Taifa v Republic (Criminal Appeal E018 of 2022)
[2022] KEHC 14230 (KLR) (24 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14230 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E018 OF 2022

RE ABURILI, J

OCTOBER 24, 2022

BETWEEN

EMMANUEL KIMANI TAIFA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgement by the Hon. J.O. Ong'ondo delivered on the 14.10.2021 in the Senior Resident Magistrate's Court at Siaya in Sexual Offence Case No. E014 of 2020)

JUDGMENT

Introduction

1. The appellant Emmanuel Kimani Taifa was charged with the offence of defilement contrary to section 8(1) (3) of the *Sexual Offences Act* No 3 of 2006.The particulars of the charge were that that on the 17th and November 18, 2020 at [Particulars Withheld], Siaya County, the accused caused his penis to penetrate the vagina of LAO, a child aged 14 years. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The appellant pleaded not guilty to the charge and the matter proceeded to full trial with the prosecution calling 5 witnesses. Placed on his defence, the appellant gave sworn testimony.

2. After evaluating the prosecution and defence evidence adduced, the trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt and he convicted the appellant and subsequently sentenced him to serve 20 years' imprisonment.

3. Aggrieved by the trial court's judgment, conviction and sentence, the appellant his petition of appeal raising the following grounds of appeal:

    i. That the trial court failed to observe that the sentence imposed is/was manifestly harsh due to its mandatory nature.

ii. That the trial court failed to consider that my fundamental constitutional rights was /were violated and thus no ample time was the appellant given to defend himself.

iii. That the trial court did not consider that the investigations tendered was shoddy.

iv. That the trial court failed to consider that the subject was based on fabrication and afterthought.

v. That the appellant hereby beseeches the superior court to indulge into the same and or be pleased to reduce the sentence proportionately as enshrined in the Article 50(2) p of the *Constitution*.

vi. That I wish to be present at the hearing of this appeal and or be supplied with trial record to enable me erect more grounds.

4. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

5. The appellant submitted that the facts of the case and the circumstances that surrounded the veracity of the offence were in immense conflict. It was his submission that it was not clear whether the appellant was arrested with the complainant on the alleged diverse dates of 17th -November 21, 2020 and that what was clear was that no prompt and first report was documented at the police station regarding the dates alleged and thus there was no nexus between the appellant and the offence in question. The appellant urged the court to analyze the evidence afresh as was held in the case of *Okeno v Republic (1972) eKLR*.

6. On the medical evidence adduced, it was submitted that the P3 form used in the evidence was shoddy given that part 1 regarding the brief details of the alleged offence stated that the complainant was allegedly defiled by a person unknown to her whereas in her evidence in chief the complainant alleged to have known the appellant before, during and after the alleged offence and as such the appellant submitted that her evidence did not corroborate the evidence stipulated in the P3 form.

7. The appellant further submitted that the medical evidence was ousted by the fact that the complainant was taken to hospital after a lapse of 72 hours which time duration affected the doctor's findings in totality and as such the court should find that the same was not proved either and that the doctor's findings were a fabrication that could not sustain a conviction. Further, that the P3 form showed that the complainant was defiled by someone unknown to her hence her evidence in court that she knew her defiler was not corroborated.

8. Regarding the sentence meted out, the appellant submitted that the trial magistrate relied on the evidence of a single identifying witness, the complainant, without considering the appellant's defense and the mitigating factors. The appellant further urged the court to consider the time the appellant spent in custody as per the provisions of Section 333(2) of *Criminal Procedure Code* in its judgment.

The Respondent's Submissions

9. The Prosecution/Respondent opposed the Appellant's Appeal and supported the conviction and sentence imposed on the appellant by the trial court and framed the following issues for determination:

i. Whether the prosecution proved its case beyond reasonable doubt:

10. It was submitted that the ingredients of the offence of defilement as set out in the case of *George Opondo Olunga v Republic [2016] e KLR* which are: identification or recognition of the offender, penetration, and the age of the victim were proved beyond reasonable doubt and that the evidence adduced to establish these elements of the offence of defilement was never controverted. It was established that PW1's evidence on how she had sex with the accused was corroborated by the evidence of PW5 the Clinical Officer to the effect that there was complete penetration of the complainant's genitalia and that her age was proved by the production of her Birth Certificate as an exhibit.

