Ouma v Republic (Criminal Appeal 8 of 2020)
[2021] KEHC 13707 (KLR) (30 July 2021) (Judgment)

Neutral citation: [2021] KEHC 13707 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL 8 OF 2020

RN NYAKUNDI, J

JULY 30, 2021

BETWEEN

RODGERS OUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgement rendered by the Learned T.A. Sitati, Principal Magistrate while sitting at the Lamu Principal Magistrates Court in Criminal Case Sexual Offences Act 19 of 2019 on 1.7.2020)

In considering the fair, just and proportionate sentence the trial courts are under a duty to embrace broader sentencing ranges

The appeal was against the conviction and sentence of the appellant for the offence of rape and abuse of position of authority. The court stated that rehabilitation should not be the reason either to enhance or extend a prison sentence prescribed by Parliament. The court further held that in considering the fair, just and proportionate sentence the trial courts were under a duty to embrace broader sentencing ranges, combined with the principle of parsimony to permit and encourage the exercise of mercy towards convicted offenders, like the appellant. The court noted that the Victim Protection Act stated under section 26(3) that the enforcement of the award shall be under the Civil Procedure Rules.

Reported by Kakai Toili

Criminal Law *– sentences – sentences in sexual offences – damages - what was the role of courts in considering the fair, just and proportionate sentences in criminal cases - whether rehabilitation justified the enhancement or extension of a prison sentence prescribed by Parliament - whether the Civil Procedure Rules could be applied in the Criminal Procedure Code in the award of damages – Sexual Offences Act (cap 63A), sections 3(1)(a) and (c), and (3); Criminal Procedure Code (cap 75), section 14; Victim Protection Act (cap 79A), sections 3(b)(i), 23 and 25.*

Brief facts

The appellant had been charged with the offence of rape contrary to section 3(1)(a) and (c) as read with section 3(3) of the Sexual Offences Act, No. 3 of 2006. In the alternative, he was charged with indecent act with an

adult, contrary to section 11A of the Sexual Offences Act. He also faced the 2nd count of abuse of position of authority contrary to section 24(2)(b) of the Sexual Offences Act.

The appellant was found guilty and convicted of the offence of rape and abuse of position of authority and after considering the victim impact statement as well as appellant's mitigation sentenced him to serve life imprisonment in respect of the offence of rape and 10 years imprisonment in respect of the 2nd count. The court also awarded Kshs 400,000 as general damages for pain and suffering. Being aggrieved by his conviction and sentence, the appellant, preferred the instant appeal. The appellant prayed that the appeal be allowed, the conviction be quashed and sentence set aside.

Issues

i. What was the role of courts in considering the fair, just and proportionate sentences in criminal cases?
ii. Whether rehabilitation justified the enhancement or extension of a prison sentence prescribed by Parliament.
iii. Whether the Civil Procedure Rules could be applied in the Criminal Procedure Code in the award of damages.

Held

1. The evidence on record was direct, cogent evidence that was properly corroborated. The unlawful sexual act did occur. The trial court properly relied on section 124 of the Evidence Act though it did not warn itself of the evidence of a single identifying witness. There was no reason to doubt the evidence of the complainant (PW1) because the chain of events as narrated by her, the persons who she reported to was consistent, PW1 was indeed truthful. On the other hand the account of the appellant pointed towards deliberate untruthfulness because he claimed that the woman left her items in his house for no reason yet the evidence of the prosecution was to the effect that she was fleeing from him and left the clothes in distress.
2. There was evidence produced of menaces or force that was meted on the complainant. The appellant was properly identified as the perpetrator. There was no inconsistencies alleged by the appellant and in placing reliance on section 382 of the Criminal Procedure Code, there was no material as to shake the evidence against the appellant. In the result therefore, the conviction of the appellant for the offence of rape contrary to section 3(1) was based on sound evidence. The conviction on the 2nd court was safe.
3. The sentence for rape was not less than 10 years and the sentence may be enhanced to life. There was no reason to interfere with the sentence passed by the trial court. Further, the appellant seemed not to have taken issue with the sentence and he did not challenge the same in his appeal. There was no merit in the appellant's appeal against conviction.
4. The appellant was charged, tried, convicted and sentenced to life imprisonment for the offence of rape contrary to section 3(1)(a) and (c) as read with section (3)(3) of the Sexual Offences Act. The prescribed sentence for the offence on conviction was a minimum period of ten years to be enhanced to life imprisonment. The function of sentencing was within the purview of the trial court. The power to alter or vary it on appeal must only be considered within the textual and context of the principles in *Shadrack K Kogo v R* CR Appeal No 253 of 2003.
5. No sanction should be imposed greater than which was deserved for the crime or series of crimes being considered for sentence by the trial court. However, the courts were permitted but not obligated to impose the maximum which the offender deserved but with clear judicial reasoning for the departure from the minimum expressly provided for by Parliament and the emphasis for enhancement.
6. Rehabilitation should not be the reason either to enhance or extend a prison sentence prescribed by Parliament. Furthermore, in all prison treatment programs were entirely voluntary and not linked to the period of release. Trial courts were required to approach imposition of any sentence for rape prescribed with a conscious that the Legislature had ordained first the minimum sentence of ten years as the ordinary sentence in absence of weighty justification to enhance it to life imprisonment.

