Muchai v Republic (Criminal Appeal E033 of 2023)
[2025] KEHC 10695 (KLR) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10695 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E033 OF 2023

RN NYAKUNDI, J

JULY 23, 2025

BETWEEN

JACKTON MUCHAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the conviction and sentence in Eldoret Chief Magistrates' Criminal Case (SO) 1691 of 2011 by Hon. J. Owiti on 29th November 2011)

JUDGMENT

Representation:

M/s Sidi for the State

1. The Appellant was charged in Eldoret Chief Magistrate's Court Sexual Offences Case No. 1691 of 2011 with the offence of defilement contrary to Section 8[1] as read with Section 8[2] of the *Sexual Offences Act*, No. 3 of 2006. It was alleged that the Appellant, on 26th June 2007, at [Particulars withheld] in Lugari District, within Western Province intentionally and unlawfully caused his penis to penetrate the vagina of SND, a girl aged 9 years.

2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11[1] of the *Sexual Offences Act* No. 3 of 2006.

3. The Appellant pleaded not guilty to all the charges and the case then went to full trial in which the prosecution called 5 witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and put him on his defence under Section 210 of the *Criminal Procedure Code*. The Appellant gave a sworn statement and called no witnesses. By the Judgment delivered on 29th November 2011, he was convicted on the main charge and sentenced on the same date to serve life imprisonment.

4. Dissatisfied with the said decision of the trial Court, the Appellant instituted this appeal on 11th April 2023, against the conviction and sentence on 5 grounds reproduced verbatim as follows:

   i. That the Appellant pleaded not guilty in the instant case.

   ii. That, the learned trial magistrate erred in law and facts when she convicted the appellant in a prosecution case where age was not proved.

   iii. That, the learned trial magistrate erred in law and fact when she convicted the appellant in the prosecution case where penetration case was not proved.

   iv. That the learned trial magistrate erred in law and fact by applying wrong standards of proof in criminal case which was a standard of probability instead of reasonable doubt, the learned trial magistrate erred in law and fact by convicting the appellant but did not consider the appellant's defence.

   v. That [I] pray to be present during the hearing of this appeal.

Prosecution evidence before the trial Court

5. Before the trial Court, the prosecution called 5 witnesses.

6. PW1 was the minor-complainant [victim]. Because of her age, she was taken through a voire dire examination after which the Magistrate recorded that she was aware of the importance of telling the truth. Under such circumstances, the Magistrate directed that the minor would give sworn evidence which she then proceeded to do. She stated that in the year 2007 she was 9 years old and that on 26/06/2007, she was sent to the posho mill by her mother at around 2.10 pm. On the way she saw the accused and he pulled her into a nearby maize farm. He blocked her mouth with his hand and removed her pant by force. He lay on top of her and used his 'dudu' to rape her. She described the genital parts in her mother tongue and stated that he defiled her for 30 minutes. Her grandfather then came and rescued her as she had raised alarm during the incident. The accused ran away after seeing her grandfather and they later found him seated at a poshomill, dressed in a red t shirt and black pair of trousers. She stated that she always used to see him when she would go to the poshomill and therefore she knew him. She was later taken to Lumakanda police station and then referred to Webuye District Hospital where she was issued with a P3 form. She produced the P3 form and treatment notes and her child health card as exhibits.

7. In cross-examination, PW1 stated that she knew the accused person very well and that he was hiding in the maize before he defiled her. Further, that he was armed with a knife when he defiled her.

8. PW2 was [name withheld], the complainants' grandfather. It was his testimony that on 26/06/2007, while heading to the market he heard PW1s' distress call from inside the maize farm. He saw the accused lying on top of PW1 and as he moved closer, he could see that he was defiling the minor. The accused ran away and they were able to arrest him.

9. During cross-examination, he stated that he found the accused defiling PW1 and that he fled the scene after which they caught him at the poshomill.

10. PW3 was [name withheld], PW1's mother. She stated that the minor was born in 1999 and produced her child health card as ab exhibit. She additionally stated that the minor was 9 years old in 2007. She testified that on the material date, she was at the market when she saw a crowd of people saying a minor had been defiled. She went to the chief's camp and escorted the minor to the hospital. She however, never witnessed the incident.

11. PW4 was Julius Masheti, the clinical officer who examined the complainant. He stated that she was in pain at the time of examination and that the hymen was freshly torn with blood oozing from the walls. That there was evidence of penetration.

