PON v Republic (Criminal Appeal E052 of 2021) [2024] KEHC 924 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEHC 924 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E052 OF 2021

RE ABURILI, J

FEBRUARY 1, 2024

BETWEEN

PON .... APPELLANT

AND

REPUBLIC .... RESPONDENT

((An appeal against the conviction and sentence by the Hon. M.C. Nyigei delivered on the 17th September 2015 in the Senior Principal Magistrate's Court in Tamu in Sexual Offence Case No. 14 of 2014)

JUDGMENT

Introduction

1. The appellant herein was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006 the particulars being that on the 31st day of August 2014 in Muhoroni district within Kisumu County, he intentionally caused his penis to penetrate the vagina of CD a child of 12 years.

2. The prosecution called five witnesses in support of its case and in his defense, the appellant gave a sworn testimony. he did not call any witness.

3. The trial court after considering the evidence adduced by both parties found that the prosecution had proved their case against the appellant beyond reasonable doubt. The appellant was convicted and sentenced to serve twenty (20) years in prison.

4. Aggrieved by the conviction and sentence, the appellant filed his Petition of Appeal dated 16th November 2021 in which he raised the following grounds of appeal:

   i. That the trial court failed to observe that the investigation tendered was shoddy.

ii. That the trial court failed to consider that the prosecution evidence was full of contradictions hence unsafe to base a conviction upon.

iii. That the trial court failed to consider that the sentence imposed was against the weight of evidence adduced.

iv. That the trial court failed to appreciate that the sentence imposed was unconstitutional due to its mandatory nature.

v. That I be served with the certified copy of the trial court record to enable me erect more grounds of appeal.

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

The Appellant's Submissions

6. In his submissions, the appellant sought to amend his appeal and argue out the same as against the sentence meted out only.

7. The appellant however faulted the trial court's finding that penetration and age of the minor had been proved. He further submitted that the prosecution failed to call some witnesses and that all these defects in the prosecution case could not lead to such a heavy penalty even if conviction had been secured.

8. It was submitted that the sentence meted having been mandatory in nature, deprived the appellant the right to a fair trial as the court was denied the power to exercise discretion in sentencing. The appellant submitted that the minimum sentence was illegal as held in *Jared Koita Injira v R* Criminal Appeal No. 93 of 2014.

9. The appellant submitted that his mitigating factors were not considered in light of the sentence passed contrary to the holding of the court in the case of *Simon Kipkorio v R* [2019] eKLR.

The Respondent's Submissions

10. It was submitted that the Birth Certificate indicated that the complainant was born on the 23rd December 2012 and was thus 10 years old, which evidence was corroborated by the testimony of PW2, the complainant's guardian.

11. On penetration, it was submitted that the same was proved by medical evidence adduced by PW3, the clinical officer who examined the complainant, which evidence corroborated the complainant's evidence.

12. As regards the identity of the perpetrator, it was submitted that the complainant testified that it was the appellant who took her to his house where he defiled her under threat that he would cut her with a panga and further that the appellant was her neighbour.

13. The respondent submitted that the sentence meted out on the appellant was lenient as the trial court took into consideration the appellant's mitigation. It was further submitted that the sentence was commensurate to the serious offence considering that the prescribed sentence under the law is life imprisonment.

Role of the Court

14. As a first appellate court; I shall re-evaluate and reassess the evidence afresh and arrive at my own independent conclusions. I am however reminded that unlike the trial court, I neither saw nor heard the witnesses and give due regard for that. See *Okeno v R*. (1972) E.A. 32.

Evidence before the Trial Court

15. PW1, the clinical officer who examined the complainant 2 weeks after the alleged defilement produced her P3 form and stated that on examination, she found that there was a normal external genitalia and that there was no tear on both the labia majora and minora. It was her testimony that the hymen was not intact. PW1 also produced the appellant's P3 form which showed that the appellant 's genitalia was normal.

16. In cross-examination, PW1 stated that the complainant had been defiled as there was no hymen and further that the complainant had informed her that she had been defiled. She further stated that there is usually bleeding when the minor had been freshly defiled but the bruises heal within 2 days.

17. PW2 Mary Owuor Onyango testified that on the 28.8.2014, the complainant and three other children went to her home seeking her help and claimed that the uncle whom they were staying with had defiled her. She testified that she then called the complainant's father who was in Tanzania and as he spoke to the complainant, PW2 heard the complainant say, "*yule baba uliniwacha kwake amenishika nikaja kuishsi kwa huyu mwenye simu*."

18. PW2 testified that the complainant's father asked her to get the complainant's uniform from the appellant's house so that she could continue with school. It was her testimony that on the 3.9.2014, she went to the complainant's school and informed them what had happened and at 1pm, she was called by the school and informed that she was required at the police post so she went there. PW2 identified the appellant whom she stated she knew well.

19. In cross-examination, PW2 reiterated her testimony and stated that the complainant informed her that the appellant defiled her at 6am when he had sent his son Felix to the shop to buy sugar. She further stated that the appellant was the complainant's uncle.

20. The complainant testified as PW3 stating that she was 12 years' old. She referred to the appellant as his father and stated that she used to stay in his house with his wife and their son Felix and that she went to his home in January.