11. On the identification of the offender as an element of defilement, it was submitted that relying on the decision in the case of *Peter Musau Mwanza v Republic [2008] KLR* where the Court of Appeal stated that:

> ' We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.'

12. It was submitted that in the instant case, PW1 testified that on November 17, 2020 she was at the Appellant's house at 4 pm, which was during the day, and that that was a time conducive for identification of the Appellant. Further, that her testimony that she stayed at the Appellant's home until November 19, 2020, when she returned home and later on November 21, 2020 she met the Appellant at Ndere market, where he was escorting her home, before he was arrested by the victim's father, PW4; and the fact that she also stated that the Appellant was her friend were facts and circumstances that were favourable for positive identification through recognition of the offender who was well known to the complainant.

13. Further submission was that the fact and circumstances of arrest are corroborated by the testimonies of PW4, GO and PW6, the investigating officer, No xxxx PC Vincent Nyarego, which evidence was never controverted. Further, that the appellant in his defence confirmed that he knew PW4 prior to the incident. It was therefore submitted that the ingredient of recognition of the perpetrator was also proved to the required standard.

ii. On Whether the trial court infringed on the fundamental constitutional rights of the Appellant:

14. It was submitted that Article 50(2) of the *Constitution* of Kenya, 2010, provides that, 'Every accused person has the right to a fair trial'and further that the *Constitution* guarantees every accused person the right-

    '(b) To be informed of the charge, with sufficient detail to answer it

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

    (g) To choose, and be represented by, an advocate.'

15. The prosecution submitted that the Appellant was adequately informed of the substance of the charge by the court in every element, in Swahili language, which he elected and understood and that he answered to the charge.

16. It was further submitted that the Appellant had adequate time to prepare for his defense in that the charges were read to him on November 23, 2020, and he was present throughout the trial which began on March 3, 2021. That the trial was conducted in Kiswahili language, which he understood; that the prosecution closed its case on July 7, 2021, and he had his defense heard on September 15, 2021, after indicating to the court that he was ready to proceed with his defense.

17. On whether the right to have legal representation was infringed, the prosecution submitted, relying on the Court of Appeal case of *David Njoroge Macharia v Republic [2011] eKLR* where after reviewing the past and current law stated that:

> ' Art 50 of the *Constitution* sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence. We are of the considered view that in addition to situations where 'substantial injustice would otherwise result', persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.'

18. Further reliance was placed on Nakuru *HCCRA No 9 of 2020 Hezron Kipkemoi Mutai v Republic [2022] eKLR*, where Chemitei J stated that:

> ' 'Having looked at the court records, I see no application by the applicant during the lower court trial requesting for representation by an advocate.I note further that the trial was conducted in a language clearly understood by the appellant and as a result he was able to cross examine the witnesses. Further, the record does not also indicate that he was a minor at the time of the offence. In essence this court does not find any prejudice he suffered during the entire trial process. At the same time, I find that the appellant's right to legal representation at the state expense was not infringed.'

19. It was therefore the prosecution's submission that the Appellant's right to a fair trial was not infringed by the trial court.

iii. Whether the defense places doubt on the Prosecution's case:

20. It was further submitted by the prosecution counsel that the defense was an afterthought, as the issue of a land dispute between PW4 and the Appellant was not raised during cross-examination of PW4.

iv. Whether the sentence imposed is/was manifestly harsh and disproportionate.

21. It was submitted that Section 8(3) of the *Sexual Offences Act*, 2006, provides that 'a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.'

22. To this end, the Prosecution/Respondent appreciated and submitted itself to the position of the superior courts in the locus classicus case of Francis Karioko Muruatetu & another – v- Republic, whose principles were applied by the Court of appeal in *Evans Wanjala Wanyonyi -v- Republic [2019] eKLR*, as well as other decisions in *Christopher Ochieng – v- R* and *Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO 93 of 2014*. The Prosecution therefore left it to court to apply itself to the issue of interfering with the sentence of the trial court, which applied the mandatory sentence in sentencing the Appellant.