12. PW5 was COL Sammy Rotich attached to Lumakanda Police Station at the time of the incident. He stated that on 26/06/2007 a suspect was escorted to the police station with an allegation of defilement and he issued a P3 to the victim. He prepared the charge sheet and stored the exhibits to wit; a red pant and dress produced as PE5 a and b.

Defence evidence

13. After the Prosecution case, the Court found that the Appellant had a case to answer and placed him to his defence. Pursuant thereto, the Appellant gave sworn testimony as DW1 and called no witnesses.

14. The Appellant testified that on 26/06/2007, he was arrested by police officers when loading sugarcane at Nchi Moi, and informed that he had defiled the complainant. He denied the charges ad stated that he had been implicated in the matter.

15. During cross examination, he stated that never knew the complainant and that they cut sugarcane for the complainants' father in May 2011 and he did not pay them. He denied having committed the offence and further, that he had no witness to confirm that he was at Lubwa's farm loading sugarcane on 26/06/2007.

Judgment of the trial Court

16. After analysing the evidence, on 31st October 2011, the trial Court found the Appellant guilty and convicted him. The Appellant was then given an opportunity to mitigate which he did. On 29th November 2011, the trial Court then sentenced the Appellant to serve life imprisonment for the charge of defilement.

Hearing of the Appeal

17. The Appeal was canvassed by of written Submissions. The Appellant filed his Submissions on 30th January 2025 through his Advocates, Messrs Ng'eno Ondieki & Company Advocates while the State did not file any submissions.

Appellant's Submissions

18. Counsel for the Appellant submitted that honourable magistrate erred in law and fact when he failed to notice that apart from the investigation officer and the doctor, the other three witnesses were relatives to the victim. He recounted the testimonies of the witnesses and urged that the testimony of the PW1 raises much doubt when in examination in chief she states that, it was her first time to hear the name of the Appellant while in cross- examination she acknowledges to know the Appellant very well. Further, that the sharp knife was not produced in court as exhibit or mentioned by other witnesses. Counsel submitted that it is also in doubt when PWl says that together with PW2, they ran after the Appellant and caught him at the posho mill, questioning how a defiled child in pain can manage to run and chase after the Appellant. He maintained that the testimony of PW1 was as a result of pure coaching since it lacks flow and practicability of facts.

19. Counsel submitted that there were people at the Posho Mill where the appellant was arrested and just like the victim's mother they were not called upon as witnesses. The same was limited to her grandfather and father who were not at the crime scene. Counsel reproduced the evidence of PW2 and urged that

the testimony of PW1 and PW2 were contradictory raising reasonable doubt. He urged that the burden of proof is on the prosecution, citing the case of Woolmington v DPP [1935] and the case of Miller v Minister Of Penscons[2947] ALL ER372 on reasonable doubt.

20. Counsel submitted that the Appellant was first arrested in 2007 and later recharged in 2011 where he was sentenced to life and now served over 15 years. He urged that the period to which the Appellant has served be considered by the honourable court and he be acquitted.

Determination

21. I have considered the appeal and submissions by both parties. I have also read the record of the trial Court and the impugned Judgment. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses [See Okeno v Republic [1972] E.A 32]

Issues for determination

a. Whether the defilement charge against the Appellant was proved beyond reasonable doubt.

b. Whether the sentence of life imprisonment imposed against the Appellant was justified.

22. I now proceed to analyse and determine the said issues

a. Whether the charge was proved case beyond reasonable doubt

23. It is trite law that for the offence of defilement to be established, 3 ingredients must be proved, namely, the age of the victim, penetration and positive identification of the offender.

24. Section 8[1] and 8[2] of the *Sexual Offences Act* provides as follows:

> " 8.
>
> [1] A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
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> [2] A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

25. The importance of proving age was underscored by the Court of Appeal in the case of Hadson Ali Mwachongo v Republic [2016] eKLR, as follows:

> " The importance of proving the age of the victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In Alfayo Gombe Okello v Republic Cr. App 203 of 2009 [Kisumu] this Court stated as follows: -
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> "In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. This must be so because dire consequences flow from proof of the offence under section 8[1]".

26. In instant case, PW1 testified that she was 9 years old in the year 2007. PW 3 [her mother] also confirmed this and also produced PW1's clinic card and the P3 form indicated her age as 9 years old. The same indicates that PW1 was born on 17th April 1999. The alleged offence having occurred on 26th June 2007, PW1 was indeed 8 years or thereabout. This dispenses with the first ingredient as adequately proven.

27. With regard to penetration. Section 2[1] of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

28. In the case of Mark Oiruri Mose v R [2013] eKLR the Court of Appeal stated that:

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ." [Emphasis added].

