjournments to call his witnesses but unfortunately for him, they did not take up the chance. On 19th April 2022, the appellant informed court that his witness had declined to come and left it to court to finalise the matter.

55. The record thus speaks for itself, the trial was held in a fair and open manner, the appellant given trial bundle and actively participated in the said trial until the end. His rights were thus not violated in any manner as he suggested and neither did he raise any complaint during the course of the trial that he had any issue with the away the trial was being conducted.

Whether the sentence melted out was harsh and excessive in the circumstance.

56. During sentencing the trial magistrate considered the victim report and noted the effect of the offence on the victim. Equally he noted that the appellant was not remorseful for his acts and had been remanded for a period of 21 days before he secured his bond. Taking into account all the above and the courts discretion in sentencing even where there is mandatory minimum sentences, the trial court sentenced the accused to 12 years imprisonment.

57. The appellant faulted the court and submitted that the sentence melted out was harsh and excessive. The magistrate also erred when he held that the appellant was not remorseful, which was occasioned by the appellants remarks mitigation, where he said that, " I did not commit the act. It is fabricated. I pray for investigation to be done." This was wrongly inferred to mean that he was not remorseful and was a misdirection by the court. Section 3(3) of the *sexual offences Act* also gives a minimum of Ten years and there was no reason and or aggravating circumstance which would lead to the enhancement of the sentence. There was therefore good reason to review the same.

58. This court is guided by the principles in the court of Appeal case of *Bernard Kimani Gacheru vrs Republic* (2002) eKLR. Where it was 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 must depend on the facts of each case. On appeal the appellate court will not easily interfere with 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 a wrong principal. Even if the appellate court feels that the sentence is heavy and that the appellate court might have 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 of the matters above are shown to exist.

59. The judiciary sentencing policy also states that, the court should schedule a hearing in which it receives submissions that would impact on the sentence. This provides the court with a clear opportunity to examine the information received and seek clarity on all issues. To determine the most suitable sentence, the court will take into account the aggravating and mitigating circumstances. Where there are aggravating circumstances a stiffer penalty would be issued. The aggravation circumstances are provided for under 23.7 of the said policy.

60. Though the minimum sentence provided for under Section 3(3) the *Sexual Offences Act* is 10 years that does not bar the trial court from giving a stiffer sentence, where appropriate. The trial magistrate rightly called for victim impact report and a probation report before sentencing and considered the same before sentencing the appellant to serve 12 years imprisonment. The trial magistrate was faulted

for stating that the appellant was not remorseful, but this was clearly brought out in the findings of the probation report filed in court on 10th June 2022.

61. There is therefore no basis to interfere with the sentence as imposed as the legal parameters for interfering with the same have not been demonstrated and/or meet.

Disposition

62. Having considered all grounds of appeal presented in this appeal I do find that the same have no merit. The appeal as against conviction and sentence has no merit and the same is dismissed.

63. Right of Appeal 14 days.

64. Judgment Accordingly

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