23. On the whole, the prosecution concluded that the prosecution proved its case beyond reasonable doubt; that the evidence by the prosecution witnesses was cogent and consistent and that the trial court properly applied itself to the law in convicting the Appellant hence this Appeal is devoid of merit and ought to be dismissed.

Analysis and Determination

24. The role of the first appellate court is now well settled as was stated in the case of *Okeno v R [1977] EALR 32* and later in *Mark Oiruri Mose v R [2013] eKLR* among other many decisions that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

Evidence before the trial Court

25. PW1, the complainant testified that on the November 17, 2020 at about 4pm she was at K's home. She further testified that K had gone to her home and told her to go and know his home. She testified that she slept at his home that day and on November 18, 2020 and that they had sex together. It was her testimony that she returned home on November 19, 2020 and told her parents that she was at K's home and her parents told her not to repeat.

26. PW1 testified that on the November 21, 2020 her mother sent her to Ndere market to buy onions, soap and sugar and that she met K at the market. It was her testimony that K escorted her home where they met her father who took them to the police station and then to hospital. She testified that she went to Siaya hospital where she was examined. PW1 identified K as the accused in court and stated that he was her friend.

27. In cross-examination, the complainant testified that she left home at 4.00 pm and got to the accused's home at almost 5 pm It was her testimony that there were people on the way but that she did not tell her friends and further that nobody saw them. The complainant further stated that she left for home alone on November 19, 2020 and that the accused left her near her home. It was her testimony that only her mother knew about the events of 17th to November 18, 2020.

28. PW2 EAO a minor aged 12 years was taken through a voire dire and found understanding of the nature of an oath so she gave sworn testimony. It was her testimony that on the November 21, 2020, a Saturday, she had gone for choir practice with the complainant when the complainant told her that they go to PW1's boyfriend, EK's home which they did but that they did not find him so they returned home but met K at the market.

29. PW2 further testified that she left L-PW1 with K as they were wasting her time and that when she met her mother who asked her if L.-PW1 had arrived, her mother told her father to go and get the accused. It was her testimony that her father arrested the accused on the way. She further testified that there was

a day when the complainant disappeared from home for 2 days and that her friends told them that the complainant was at K's home.

30. In cross-examination, PW2 restated that the complainant took her to the accused's home and that the accused's sister told her that that was the home of the accused. She further stated that the accused's sister even called him on phone and that they met the accused on the road and walked to the near the video show hall where PW2 left the accused and the complainant.

31. PW2 testified that they had been sent to buy charcoal and that she had been given money to buy charcoal while the complainant was given money to buy other items. She stated that the accused called the complainant to where he was standing as he sent PW2 to get chapati.

32. PW3 Celestine Atieno Otieno testified that on the morning of the November 17, 2020 she left home to take a child to the clinic and returned at 1.00pm but did not find the complainant at home watching over FO, aged 5 years but rather found the child alone and that the complainant was not reachable on phone. It was her testimony that the complainant was aged 14 years.

33. She further testified that on the November 19, 2020, she returned home in the evening and when she inquired from the complainant where she had been staying, the complainant told her that she was staying with EK at his home and that K's wife was not present. It was her testimony that on Saturday, she sent the complainant to the market at [Particulars Withheld] accompanied by PW2 EA but that PW2 returned quickly and told her that she had seen the person who was with the complainant previously.

34. PW3 testified that she informed the complainant's father who told her to report to the police. It was her testimony that on the 20th she met the accused and her husband arrested him and took him to Ndere police station after which they took the complainant to the referral hospital where she was examined and a P3 form was filled. PW3 testified that the complainant was born in 2006, precisely on the August 6, 2006. She identified the accused in court and stated that the complainant told her that she was staying with Emanuel Kimani. She further testified that the accused was arrested for the offence of October, 17 2020.