29. Medical evidence was provided by PW4, the clinical officer. He testified that PW1's hymen was torn and he concluded that there was penetration.

30. On the issue of identification, the Court of Appeal in the case of Cleophas Wamunga v Republic [1989] eKLR expressed itself as follows:

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

31. In the case of Republic v Turnbull & others [1976] 3 ALLER 549 the court drew special attention to questions to be asked when it comes to identification of a perpetrator of the offence by a victim. It stated thus:

> " The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often, if only occasionally, had he any special reason for remembering the accused? How much time elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them as his actual appearance?.....
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> Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

32. In the instant case, the complainant stated that she knew the appellant as she often saw him at the posho mill whenever she went there. He was known to her and identification by recognition. Her evidence

was corroborated by PW2, her grandfather, who was alerted when she raised alarm and caught the appellant in the act. His identification of the appellant was also by recognition. It is my considered view that this element was proved to the required standard.

b. Whether the sentence of life imprisonment was justified

33. The applicable principles in considering sentence on appeal were restated by the Court of Appeal in Bernard Kimani Gacheru v Republic [2002] eKLR, in the following terms:

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

34. In applying the above guidelines, I observe that Section 8[2] of the *Sexual Offences Act* provides as follows:

> " [2] A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

35. The constitutionality of the life sentence has also now been questioned. In dealing with a matter where, as herein, the Appellant had been sentenced to life imprisonment under Section 8[2] of the *Sexual Offences Act*, the Court of Appeal, in the case of Manyeso *vs Republic [Criminal Appeal 12 of 2021*] [2023] KECA 827 [KLR] [7 July 2023] [Judgment], stated as follows:-

> "...an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom [Application Nos 66069/09, 130/10 and 3896/10] [2016] III ECHR 317 [9 July 2013] that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.... we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence... We, therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction."

36. Regarding sentence, Majanja J, quoting Muruatetu, in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, stated as follows:

> "The Sentencing Policy Guidelines, 2016 ["the Guidelines"] published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second,

consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case [Supra, para. 71], considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;

[a] age of the offender;

[b] being a first offender;

[c] whether the offender pleaded guilty;

[d] character and record of the offender;

[e] commission of the offence in response to gender-based violence;

[f] remorsefulness of the offender;

[g] the possibility of reform and social re-adaptation of the offender;

[h] any other factor that the Court considers relevant.

37. In the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa [ISLA] & 3 others [Amicus Curiae] [Petition E018 of 2023] [2024] KESC 34 [KLR] [12 July 2024] [Judgment] when setting aside the decision of the Court of Appeal which had applied the Muruatetu reasoning in setting aside the mandatory minimum sentence of 20 years imprisonment imposed on the Appellant, the Supreme Court stated as follows:

> " 52. We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance.
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> .....
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> 57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.
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> .....
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> 61. have struck down both mandatory life imprisonment as Having so stated, we are aware that mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently,

various apex courts of several countries such as Canada, USA, Australia, South Africa as well as the European Court of Human Rights well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed.

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62. Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below.

.....

68. Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.

38. Further, The Supreme Court of Kenya [Hon. P. M. Mwilu DCJ & VP, M. K. Ibrahim, S. C. Wanjala & Njoki Ndung'u & Lenaola, SCJJ] allowed the appeal by the Office of the Director of Public Prosecutions in REPUBLIC v. Evans Nyamari Ayako [SCORK Petition No. E002 of 2024] challenging the decision of the Court of Appeal which had declared, inter alia, that life imprisonment in Kenya must be translated to mean thirty years [30] imprisonment. The Court of Appeal accordingly substituted the life imprisonment term with a 30 year sentence. The court held;

> " In view of the foregoing, we find that the Court of Appeal ought not to have proceeded to set a term sentence of thirty [30] years as a substitution for life imprisonment, as the effect would be to create a provision with the force of law while no such jurisdiction is granted to it. The term of thirty years was arrived at arbitrarily without involvement of Parliament and the people. In consequence, we find that the Court of Appeal ventured outside its mandate and powers."

39. In view of the decision and guidelines expressly set out by the Supreme Court as above, this Court will be acting ultra vires were it to set aside the sentence of life imprisonment on the basis that the same, being a mandatory sentence stipulated by statute, is unconstitutional.

40. It follows that the appeal fails in its entirety.

Final Order

41. In the circumstances, I make the following Orders:

    i. The Appeal against conviction and sentence is dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 23RD DAY OF JULY 2025.

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R. NYAKUNDI

JUDGE