Wachera v Republic (Criminal Appeal E008 of 2023)
[2025] KEHC 11843 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11843 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E008 OF 2023

DKN MAGARE, J

JULY 24, 2025

BETWEEN

KELVIN NG'ANG'A WACHERA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was charged and convicted for the offence of defilement contrary to Section 8(1) as read with section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that on the 18.09.2021 in Nyeri County the appellant intentionally and unlawfully caused his penis to penetrate the Vagina of MTK a child aged 11 years.

Submissions

2. The Respondent submitted that this being a first appeal, the duty of this court is to re-evaluate the evidence and draw its own conclusions, as was held in the celebrated case of Okeno v Republic [1972] EA 32, 36 where the Court of Appeal, stated as follows:

> An appellant on a first appeal is entitled to expect the appellate court to subject the evidence as a whole to a fresh and exhaustive examination and to draw its own conclusions, bearing in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.

3. The prosecution submitted that the key elements of the offence were clearly proven at trial, leading to a proper conviction. The state submitted that three elements are to be proved that is:

   a. Proof of penetration of genital organs of another,

   b. Proof of age of the victim,

c. Identity of the perpetrator.

4. It was their submissions that the victim gave a consistent account of how the appellant grabbed and defiled her in his nearby house. Further that medical evidence confirmed the defilement, and the appellant admitted the proximity of the houses. The victim's testimony remained unchallenged during cross-examination. The appellant, dissatisfied with the trial court's findings, has now lodged this appeal.

5. They submitted that on the issue of identification, given the location and their relationship, there was no possibility of mistaken identity. It was their submission that the offence occurred within the homestead where both the victim and the appellant lived. They are relatives, and the victim knew the appellant and his house well. Being in class six, the victim was of sufficient age to understand her surroundings and gave sworn evidence in court.

6. They continued that the court rightly rejected the appellant's defence. The appellant raised an alibi only during his defence and failed to put it to any prosecution witness, rendering it an afterthought. In respect of the claim that there was bad blood with the victim's family, they submitted that this was never raised during cross-examination hence lacked credibility. It was their submissions that contrary to the appellant's claims, the court considered the defence offered and found it too weak to counter the strong and consistent case presented by the prosecution.

7. On sentence they submitted that this court as an appellate court cannot interfere with a sentence simply because it would have imposed a different one. It may only do so if the trial court committed a material misdirection or if the sentence is so disproportionate that it can be described as "shocking," "startling," or "disturbingly inappropriate." As held in S V Maleas Zoor (R) SACR 460 (Sca) at para 12, this preserves the sentencing discretion of the trial court. Similarly, in Shadrack Kipkoech Kogo V Republic, Eldoret Criminal Appeal No. 251 of 2003, the court of appeal emphasized that sentencing is a discretionary function, and appellate interference is only warranted where the trial court considered irrelevant factors, applied wrong principles, or imposed a manifestly excessive sentence.

8. The appellant filed submissions that sometimes sexual offences are used to extort money. Reliance was placed on the case of Eliud Waweru Wambui vs Republic [2019] eKLR. He submitted that the three main ingredients set out in Charles Wamukoya Karani vs Republic Criminal Appeal No. 72 of 2013.

9. He stated that there was no proof of penetration as her general body had no injuries, hymen was old broken and vaginal canal were inflamed. He stated that the defence was not considered as he was an orphan. He stated that his evidence was not considered. He stated that he had issues with his uncle Gatitha. He stated that life imprisonment is harsh and inhuman. He stated he was still a young man of 23 years old.

10. He stated that mitigation was not considered. He referred to the case of Cunningham v. California, 549 U.S. 270 (2007), where, according to him the court ruled that aggravating facts must be proved beyond reasonable double. He relied on the case of Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR, where the court of appeal [Mwera, Warsame, Kiage, Gatembu & J. Mohammed JJ.A], stated as follows:

> The import of this decision is that mitigation is now required to determine the appropriate sentence in cases where there had been convictions for capital offences. In effect, the holding in this case introduced sentencing discretion to judicial officers in murder cases. Decisions by this Court are generally binding, but we do have the power to depart from those decisions where we consider that in the circumstances, it is correct to do so. The Court will also not

follow a case that it considers per incuriam. See Dodhia v National Grindlays Bank Ltd [1970] EA 195.