35. In cross-examination, PW3 reiterated that PW1 disappeared on November 17, 2020 and that she had left her at home at 7am but when she returned at 1pm she did not find her. She further reiterated that she tried to trace her by phone, thinking that she was at her neighbor's or relative's home. PW3 admitted that she did not report or take action against the accused when PW1 told her that the complainant was with the accused. She further testified that PW1 went home on November 19, 2020.

36. PW3 further admitted that PW1 was found at the point when PW3 called her as she had left the accused's home. It was her testimony that she could not remember the date but it was on a Saturday and that the complainant had gone for choir and later went to be with the accused. She further testified that she saw where the accused was arrested from and that she had not seen him with the complainant before.

37. PW4 GO from [Particulars Withheld] testified that on the November 21, 2020 he was at work in the village and that at 5pm he got a call that her daughter L PW1 had gone for choir with E.-PW2 after which she went to be with the accused and told PW2 that she would meet her later. It was his testimony that she took PW2 to show him where PW1 was with the accused which she did. He testified that he saw the accused walking ahead as PW1 followed from behind and that he arrested the accused and took him to the police station. He further testified that he took PW1 to the referral hospital and she was examined and the doctor prepared a report.

38. In cross-examination, PW4 stated that Celestine called him at about 5pm on the November 21, 2020. It was his testimony that he arrested the accused at about 6.00pm. He further testified that the accused and the complainant were about 50 metres apart as the accused was ahead. He testified that he decided to take the accused to the police as it was easy. He stated that his wife found the accused and he arrested him.

39. PW5, Kennedy Opiyo, a clinical officer, testified and produced a P3 form dated November 21, 2020 as Exhibit 2(a). He stated that he examined the victim/complainant, and filled the P3 form signed on November 22, 2020. On examination of her genitalia, he observed 'fresh bruised vaginal walls with broken hymen and inflamed cervical walls'. He also stated that the approximate age of the injuries was 4 days old, and concluded that from the physical observation of the victim, there were clear features suggestive of complete penetration.

40. PW6 No xxxx PC Vincent Master Nyarego from Ndere police post testified that on the November 21, 2020 at 7.30pm one parent go escorted his daughter L and the accused, ET who was accused of defiling the minor who goes to school at [Particulars Withheld] primary school. He testified that he booked the report, filled the P3 form and sent her to Siaya Referral Hospital. He further testified that he called Siaya Police Station and made the report.

41. PW6 testified that E was picked at 8.00pm and charged. He further identified him as the accused in the dock. He further testified that the minor was 14 years old as per the Birth certificate produced as PEx1 as she was born on August 5, 2006. He stated that the accused was charged with defilement.

42. In cross-examination, PW6 stated that the one who was at report office with PC Omollo and PC Mataka. He further testified that the accused was brought on November 21, 2020. He testified that he had not received any prior report and that there was no need to visit the scene. He stated that the accused was brought at 7pm.

43. The appellant testified on oath and denied committing the offence and stated that on November 21, 2020 at about 4.30pm he was returning from a football tournament at Hono and that at 5.30pm he passed by his farm at [Particulars Withheld] and saw 2 people who followed him from behind. He further testified that as he approached the farm, he saw them, one of them who was O with whom they had a land dispute after O had given him a portion to till.

44. The appellant testified that the two arrested him claiming that he had been disturbing the and that they should go to the Chief but they passed the Chief's office and went to Ndere Police Post where PC Omollo locked him up in the cells. He further testified that he was taken to Siaya Police Station and charged with the offence. It was his testimony that PW4 arrested him with another person, Crispin, who did not attend court and no reason had been given as to why he did not attend as he would have talked about the land dispute and not the offence before court.

45. He further testified that the investigating officer who had testified was not connected with any investigations and denied conducting investigations. He further testified that PW4 did not tell him why he had arrested him but said that he thought he was with the complainant but there was no evidence. He further stated that PW3's evidence was contradicting that of PW4.

46. In cross-examination, the appellant stated that PW4 was the complainant's father and that he took him to Ndere police post. He further admitted that he was informed of the reason of arrest. The appellant stated that PW3 did not report the disappearance of PW1. In re-examination the appellant stated that PW3 reported to the village elder but the village elder did not attend court.