7. Courts lacked the ability to accurately predict future behavior of an individual and very likely could err on the side of imposing lengthy sentences resulting in an over-incarceration of the offender. That excess on sentencing as implied from the record in the instant case was the vague and expansive nature of the notion as to what constituted dangerous behavior calling for incapacitation, and deterrence. Equally erroneous was the analogy one was capable of drawing that the sentence of life imprisonment may be interpreted to under the class of sentences prohibited as cruel and inhuman punishment for the offence in question.
8. In considering the fair, just and proportionate sentence the trial courts were under a duty to embrace broader sentencing ranges, combined with the principle of parsimony to permit and encourage the exercise of mercy towards convicted offenders, like the appellant. Justice and mercy both had roles to play in the criminal justice system.
9. It was prudent for the trial court to start with the lower end of the range of deserved punishment for the offence as a starting point and should only have increased it only to the extent of existing substantial and compelling circumstances. Thus, the specific sentence of ten years provided for by Parliament though enhanced to life imprisonment based on the factors in the verdict of the court, it fell far short to meet the criterion of compelling aggravating guiding factors to create such a disparity. The substantial departure by the trial court was only limited to extra ordinary situations, the appellant did not fit within that category.
10. Section 14 of the Criminal Procedure Code and exposition of the law permitted that in the instant appeal the sentences in respect of both counts shall run concurrently.
11. *David Gachiri Gatheru v MWM* (2006) eKLR was a 2006 decision that was made before the enactment of the Victim Protection Act. In addition, the prosecution counsel appeared to have misled the court in imputing that the Civil Procedure Rules could be applied in the Criminal Procedure Code in the award of damages and that quite far from the provisions of the operative law. The Victim Protection Act stated under section 26(3) that the enforcement of the award shall be under the Civil Procedure Rules. The cited case was improperly applied because an order of compensation was provided for under sections 3(b)(i) and 23 of the Victim Protection Act. Section 25 of the Act permitted an order for compensation in addition to the custodial.
12. The tenets of proportionate sentencing practices which eschewed other objectives of sentencing including an award on compensation for the victims in sexual offences with regard to the appellant had manifested excessive and punitive sentence. The trial court in awarding the Kshs 400,000 compensation to the victim the objective features was in the factoring of the harm done to the victim of rape as occasioned by the appellant. There was nothing new about the award, as the need to consider the injuries sustained by the victim became a relevant component of the evidence relevant to the issues.
13. Though a well-founded principle at common law, essentially the victim ought not to be trusted as a reliable source of information on the basis that her perspective was likely to be a private and possibly vengeful one, which if factored into sentence on compensation may lead to the handing down of a manifestly excessive award contrary to offenders, just desert compensation was in the realm of restorative justice. It therefore presented a trajectory of moving beyond compensation and reparation or even acts of shaming.
14. From the record, that was a case the focus of the trial court needed to have shifted from the exclusive need to deter and punish the appellant but construe all circumstances objectively on re-offending to assist in reaching a fair decision rather than advocating for long custodial sentence. Lengthy custodial sentences and excessive compensation to victims of rape or defilement were likely to do little to repair any emotional or psychological upset that was caused by the offence or to restore the moral equilibrium that had been disturbed by undermining the victim's presumption of personal security.