11. He also relied on the court of appeal authority of David Njuguna Wairimu v Republic [2010] eKLR, where [S.E.O. Bosire, P.N. Waki and D.K.S. Aganyanya] and Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment), where the supreme court [DK Maraga, CJ, PM Mwilu, DCJ & V-P, JB Ojwang, SC Wanjala, NS Ndungu & I Lenaola, SCJJ] held as follows:

> 63 ... Refusing or denying a convict facing the death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. This is repugnant to the principle of equality before the law. Accordingly, section 204 of the Penal Code violates article 27 of *the Constitution* as well.

12. He also relied on the case of Stephen Nguli Mulili v Republic [2014] eKLR, where court of appeal [Githinji, Karanja & J. Mohammed, JJ.A.] stated as follows:

> The standard of proof required is "proof beyond reasonable doubt". In reference to this Lord Denning in Miller V Ministry of Pensions, [1947] 2 ALL ER 372 stated:
>
> > "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

As a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section make an exception in sexual offences and provides as follows:

> "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."

In the case of Kaingu Elias Kasomo V R, Malindi CR. NO. 504 OF 2014, the Court of Appeal stated that age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence.

13. The appellant pleaded not guilty. The matter then proceeded with six witnesses for the state and two for the appellant including the appellant.

14. PW1 testified that she was born on 15.11.2010 and was a pupil in grade 6. She knew the Appellant who is her cousin. On the 08.09.2021, she was collecting dry leaves near the appellant's house, like 10m apart. The appellant came from behind and closed her mouth and carried her to the house and placed her on a sofa set. She kicked him. He threw the complainant on the sofa set, and sealed her mouth with a blue cello tape. He removed both his and her clothes, inserted a penis into her vagina and a watery substance came out of his penis.

15. When the appellant was done, he unsealed her mouth and threw the victim out of the house, along with her undergarments. She was experiencing pain in her vagina and went outside to cry in the shamba. The appellant then left the house and went on his way. The victim collected some leaves and did not inform anyone about the incident.

16. After watching a program on television about the dangers of HIV, she became aware of the risks involved and decided to confide in a friend. This eventually led to her informing Ms. Were, and ultimately, her mother. After reporting to the police, the appellant was arrested. She identified the Appellant in court.

17. On cross examination, she stated that she did not inform the mother immediately as the appellant threatened her. She stated that the cello tape was blue but she did not know how the same was not bought. She did not tell the mother since she feared repercussions of the appellant's threats.

18. PW1's mother testified that she was called on 10.11.2021. She was required to go to school on 11.11.2021. The deputy head teacher informed her of the incident. She took the victim to PGH. She was examined and treated. It was her evidence that there were no differences between them and the appellant. Nothing was examined about any grudge.

19. PW3 was Dr. William Muriuki who had been in the hospital since 2017. He had a degree of Bachelor of Medicine and Surgery from the University of Nairobi. He gave evidence on the examination of the minor where he found no injuries, hymen was old broken, and walls were inflamed, means that there was some canal activity. He produced the PRC and P3 form. The later was produced under Section 33 of as read with Section 77 of the *Evidence Act*.

20. PW4 was Susan Wanjiru, a teacher by profession, who testified that the victim was their pupil. She stated that when schools reopened after the holidays, she learned that the victim had been defiled during the school holidays. This information was relayed to her by AB, another pupil. During cross-examination, she confirmed that she did not witness the incident.

21. PC Andrew Wanaswa Were testified that on 24.11.2021, he was assigned as the investigating officer for a defilement. He was directed to the appellants' village where, he was led to the appellant and arrested him. He had no grudge against the appellant. On cross examination, he stated he was the arresting officer.

22. PW6 Florence Mwendwa, was the investigating officer. She received information regarding the defilement of a ten-year-old minor. The minor went into the police station in the company of her mother when the victim reported that she had attempted to resist the act, but her efforts were unsuccessful. She stated that the appellant, who is her cousin, had defiled her. She further observed that a whitish substance was discharged from the appellant's penis. She stated that a P3 form was filled at PGH. The minor stated that the appellant threatened the minor after the ordeal.