Determination

47. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions by both the appellant who is self-represented and the prosecution counsel appearing for the Respondent State. I find the following issues for determination:

    a. Whether the prosecution's case against the appellant herein was proved beyond reasonable doubt and

    b. Whether the appellant's sentence was excessive and harsh or unconstitutional.

On whether the prosecution proved its case beyond reasonable doubt

48. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006. To prove the offence charged, the prosecution must establish beyond reasonable doubt all the elements of defilement as was stated in the case of George Opondo Olunga v Republic [2016] eKLR that the ingredients of an offence of defilement are: identification or recognition of the offender, penetration and the age of the victim. The prosecution was therefore under a duty to establish or prove all the above elements of defilement beyond reasonable doubt. That duty or burden of proof does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the prosecution witnesses. The accused was also under no duty to give any self-incriminating evidence.

49. On the identity of the appellant, the complainant testified that the appellant was her friend. PW2 testified that the appellant was the complainant's boyfriend and that she had even visited his home and although they did not find him the appellant's sister attempted to call him.

50. In his defence, the appellant stated that PW4 arrested him as they had a land dispute implying that he and the complainant's family were well acquainted. To this end it is my finding that the appellant who was well known to the complainant and her family was positively identified. Furthermore, there was no claim of mistaken identity. The appellant was therefore identified beyond reasonable doubt.

51. Regarding the complainant's age, PW3, the complainant's mother testified that the complainant was born on August 6, 2006. PW6, the investigating officer produced the complainant's birth certificate as PEx1, which showed that the complainant was born on August 5, 2006 and was thus 14 years 4 months old at the time the offence occurred.

52. In the circumstances, I find that despite the minor discrepancy in the actual date of birth as stated by PW3, the Birth Certificate which is a public document clarified the date of birth hence the discrepancy is minor and cannot vitiate the evidence of age as the difference was in one day. The Birth Certificate was proof beyond reasonable doubt of the complainant's birth date and thus her age. I find that the prosecution proved this element of age of the complainant beyond reasonable doubt.

53. On the issue of penetration, 'Penetration' is defined under Section 2 of the *Sexual Offences Act* to mean 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'. The complainant testified that she had sexual relations with the appellant when she stayed with him on the 17th and November 18, 2020.

54. On his part the appellant denied committing the offence and in his submissions before this court he stated that the complainant's testimony was not corroborated by the evidence contained in the P3 form. The appellant further submitted that the medical evidence was ousted by the fact that the complainant was taken to hospital after a lapse of 72 hours which time duration affected the doctor's

findings in totality. He further lamented that the P3 form showed that she was defiled by a person unknown to her hence her evidence that she knew the defiler was not corroborated. The question therefore is whether the complainant's evidence requires corroboration and whether there was water tight evidence of penetration.

55. Section 124 of the *Evidence Act* provides that:

> ' Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declaration Act*, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.'

56. The evidence of the complainant on the fact of her being defiled was corroborated by that of PW5-Kennedy Opiyo, the clinical officer as indicated in the PEx2 (the P3 Report) in which it was indicated that PW1's hymen had been broken and that there were spermatozoa and fresh blood discharge detected barely three days after the incident was reported.

57. PW1, the complainant was firm in her testimony that she had sexual relations with the appellant and that the appellant was her friend. PW2 corroborated the complainant's testimony stating that the complainant disappeared for some 2 days at what time she was with the appellant and further that the appellant was the complainant's boyfriend. The trial court believed the testimony of the minor and her witnesses and stated that the narration was reliable and uncontroverted by the defence on cross examination.

58. This evidence adduced by the prosecution witnesses, compared with the defence by the appellant wherein he claimed that the complainant's father had fixed him because they had a land dispute, I find that the appellant's defence is an afterthought. Furthermore, no issue of a land dispute arose when PW4 was testifying and no question was put to him to suggest that he had a land dispute with the appellant.