15. As much as the appellant may have a propensity to sexual offences, that should not be the only deceive factor as the trial court should not shut its eyes from other parameters on sentencing as outlined by the Supreme Court in *Francis Muruatetu v R* [2017] eKLR.
16. The sanction on award of damages was excessive and it was not deserved. In the circumstances, the contours of criminal due process, and intricacies of additional measure of compensation on general damages for pain and suffering may best to have been applied by the trial court, with an opportunity given to the appellant to adduce evidence to that effect.
17. The essential element of procedural and substantive due process as established in civil settings but to be imported in criminal settings was never adhered to with regard to the award made against the appellants. The core principle that due process, granted notice and hearing rights on the provision preceding the verdict was nonetheless useful and fashioned in the context of fair trial rights. The right to be heard before being condemned to pay Kshs 400,000 as general damages for pain and suffering or grievous loss of any kind was a basic constitutional principle under article 50 of the Constitution. The particular hearing procedures were in a given setting which balanced the interests of the victim at stake, with that of the offender, and the risk of error and value of additional measure of punishment.
18. The appellant knew nothing of the issues that would lead to an assessment of general damages for pain and suffering to the victim, in a criminal setting, compensation being civil model of procedural due process. In that respect infused into criminal law ought to be explained in greater detail to the offender or the affected party for that matter, it could not be a decision made without the participatory procedures of the offender or convict.
19. The sole contribution of the appellant during the sentencing hearing was on offering mitigation. As a logical matter, it was hard to see how significant it was to the doctrinal approach to award damages in favour of the victim but ultimately payable by the appellant. Some of those harmful effects that flowed simply from being convicted with a criminal offence should patently follow due process steps in the civil context setting. It was simply not sufficient from the record to determine whether the evidence availed was strong enough to make an assessment of Kshs 400,000 for pain and suffering. The reasoning of the trial court was also sparse, in a case in which consequences against the appellant flowed from the criminal charges.

Appeal partly allowed.

Orders

i. *Appeal on conviction dismissed whereas the sentence on count 1 was varied and substituted with that of 25 years imprisonment.*
ii. *The sentence on count 2 lacked merit.*
iii. *In sum both sentences to run concurrently. 14 days right of appeal explained.*
iv. *The award of compensation was set aside for want of proof.*

Citations

Cases

Kenya

1. *Gatheru, David Gachiri v MWM* Civil Appeal 90 of 2001; [2006] KEHC 2804 (KLR) - (Distinguished)
2. *Kabui, Peter Mbugua v Republic* Criminal Appeal 66 of 2015; [2016] KECA 713 (KLR) - (Explained)
3. *Kogo, Shadrack K v Republic* Criminal Appeal No 253 of 2003 - (Explained)
4. *Muriuki, Arthur Muya v Republic* Criminal Appeal 31of 20 of 2010; [2015] KEHC 807 (KLR) - (Followed)
5. *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR) - (Applied)

6. *Mutisya, Antony Mwema v Republic* Miscellaneous Criminal Application 60 of 2017; [2020] KEHC 8493 (KLR) - (Applied)
7. *Ntuma, Kanyoike v Republic* Criminal Appeal 8 of 2017; [2018] KEHC 9279 (KLR) - (Applied)
8. *Republic v Francis Otieno Oyier* Criminal Appeal 158 of 1984; [1985] KECA 55 (KLR) - (Applied)

Canada

Hoare v Queen [1989] HCA 33; 167 CLR 348; 63 ALJR 505; 86 ALR 361; 40 A Crim R 391 - (Explained)

Regional Court

Okeno v Republic [1972] EA 32 - (Explained)

Statutes

Kenya

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) In general- (Cited)
2. Constitution of Kenya article 50(2)(p)- (Interpreted)
3. Criminal Procedure Code (cap 75) sections 14, 382 - (Interpreted)
4. Evidence Act (cap 80) sections 33, 124 - (Interpreted)
5. Sexual Offences Act (cap 63A) sections 3(1)(3); 11; 24(2)(b)- (Interpreted)
6. Victim Protection Act (cap 79A) sections 3(b)(i); 23; 25; 26(3)- (Interpreted)