23. Thereafter, Mrs. Were was informed, who in turn alerted the minor's parent. She produced a birth certificate showing the victim was 10 years. She stated that by the time of arrest, the defilement had already occurred.

24. The appellant was found to have a case to answer. He opted for unsworn testimony. He stated that he was in bad terms with PW 2. He stated that he was a nephew to the said witness. He stated that they had a grudge with the said witness. This was said to be related to inheritance. He stated on that day, he was in the market the whole day. He then went to sleep. Next day he was arrested in the presence of PW1 and PW1's father and 2 police officers. He stated that he did not know why he was arrested. The following day, he woke up and went to the grandmother's place to do menial jobs.

25. DW2 was Grace Nyachomba. She was a guardian to the appellant, since the parents died when he was very young. Later she handed him to the auntie. She recalled that on 18.09.2021, the appellant went to her house and asked for casual job. The appellant was there the entire day; he cut some trees and prepared firewood. She stated that later she met the appellant who told her that the appellant was in remand. She stated that the appellant did all the works assigned to him. She stated that the appellant was getting materials to build his house.

26. The court found him guilty and convicted him accordingly. On being found guilty he mitigated that he was an orphan. The court then sentenced him to life imprisonment.

Analysis

27. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

28. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

29. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence

given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

30. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

31. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

32. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

33. Section 8 of the *Sexual Offences Act* provides as follows:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(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.

34. In this context the court has a duty to determine two issues only, that is:

a. Whether the case against the appellant was proved beyond reasonable doubt.

b. Whether the sentence was excessive.

35. On conviction, there were three aspects that the court has to establish before convicting an accused of the offence of defilement as follows:

a. Proof of penetration of genital organs of another,

b. Proof of age of the victim,

c. Identity of the perpetrator.

36. The age of the victim was said to be 11 years. She was born on 15.11.2010. As at the time of the alleged offence, on 18.09.2021, she was 10 years and 10 months. This is well within the term 'a child aged eleven years or less'. Her birth certificate was produced as exhibit 1. Registration for the birth certificate was done on 30.11.2010. There were no doubts on the authenticity of the birth certificate. The medical record also indicated the age of the minor. From the evidence, as a fact, the age of the minor was proved.

37. The next question is whether there was penetration of the minor with a sexual organ. The hymen was broken as per the PRC and the P3. However, a broken hymen is not enough to prove penetration in this particular incident. In the case of PKW vs Republic [2012] eKLR, the Court of Appeal observed that:

> " Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen."

38. From the foregoing, it is evident that the absence of a hymen is not, in itself, conclusive proof of penetration through a sexual act. In the present case, it was incumbent upon the prosecution to prove beyond reasonable doubt that the complainant's hymen was torn as a result of an act of defilement committed by the Appellant. Further, the state needed to prove that even notwithstanding issues related to the hymen, they could independently prove that there was penetration.

39. This then brings us to the next issue which will be dealt with the remainder of the issue of penetration. The P3 indicated that the minor was 12 years. The minor gave a vivid description of the incident. She was not shaken on cross examination. The evidence was corroborated by PW2, medical evidence, and

evidence of PW4. The court found that the evidence of the minor was truthful. There are no reasons to doubt this. Section 124 of the *Evidence Act* provides as follows:

> Corroboration required in criminal cases. Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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 material 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.

40. The minor described what happened to her and did not shake. This court cannot differ with the findings on this piece of evidence without shaking. It is thus not possible, merely because the appellant threatened the minor, that she needed to have reported immediately. The case turned out on whether the minor could be believed. In this case, the evidence of the minor and her actions were consistent with her age and evidence on record.

41. In that connection, where threats made a child not to report earlier, the appellant cannot use it to defeat the cause of justice. Cross examination did not shake the minor. This was also the same evidence she gave to PW4.

42. The defence have no duty to prove their innocence. He then raises issues of bad blood with PW2. This was neither raised with her or is the truthfulness of the allegations cogent. As a fact, the appellant dealt with dates leading to his arrest and no alibi for the date in issue, that is 18.09.2021. It is the witness, who spoke about 18.09.2021 but the appellant had no recollection of the event. The defence did not raise serious issues.

43. The court was wrong in blaming the appellant on having the alibi at the tail end. However, the court was correct in finding that these questions were not put to the witnesses. This is important since the offence occurred at home.