59. The appellant submitted to the effect that the evidence adduced by the prosecution and specifically the evidence of the complainant contradicted that in PEx2, the P3 form and further that the testimony of PW3 contradicted that of PW4.

60. I have considered evidence adduced by the witnesses for the prosecution as a whole and in my view, I find no material contradictions as alleged. On the P3 form, what is said to be 'person unknown to them' is the report made by the complainant's father to the effect that the complainant was defiled by a person unknown to them. However, in the history given by the complainant herself to the medical officer as per the P3 Report in Part II Section 'A' (2), she stated and it is recorded that she was defiled by a person well known to her at Ndere area within Siaya County (Alego).' I therefore find no material contradiction in the evidence adduced by the prosecution witnesses. The Court of Appeal in the case of *Rwichard Munene v Republic [2018] eKLR* stated as follows on contradictions in evidence:

> ' It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main

issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.'

61. Accordingly, in this case, I find that the assertions that the prosecution evidence was contradictory was devoid of any merit. There was no material contradiction in the prosecution case as to prejudice the appellant. I therefore find that the prosecution proved the element of penetration beyond reasonable doubt.

62. The appellant pleaded in his grounds of appeal that the investigations were shoddy and not enough to sustain a conviction. I have perused the evidence adduced by the prosecution witnesses and as earlier stated, I find that the investigations were properly carried out leading to the charge of defilement being preferred against the appellant.

63. The appellant also lamented that he was not given ample time to prepare his defence. However, the trial court record shows that the appellant was granted enough time to prepare for his defence. After the prosecution closed its case on July 7, 2021, the appellant he asked for two weeks which the trial court granted him and fixed the defence hearing for August 23, 2021 which was more than six weeks away. When the case came up for the first time for hearing on March 3, 2021, the appellant stated that he was ready and on subsequent dates being May 31, 2021 and July 7, 2021, he stated that he was ready to proceed.

64. Taking all the above into consideration, I am satisfied that the appellant had sufficient time to prepare for his defence and therefore his complaint is devoid of any merit.

65. On the whole, I find and hold that the prosecution proved its case beyond reasonable doubt against the appellant on the charge of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006 and that the conviction of the appellant for the said offence was sound.

Whether the appellant's sentence was excessive, harsh or unconstitutional

66. The appellant pleaded in his grounds of appeal and submitted that his 20-year sentence was excessive in view of Article 50 (2) (p) ofthe *constitution*. Article 50 (2) (p) of the *Constitution*, 2010, which provides that:

> ' Every accused person has the right to fair trial, which includes the right.
>
> (p) To the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentence:'

67. In *Alister Antony Pariera v State of Maharashtra*, as cited in the case of *Margrate Lima Tuje v Republic [2016] eKLR* the court held that:

> ' Sentencing is an important test in matters of crime. One of the prime objectives of the criminal law is the imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused in proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.'

68. The prosecution left it to the court to decide on the question of sentencing in view of the Francis Muruatetu case as applied by the Court of Appeal in various decisions. I note that section 8 (3) of the *Sexual Offences Act* provides that upon conviction, the offender shall be imprisoned for a term of not less than twenty years. Previously, the principle laid down by the Supreme Court *Francis Karioko Muruatetu & Another v Republic [2017] eKLR*, was that, provisions of law which exclude or fetter discretion of a court of law in sentencing were inconsistent with the *Constitution*.

69. The Court of Appeal on its part stated that pursuant to the Supreme Court's decision in the Muruatetu (2017) case, if the reasoning is applied, the sentence stipulated by section 8(2), (3) and (4) of the *Sexual Offences Act* which is a mandatory minimum should also be considered unconstitutional on the same basis. See *Jared Injiri Koita v Republic [2019]e KLR*.