Advocates

Munyanze for the appellant
Mr. Mwangi for the respondent

JUDGMENT

1. This is an appeal that was lodged herein on July 8, 2020 by the appellant, Rodgers Ouma, against the conviction and sentence imposed by the Principal Magistrates Court Criminal Case SOA 19 of 2019. The appellant had been charged before the lower court on December 23, 2019 with the offence of Rape contrary to Section 3(1) (a) and (c) as read with section 3 (3) of the *Sexual Offences Act*, No. 3 of 2006. In the alternative, he was charged with Indecent Act with an adult, contrary to section 11(a) of the *Sexual Offences Act*. He also faced the 2nd count of Abuse of position of Authority contrary to section 24(2)(b) of the *Sexual Offences Act*. The particulars of the first count were that the appellant on 8th December 2019 at around 2030 hours at his dwelling house within [Particulars Withheld] residence in [Particulars Withheld] Location of Lamu West subcounty within Lamu County intentionally and unlawfully caused his penis to penetrate the vagina of RA by the use of intimidation/threats. The particulars of the 2nd count was that the appellant on December 8, 2019 at around 2030 hours at his dwelling house within [Particulars Withheld] residence in [Particulars Withheld] Location of Lamu West subcounty within Lamu County took advantage of his position as a police officer and had sexual intercourse with RA in his dwelling house within [Particulars Withheld] residence within the limits of the station to which he is appointed.

2. The appellant, having denied the allegations against him before the lower court, was taken through the trial process and a judgmentwas subsequently rendered by the learned trial magistrateon July 1, 2020. The learned trial magistrate in her judgement relied on the testimony of (PW1) and the medical evidence after invoking the doctrine of res gestae. The court found that the victim was penetrated after being satisfied that the sexual activity took place. Court placed reliance on the case of *Kanyoike Ntuma v R* [2018] eKLR and *R v Oyier* [1985] KLR 353 and found that the victim was penetrated without her consent as there was use of a knife. Court found that the appellant was a person who used his authority as a police officer that caused the victim to lower her guard and that the appellant used his position

of authority to break the victim's resistance. The court found that the evidence of the appellant was a bare denial that even supported the prosecution case.

3. The appellant was found guilty and convicted of the offence of Rape and abuse of position of authority and after considering the victim impact statement as well as appellant's mitigation sentenced him to serve life imprisonment in respect of the offence of rape and 10 years imprisonment in respect of the 2nd count. The court also awarded Kshs 400,000 as general damages for pain and suffering.

4. Being aggrieved by his conviction and sentence, the appellant, preferred this appeal that challenged the decision of the trial court on 7 grounds compressed as follows:

   a) The prosecution case against the appellant was not proved beyond any reasonable doubt;

   b) The prosecution evidence contained inconsistencies.

5. Accordingly, the appellant prayed that the appeal be allowed, the conviction be quashed and sentence set aside. Submissions on behalf of the appellant have not been seen.

6. The appeal was opposed vide submissions filed by Joseph Mwangi, prosecution counsel. On the issue of proof of the charge of rape, counsel placed reliance on the case of *R v Oyier* [1985] KLR 353 and submitted that the elements of the offence of rape were proven; that unlawful penetration was proven vide the P3 form; that lack of consent was proven by the state of the victim after the activity as per her account. Further that the fact that he was a police officer is an undisputed fact. Learned counsel invited the court to uphold the conviction. On the sentence, it was submitted while appreciating the case of *R v Anthony Mwema Mutisya* [2020] eKLR the court ought to pass a strong message that Gender Based Violence cannot be tolerated therefore the sentence not be disturbed.

7. I have given careful consideration to the appeal and taken into account the written submissions made herein. I am mindful that, in a first appeal such as this, the court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In *Okeno v Republic* [1972] EA 32, the Court of Appeal for East Africa expressed this principle thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."

8. The prosecutioncalled a total of 6 witnesses before the lower court in proof the particulars of the charges, the first of whom was the Complainant (PW1). Her evidence was that, on the December 8, 2019at 7 pm, she went to the police station where she recorded her report and thereafter she was unable to leave because the rain was pounding heavily. She told court that as she was waiting for the rain to subside, she met the appellant, a police officer who lured her with promises of following up her report and offered her shelter from the rain in his house. She accepted the offer and on arrival at his house, he indicated fury against her communication with her male friend on phone whereupon he reached for a knife that was in his house then brandished it on her and imputed that he wanted to have sex with her. She recounted how she sensed danger and she tried to phone a one Yusuf, however the appellant grabbed the phone from her whereupon he pounced on her like a he-goat and tore her dera, then he retrieved a condom and inserted it into her vagina. She recalled how he forcefully had sex with her