44. The court found that the appellant and the minor lived in the same house. The appellant was the perpetrator. In this case, there are no doubts on who the perpetrator was. It was the Appellant. The appellant raised a defense of alibi. His defence was supported by witnesses. The state had an opportunity to call rebuttal evidence which they did not call. With reference to alibi evidence, the court of appeal in Erick Otieno Meda vs. Republic [2019] eKLR stated thus:

> " In considering an alibi, we observe that:
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> a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
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> b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
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> c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

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

45. The first aspect was the alibi defence set out. The state did not find it fit to challenge any of the statements made by the Appellant in relation to the alibi. The state, in its cross examination confirmed the consistence of the defence evidence. The appellant was in their home from 5 pm up to 10 pm when the parties took dinner. This piece of evidence was not impeached at all. The Appellant's evidence remained unrebutted. In the case of Erick Otieno Meda v Republic [2019] eKLR, the Court of Appeal [Asike Makhandia, Kiage & Otieno-Odek JJA] posited as follows regarding an alibi: -

> In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of Kiarie – v- Republic [1984] KLR, this Court stated:
>
> > "An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable....."

46. In the South African case of S -v- Malefo en andere 1998 (1) SACR 127 (W) at 158 a - e the court set out five principles with respect to the assessment of alibi evidence:

i. There is no burden of proof on the accused to prove his alibi.

ii. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.

iii. An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word."

iv. If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar").

v. The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false alibi.

47. The burden of proving the falsity of an alibi was addressed in case of Victor Mwendwa Mulinge –v- R, [2014] eKLR as follows: -

> " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution...."

48. In another persuasive South African case of R - v - Biya 1952 (4) SA 514 (A) at 521C - D Greenberg JA said:

> 'If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a

reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.

49. In this case, the alibi raised was not complete. There was thus no burden on the state. The appellant was in the house on the said date and left at some stage and came back. That then cannot be an alibi, as the appellant was at home at the beginning and the end of the day. The appellant thus had special knowledge on where he was in a scenario where he was at the scene. Section 111 of the *Evidence Act* provides as follows:

> Burden on accused in certain cases. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him
>
> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

50. In the circumstances, the evidence both direct and circumstantial point towards the guilt of the appellant. For circumstantial evidence to work, it must be inconsistent with the accused's innocence. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, Court had this to say on circumstantial evidence:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

51. In this case, the court was correct. The appeal on conviction is dismissed.

52. On the question of excessive sentence, the minor was 11 years. There was no doubt that the sentence provided is a mandatory minimum sentence. In the circumstances, the court meted out the only available sentence. 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), the Supreme Court stated as follows:

> 56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express

different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

61. 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 have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed. That is why the Supreme Court of the United States, which has actively challenged mandatory death sentences since the early twentieth century, ruled in Miller v. Alabama, 132 S. Ct. 2455 (2012) that imposing mandatory life imprisonment without parole for juvenile offenders at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. Similarly, the European Court of Human Rights has on several occasions applied the "grossly disproportionate test," for instance in the cases of Harkins and Edwards v. United Kingdom, 2012 ECHR 45 and Murray v. Netherlands, 2016 ECHR 408 where the court found that mandatory sentences of life imprisonment without the possibility of parole go against Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms on the prohibition from torture and inhuman and degrading punishment. Canada has also actively struck down minimum mandatory sentences and recently a 9 Judge bench of the Supreme Court of Canada in R. v. Safarzadeh Markhali, 2016 SCC 14, reiterated its Constitutional commitment for proportionality in sentences. In Australia, in the case of Magaming v. The Queen, (2013) 253 CLR 381 the High Court struck down minimum mandatory sentence in the Migration Act finding that the statute usurped judicial power by granting the prosecution office the discretion to determine the minimum penalty to be imposed by allowing them to elect which offences to charge suspects with.

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.

53. The sentence meted out is a proper one. It is accordingly upheld. The appeal on sentence is dismissed as baseless.

Determination

54. The consequence of the foregoing is that the court makes the following orders:

    a. The appeal on conviction and sentence is dismissed.

    b. The file is closed.

DELIVERED, SIGNED AND DATED AT NYERI ON THIS 24TH DAY OF JULY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Kimani for the State

Appellant present

Court Assistant – Michael