70. The reasoning for the holding by the Supreme Court and the Court of Appeal was that the mandatory minimum or maximum sentences deprived the Court of its legitimate jurisdiction to exercise discretion in sentencing. It was further observed that mandatory sentences fail to conform to the tenets of fair trial which are an in-alienable right guaranteed under Articles 50 and 25 of the *Constitution*. See *Christopher Ochieng v Republic KSM CA Criminal Appeal No 202 of 2011 [2018] eKLR*, and Jared Koita Injiri v Republic, KSM CA Criminal Appe84567890al No 93 of 2014 [2019] eKLR

71. However, the Supreme Court in the case of Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] KLR clarified the position and stated interalia that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution* but that the said decision only applied in respect of sentences of murder under Sections 203 and 204 of the *Penal Code*, which was the case before the Supreme Court.

72. In his decision in *WOR v Republic (Criminal Appeal E017 of 2020 [2022] KEHC 412 (KLR) a (26 April 2022)* (Judgment) FA Ochieng J (as he then was) stated inter alia that:

> ' If the mandatory nature of the death penalty was declared unconstitutional, a similar reasoning can extend to mandatory sentences such as those in Section 8 of the *Sexual Offences Act* and that he was unable to see any distinction between the mandatory nature of the sentence for the offence of Murder, and the mandatory minimum sentence for the offence of defilement and that in his view that renders the sentence unconstitutional as the fact that the prescribed sentence completely precluded the Court from exercising any discretion, regardless of whether or not the circumstances so require.

73. In the recent decision in *Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment*), Odunga J (as he then was at Machakos High Count reported at [2022]e KLR pronounced himself as follows on this debate of the constitutionality or otherwise of the minimum mandatory sentences stipulated in the *Sexual Offences Act*:

> ' This Court does not doubt the good intentions of the drafters of the *Sexual Offences Act* in taking steps to curb the menace of sexual offences and the trauma it causes to the victims of the said offence. The perpetrators of the said offences must be condemned by all means. However, the sentences to be imposed must meet the constitutional dictates.
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> 110. It is also debatable whether minimum mandatory sentences which only prescribe imprisonment as the mode of sentencing are in tandem with the *International Covenant on Civil and Political Rights of 1966*, which

Kenya ratified in 1972 and for that reason, Covenant forms part of Kenyan law pursuant to Article 2(6) of the *Constitution*. Article 10(3) of the Covenant stipulates that—'[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.' A sentence that does not provide for other options save for custodial sentence may well be frowned upon the ground that it may not achieve the essential aim of sentencing.

111. My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the Courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under Article 28 of the *Constitution*. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than the *Constitution*, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of the *Constitution* as appreciated in the Muruatetu 1 Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional. 112. At the risk of being repetitive, I must make it clear that my finding herein does not mean that the court ought not to mete out what appears as prima facie mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentences as are appropriate to the offence committed. I gather support from the opinion held by the Court of Appeal in *Dismas Wafula Kilwake vs Republic [2019] eKLR* that:

> ' '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.' 113. I however associate myself with the sentiments of the Court of Appeal in It was noted that the Court of Appeal in Eliud Waweru Wambui vs Republic [2019] eKLR has also rallied the above call for legislative amendments to the *Sexual Offences Act* by opining that; -
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> 'We need to add as we dispose of this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of a younger age than 16 years. We think it is rather unrealistic to assume that teenagers and maturing adults in the sense employed by the English House of Lords in Gillick vs West Norfolk and Wisbech

> Area Health Authority [1985] 3 ALL ER 402, do not engage in, and often seek sexual activity with their eyes fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process, and not a series of disjointed leaps. As Lord Scarman put it in that case (at p421); 'If the law should impose on the process of 'growing up' fixed limits where nature knows only a continuous process, the price would be artificially and a lack of realism in an area where the law must be sensitive to human development and social change.' At p 422. In England, for instance, only sex with persons less than the age of 16, which is the age of consent,is criminalized and even then the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age. See Archbold Criminal Pleading, Evidence and Practice, [2002] p1720.

The same goes for a great many other jurisdictions. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation. For the reasons we have set out herein, we find that the appellant's conviction was not safe, given the full circumstances of the case and the sentence, clearly imposed on the basis of a mandatory minimum was clearly harsh and excessive.'

114. That a strict application of some of the provisions of the *Sexual Offences Act* may cause injustice was appreciated by the Court of Appeal in *Evans Wanjala Siibi vs Republic [2019] eKLR*.