then she was able to flee as he seemed worn out from the unlawful activity. She told court that she fled leaving behind her brown bui bui, black boots, handbag, house keys, phone and pink panty. She told court that she went to Yusuf's house where they were able to go back to the appellants house and recover her house keys and phone from him; that the appellant refused to hand over the other items he had detained. She told court that she reported the matter to the OCS Lamu and was referred to the DCIO whereupon she was taken to King Fahd Hospital and examined then a P3 form was filled. She was able to identify her bui bui, pink panty, shoes and bag that she left in the appellant's house after fleeing from him. On cross examination by the appellant, she told court that she let her guard down when the appellant led her to his house because he was a police man. She was able to identify his house as being next to the AP camp residence; she reiterated that she made a repeat visit to the appellant's house together with Yusuf where she was able to recover her house keys.

9. (PW2), Yussuf Mahmud, testified and told the lower court that on December 8, 2019, he received a distress message from (PW1) and he attempted to call her but was met with a male voice in what appeared to be a tense exchange of words between (PW1) and the male person. He told court that (PW1) stormed his house in a torn dera and wrapped in curtains and she was crying. He recounted how he heard (PW1) sob all night and that in the morning (PW1) led him to a house in the AP camp where he was able to get a bunch of keys and a phone from a man who was living in the house; he was able to identify the man as the appellant. On cross examination, he told court that (PW1) told him about the rape incident.

10. (PW3), Cpl David Odero, the investigating officer told court that that on December 9, 2019he was assigned to investigate a rape case and the complainant reported that the perpetrator was a serving police officer. He testified that he confirmed via documentation that indeed the appellant was a serving officer whereupon he tracked down the appellant to his house where the appellant handed to him a pink panty, pair of black shoes, a black bag ad a brown bui bui; that he prepared an inventory (Pexh 12). He told the court that he was able to establish from investigations that (PW1) went to the police station to file a report against her husband and it was there that the appellant emerged and lured her to his house where he raped her. On cross examination, he was able to establish that (PW1) sent a distress message to (PW2); that there was a P3 form that was used to charge the appellant.

11. (PW4), SSGT Christopher Kiptoo told court that he accompanied (PW3) to the appellant's house where the team found a pink panty, pair of black shoes, a black bag and a brown bui bui; that he signed the inventory that was prepared. On cross examination he told court that the appellant handed over the recovered items to the team that went to his house.

12. (PW5), ASP James Kariuki told the lower court that the appellant was under his direct command and that he was appointed as an Administration Police Constable; documentation was tendered to that effect.

13. The Clinical Officer, Madi Sheyumbe Munyali (PW6), told the lower court that she examined Pw1 on December 10, 2019; that she had a history of rape by a person known to her, which occurred on December 8, 2019. The examination revealed that Pw1 had tenderness on the lower abdomen, tender vagina and a brown discharge from the vagina. After an application under section 33 of the *Evidence Act* to produce the pelvic scan, she tendered the same that was marked Pexh2 and told court that the can showed that the (PW1) had an ovarian cyst in her womb. She produced the P3 form which was marked Pexh1.

14. The court found that a primafacie case was established against the appellant and put him on his sworn defence upon his election. In his defence, the appellant denied the charges and told the court that he saw (PW1) on the material day and that she insisted on walking with him; that she entered his house

and while he was looking for his phone, she fled his house leaving her bag and clothes in his house. He told court that a man came to fetch (PW1'S) items that he handed over to the man however the lady went and made a false report against him. He told court that he was arrested on a fabricated case. On cross examination, he admitted that he hosted Pw1 in his house however he denied raping her. He called no other witness and closed his case.

15. From the foregoing summary of the evidence adduced before the lower court, as well as the judgement of the trial court the pertinent questions to pose in this appeal, grounded on the appellant Grounds of Appeal are:

    a) Whether sufficient evidence was adduced before the lower court to prove the ingredients of the offence of Rape and abuse of position of authority to the requisite standard;

    b) Whether the prosecution case was riddled with inconsistencies.

16. On the first issue, section 3 of the *Sexual Offences Act* provides for the offence of rape in the following terms:

> "(1) A person commits the offence termed rape if
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> (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
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> (b) the other person does not consent to the penetration; or
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> (c) the consent is obtained by force or by means of threats or intimidation of any kind.
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> (2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.
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> (3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."

17. Hence, the prosecutionwas under obligation to prove its allegations that there was penetration of the complainant genital organ and that consent for such penetration was procured by force. In this respect, the prosecutionadduced evidence of (PW1) that she was raped by the appellant as well as the evidence of (PW2) that indicated her distressed state after the incident.

18. The Clinical Officer, (PW6) who testified on the examination that was carried out on the complainant and filled the P3 form corroborated the Complainant evidence that she was subjected to penetration. The appellant defence before the lower court admitted that he was in the company of the Pw1 at the time of the unlawful incident. The trial court seemed not convinced of the defence and I agree with the rejection of his defence and find that there was no reasonable doubt created in the evidence of the prosecution.

19. The evidence on record is direct, cogent evidence that is properly corroborated and I am satisfied that the unlawful sexual act did occur. I am also satisfied that the court properly relied on section 124 of the *Evidence Act* though it did not warn itself of the evidence of a single identifying witness. I see no reason to doubt the evidence of Pw1 because the chain of events as narrated by her, the persons who she reported to was consistent as indicated by the testimony of (PW2) and (PW6) and I find that (PW1) was indeed truthful. On the other hand the account of the appellant point towards deliberate

untruthfulness because he claims that the woman left her items in his house for no reason yet the evidence of the prosecution is to the effect that she was fleeing from him and left the clothes in distress.

20. There is evidence produced of menaces or force that was meted on the complainant that is to the effect that the appellant threatened her with a knife, pulled her phone, tenderness of her abdomen as is indicated in the P3 form as well as the evidence of (PW6) to the effect that there was tenderness on (PW1'S) abdomen. This corroborates evidence that there was a struggle. With regard to the identity of the appellant, the evidence on record is that Pw1 saw the appellant at the police station, they walked to his house and also when he was having sex with her she saw him and was able to identify that he was the police officer she saw at the station. She had quite a length of time to see him and take note of him and he even admitted that they were together in the house. In totality all these were factors favourable to correct identification. I am satisfied that the appellant was properly identified as the perpetrator.

21. I have not seen any inconsistencies alleged by the appellant and in my view and in placing reliance on section 382 of the *Criminal Procedure Code*, I have seen none material as to shake the evidence against the appellant.

22. In the result therefore, I am satisfied that the conviction of the appellant for the offence of rapecontrary to section 3(1) was based on sound evidence. I am also satisfied that the conviction on the 2nd court was safe.

23. The sentence for rape is not less than 10 years and the sentence may be enhanced to life. On considering all the evidence and the relevant factors relating to the sentence I find that there is no reason to interfere with the sentence passed by the court. Further, the appellant seemed not to have taken issue with the sentence and he did not challenge the same in his appeal.

24. I am guided by the case of *Arthur Muya Muriuki v Republic* [2015] eKLR, where Mativo J held thus:

> "...sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly, the Appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon the wrong principle or if the court exercise its discretion capriciously. In Shadrack Kipchoge Kogo v Republic Criminal Appeal No.253 of 2003 (Court of Appeal – Eldoret), the Court of Appeal stated:
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> > "Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."

25. I find no merit in the appellant appeal against conviction. The same is hereby dismissed.

26. I now revert to the grounds on the impugned sentence of life imprisonment for count 1 and subsequent ten (10) years imprisonment all stated to be served by the appellant. It is a fact that the appellant was charged, tried, convicted and sentenced to life imprisonment for the offence of rapecontrary to section 3(1)(a) and (c) as read with section (3)(3) of the *Sexual Offences Act*. The prescribed sentence for the offence on conviction is a minimum period of ten (10) years to be enhanced to life imprisonment. The function of sentencing remains to be within the purview of the trial court. The power to alter or vary

it on appeal must only be considered within the textual and context of the principles in *Shadrack K Kogo v R* CR Appeal No 253 of 2003 at Eldoret where the court held thus:

> "Sentence is essentially an exercise of discretion by the trial Court and for this court to interfere it must be shown that in passing the sentence, the sentencing Court took into account an irrelevant factor, or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered with. In article 50(2)(p) of the *Constitution*, an accused person has a right to the benefit of the least severe of the prescribed punishment for an offence...."