> ' Once again the unfair consequences of a skewed application of that statute predominantly against the male adolescent is quite apparent: two youths caught engaging in sex receive diametrically opposite treatment. The girl is branded a victim and guided to turn against her youthful paramour while the boy, Juliet's Romeo, is branded the villain, hauled before the courts and visited with a lengthy jail term. We very much doubt that it conduces to good sense, policy and our own conceptions of justice and fairness that the law should be deployed in a manner so disparative and discriminative in effect. A supposed justice resting on the shaky foundation of injustice against young boys hardly warrants the term.'

115. This Court also had occasion to weigh in on the same matter in *Yawa Nyale vs Republic [2018] eKLR* where it expressed itself as hereunder: ' It is now clear that certain provisions of the *Sexual Offences Act*, are a cause of concern in this country. The effect of the harsh minimum sentences imposed under the said Act on young people in this country is a serious cause of concern. Our

jails are overflowing with young people convicted courtesy of the provisions of the said Act. While I appreciate that sexual offences do demean the victims of such crimes and ought not to be taken lightly, the general society in which we operate ought to be taken into account in order to achieve the objectives of punishment. Penal provisions ought to take into account the objectives intended to be achieved and should not just be an end in themselves otherwise they may end up being unjust especially where the penalties imposed do not deter the commission of crimes where both the victim and the offender do not appreciate the wrongdoing in question.'

116. Having said that the ultimate decision as to what ought to be done must remain that of the legislature. Ours is simply to align the legislation that were in existence before the promulgation of the *Constitution* of Kenya, 2010 with the letter and spirit of the *Constitution*. Having considered the issues raised in this petition, the orders that commend themselves to me and which I hereby grant are as follows:

1) To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the *Constitution*. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

2) Taking cue from the decision in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR (Muruatetu 1) those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases.

3) Save for the foregoing, the other reliefs are declined since this Court cannot grant a blanket order for resentencing in the manner sought.'

74. In my view, although the decision above was a persuasive one to this court, and not binding this court, Iam in agreement that whereas mandatory minimum sentences may be lawful, they indeed deprive the trial court of the discretion in sentencing having regard to mitigations and circumstances of each case. This is not to say that there would be any justifiable cause for one to defile a child but that each case must be considered on its own facts and circumstances. In any event, the offence of murder is one where there is deprivation of life yet the Supreme Court saw it wise to find that death sentence being mandatory deprived the trial court of the discretion to impose appropriate sentence having regard to mitigations and circumstances of the case.

75. Taking into consideration the decision of the Supreme Court in Muruatetu 2021 (supra), it is clear that the mandatory sentence provided in section 8 (3) of the *Sexual Offences Act* is lawful but not necessarily mandatory, although, just like in the Muruatetu 2017 decision, the trial court may, having regard to the circumstances of each case, impose a death sentence, which sentence is lawful. For the above reasons,

I hereby accord the appellant the opportunity to mitigate for this court to consider whether or not to reconsider the mandatory minimum sentence of 20 years imprisonment meted out on him.

76. The appellant also submitted that this court ought to look at the time spent in custody in computing the length of his sentence in line with Section 332 of the Criminal Procedure Code. The appellant was arrested on November 21, 2020 and although he was granted bond on the November 23, 2020, it appears he was never released and he remained in custody till the conclusion of the case having failed to raise the surety.

77. In the circumstances, I find that in computing the sentence imposed on the appellant, the prisons authorities shall consider the period spent in custody by the appellant from the date of arrest until the date of sentencing which was 11 months and fourteen (14) days.

78. The upshot of the above is that the instant appeal is partially successful. The appeal against conviction is dismissed. The appeal against sentence and re-computation of that sentence is allowed to the extent that the appellant is hereby allowed to mitigate for resentencing, which sentence shall take into account the period that the appellant spent in custody during the trial, as stipulated in section 333(2) of the Criminal Procedure Code.

79. I so Order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 24TH DAY OF OCTOBER, 2022

R.E. ABURILI

JUDGE