27. The import of this constitutional dictate is that no sanction should be imposed greater than which is deserved for the crime or series of crimes being considered for sentence by the trial Court. However, the courts are permitted but not obligated to impose the maximum which the offender deserves but with clear judicial reasoning for the departure from the minimum expressly provided for by parliament and the emphasis for enhancement. In every case, the approach to sentencing takes any of the following closely connected canons and principles:

    (a). Rehabilitation in the context of this appeal is an ideal of coerced, in prison treatment programs to be designed by the correction facilities towards reforming of the appellant. In this regard, such coercive treatment programmes are to last a lifetime in this specific sentence imposed by the trial Court.

28. Having balanced the considerations under this principle, I am of the view that rehabilitation should not be the reason either to enhance or extend a prison sentence prescribed by parliament. Furthermore, in all prison treatment programs are entirely voluntary and not linked to the period of release.

29. In the instant case, the trial Magistrate made reference to the past antecedents of the appellant and his likely danger he poses to society as a whole in determining the indeterminate sentence of life imprisonment for the offence of rape.

30. The Law as I see it, trial Courts are required to approach imposition of any sentence for rape prescribed with a conscious that the legislature has ordained first the minimum sentence of ten (10) years as the ordinary sentence in absence of weighty justification to enhance it to life imprisonment.

31. In my own understanding and appreciation of the Law Courts lack the ability accurately to predict future behavior of an individual and very likely can err on the side of imposing length sentences resulting in an over-incarceration of the offender. This excess on sentencing as implied from the record in this case is the vague and expansive nature of the notion as to what constitutes dangerous behavior calling for incapacitation, and deterrence. Equally erroneous to me is the analogy one is capable of drawing that the sentence of life imprisonment may be interpreted to under the class of sentences prohibited as cruel and inhuman punishment for the offence in question.

32. In considering the fair, just and proportionate sentence the trial Courts are under a duty to embrace broader sentencing ranges, combined with the principle of parsimony to permit and encourage the exercise of mercy towards convicted offenders, like the appellant in this case. It must be remembered justice and mercy both have roles to play in our criminal justice system.

33. In applying the above observations to this appeal, it was prudent for the trial magistrateto start with the lower end of the range of deserved punishment for the offence as a starting point and should only have increased it only to the extent of existing substantial and compelling circumstances. Thus, the specific sentence of ten (10) years provided for by parliament though enhanced to life imprisonment based on the factors in the verdict of the court, it fell far short to meet the criterion of compelling aggravating

guiding factors to create such a disparity. The substantial departure by the trial Court was only limited to extra ordinary situations, the appellant does not fit within that category.

34. Consequently, the appeal against the sentence succeeds. The sentence is set aside and substituted with one of twenty-five (25) years imprisonment for indictment on count 1 for a conviction on rape.

35. In relation to count 2, the courtin this regard finds no chronological highlights to interfere with the sentence of ten (10) years imprisonment.

36. As for how the sentences will run, section 14 of the *Criminal Procedure Code* provides as follows regarding sentences in cases of conviction on several offences at one trial:-

> "(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.
>
> (2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.
>
> (3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences—
>
> (a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or
>
> (b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.
>
> (4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence."

37. In *Peter Mbugua Kabui v Republic* [2016] eKLR the court of Appeal stated as follows:

> "As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."

38. The above provision and exposition of the law permits that in the instant appeal the sentences in respect of both counts shall run concurrently. I concur with trial court findings on this issue.

39. Finally, there is an award of damages for pain and suffering that was awarded and reliance was placed on the case of *David Gachiri Gatheru v MWM* [2006] eKLR. This is a 2006 decision that was made

before the enactment of the *Victim Protection Act*. In addition, the prosecution counsel appears to have misled the court in imputing that the *Civil Procedure Rules* could be applied in the *Criminal Procedure Code* in the award of damages and this quite far from the provisions of the operative law. The *Victim protection Act* states under section 26(3) that the enforcement of the award shall be under the *Civil Procedure Rules*. The cited case was improperly applied because an order of compensation is now provided for under section 3(b)(i) and section 23 of the *Victim Protection Act*. Section 25 of the same Act permits an order for compensation in addition to the custodial.

40. Notwithstanding, that legal position, I am of the view that the tenets of proportionate sentencing practices which eschew other objectives of sentencing including an award on compensation for the victims in sexual offences with regard to the appellant had manifested excessive and punitive sentence. I take it that the trial Court in awarding the Kshs 400,000 compensation to the victim the objective features was in the factoring of the harm done to the victim of rape as occasioned by the appellant. I also agree that there is nothing new about the award, as the need to consider the injuries sustained by the victim becomes a relevant component of the evidence relevant to the issues.

41. In my view, however though a well-founded principle at Common Law, essentially the victim ought not to be trusted as a reliable source of information on the basis that her perspective is likely to be a private and possibly vengeful one, which if factored into sentence on compensation may lead to the handing down of a manifestly excessive award contrary to offenders, just desert compensation is now in the realm of restorative justice. It therefore presents a trajectory of moving beyond compensation and reparation or even acts of shaming.

42. From the record, this was a case the focus of the trial court needed to have shifted from the exclusive need to deter and punish the appellant but construe all circumstances objectively on re-offending to assist in reaching a fair decision rather than advocating for long custodial sentence. There is no doubt in my mind that lengthy custodial sentences and excessive compensation to victims of rape or defilement are likely to do little to repair any emotional or psychological upset that is caused by the offence or to restore the moral equilibrium that has been disturbed by undermining the victim's presumption of personal security.

43. In the instant case, the rape was undoubtedly a very grave crime, but the question is whether it was a crime which warranted not only severe custodial punishment, but the most severe punishment of life imprisonment. In addition to ten (10) years imprisonment and an award of Kshs 400,000 as general damages for pain and suffering. As much as the appellant may have a propensity to sexual offences, that should not be the only deceive factor as the trial court should not shut its eyes from other parameters on sentencing as outlined by the Supreme Court in *Francis Muruatetu v R* {2017} eKLR.

44. In this respect the court in *Hoare v The Queen* (354) the court stated as follows on the applicability of the principle of proportionality thus:

> " A basic principle of sentencing Law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances. The desirability for the court to depart from this principle has to be exhaustively defined and reasons that are relevant to justify the departure be provided for in the judgment of the trial court."

45. This sanction on award of damages was excessive and it was not deserved. In the circumstances of this specific case, the contours of criminal due process, and intricacies of additional measure of compensation on general damages for pain and suffering may best to have been applied by the trial magistrate, with an opportunity given to the appellant to adduce evidence to that effect.

46. The essential element of procedural and substantive due process as clearly established in civil settings but to be imported in criminal settings was never adhered to with regard to the award made against the appellants. The core principle that due process, grants notice and hearing rights on this provision preceding the verdict is nonetheless useful and fashioned in the context of fair trial rights. The right to be heard before being condemned to pay Kshs 400,000 as general damages for pain and suffering or grievous loss of any kind is a basic constitutional principle under article 50 of the *Constitution*. The particular hearing procedures here are in a given setting which balances the interests of the victim at stake, with that of the offender, and the risk of error and value of additional measure of punishment.

47. At the heart of it is simply an expression of the basic values of Kenyan Adversarial System of Justice. The notion is simple, I am sure the appellant knew nothing of the issues that would lead to an assessment of general damages for pain and suffering to the victim, in a criminal setting, compensation being civil model of procedural due process. In this respect infused into Criminal Law ought to be explained in greater detail to the offender or the affected party for that matter, it cannot be a decision made without the participatory procedures of the offender or convict.

48. In sum, as reflected in the record, the sole contribution of the appellant during the sentencing hearing was on offering mitigation. As a logical matter, it is hard to see how significant it was to the doctrinal approach to award damages in favour of the victim but ultimately payable by the appellant. Some of these harmful effects that flow simply from being convicted with a criminal offence should patently follow due process steps in the civil context setting.

49. Before dissecting the complex procedural threshold that set the floor for civil trial procedures on assessment of damages to me would be a useful tool to hold a hearing within the criminal system in relation to compensation for the wrongs committed by the offender. To that extent, it's simply not sufficient from the record to determine whether the evidence availed was strong enough to make an assessment of Kshs 400,000 for pain and suffering. The reasoning of the trial Magistrate is also sparse, in a case in which consequences against the appellant flow from the criminal charges. It is in this respect, I set aside the assessment on general damages which failed the goal of due process.

50. I am persuaded to set aside the award of compensation for want of proof. The issue of sentencing on rape reduced to twenty-five (25) years imprisonment. For those reasons, the appeal on conviction remains dismissed whereas the sentence on Count 1 is varied and substituted with that of twenty-five (25) years imprisonment. The sentence on count 2 lacks merit. In sum both sentences to run concurrently.

51. It is so ordered. 14 days right of appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

Munyanze for the appellant

Mr. Mwangi for the state