21. It was her testimony that on the 24.8.2014, the appellant gave his son Kshs. 30 to go the shop and buy sugar then he lured her into his bedroom on grounds that he wanted to talk to her. It was her testimony that the appellant took hold of her, covered her mouth and laid her on the bed where he removed his trousers and underwear as well as her skirt and panty then he put on a condom and inserted his penis into her vagina. It was her testimony that when he was finished, he told her not to tell anyone about it if she wanted to continue her studies up to class 7 while at his home. The complainant testified that she informed the appellant's son on what had happened and that together with another child called Emma, they decided to go and inform PW2, whom she was familiar with as PW2 had gone to visit her father while they were in Tanzania.

22. In cross-examination, the complainant stated that the appellant had previously defiled her and that one Steve, a neighbour's son, who had seen him asked him what he was doing and that the appellant told Steve to keep quiet. She further stated that Felix, the appellant's son saw him keep the condom, which he had taken off, under the bed.

23. PW4, the complainant's father testified that on the 1.9.2014 she received a call from PW2 who informed her that his daughter, the complainant, wanted to speak to him. He testified that the complainant informed him how the appellant had defiled her. It was his testimony that he called the appellant to ask him about the incident but the appellant denied it. He testified that he prepared and on th 26.9.2014, he travelled to Kenya from Tanzania and went to PW2's house where the complainant was. It was his testimony that the complainant was born on the 20.2.2002.

24. In cross-examination, PW4 stated that he was the one who called the appellant first and that when the appellant learnt that the police were looking for him, he called PW4 to inform him that once he was arrested, he was leaving his family in PW4's care.

25. PW5 No. 73001 PC Fredrick Muli testified that on the 3.9.2014, he was at the report desk at Muhoroni Police Post when the complainant was taken to the post by her guardian and teacher from Mariwa Primary School on allegations that she had been defiled by the appellant. He testified that as he could not get birth records of the complainant, he went to MARIWA Primary School where he got a letter showing that the complainant was born in 2002 and was thus 12 years old.

26. In his defense, the appellant denied committing the offence, he testified that on the 31.8.2014 he left his place of work in the morning and went to jua kali where he worked upto 2pm then proceeded home. It was his testimony that on the morning of 1.9.2014, he went for casual work at Odula's farm which lasted until 7.92014 and that on the 8.9.2014 as he was going back home, he was arrested. The appellant denied knowing the complainant but admitted knowing her father PW4 who he stated was his cousin. He stated that his wife as always at home and did not know the complainant.

Analysis and Determination

27. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions and the applicable law. Despite the appellant's submissions that he was only appealing on the sentence, he went on to raise issues with his conviction. In the circumstances, it is my view that the issues for determination emanating therein are as follows:

    i. Whether the prosecution's case against the appellant was proven beyond reasonable doubt and

    ii. Whether the sentence meted out on the appellant was excessive and harsh.

    Whether the prosecution proved its case against the appellant beyond reasonable doubt

28. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* . The section provides that:

    > "(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 between the age of twelve and fifteen is liable upon conviction to imprisonment for a term not less than twenty years."

29. To sustain the charge of defilement against the appellant, the Prosecution needed to prove the following essential ingredients of the offence of defilement:

    a. That the Complainant was, at the material time, a child as defined under section 2 of the Children's Act and of the age between 12 years and 15 years

    b. That there was penetration of the child's vagina; and;

c. That it was the appellant who caused such penetration of the complainant's vagina or genitalia.

30. On the age of the complainant, the complainant testified that she was 12 years old. PW4, the complainant's father testified that the complainant was born on the 20.2.2002. PW5, the investigating officer testified that although he could not get the complainant's birth certificate, he had a letter from the complainant's school showing that she was 12 years' old which he produced as PEX3.

31. In *Kaingu Kasomo v Republic*, Criminal Appeal No. 504 of 2010, the Court of Appeal stated as follows:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

32. Rule 4 of the *Sexual Offences Rules of Court Rules* is explicit that:

> " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

33. In *Fappyton Mutuku Ngui v Republic* [2012] eKLR, it was held:

> " ...that "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

34. Further, Courts have also declared the evidence of the mother to be crucial on the age of the child. For instance, in the case of *Richard Wahome Chege v Republic* Criminal Appeal No 61 of 2014, the Court of Appeal held as follows:

> " On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself."

35. Therefore, in this case, in the absence of any other evidence to the contrary, I find that complainant was aged 12 years 6 months old when the alleged incident of defilement occurred.

36. On 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."

37. 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."

38. In the instant case, the victim gave unsworn testimony that the appellant was the one who defiled her. The complainant testified that the appellant lured her into his bedroom then took hold of her, covered her mouth and laid her on the bed where he removed his trousers and underwear as well as her skirt and panty then he put on a condom and inserted his penis into her vagina. In cross-examination, the complainant testified that this was not the first time that the appellant was defiling her and that he had previously done so and was spotted by one Steve, a neighbour's son. Her testimony was corroborated by the testimony of PW1 who examined her two weeks after the incident and noted that the complainant's hymen was not intact.

39. The appellant faulted the trial court for relying on the complainant's testimony as provided under Section 124 of the *evidence act*.

40. Under section 124 of the *Evidence Act*, a trial Court can convict the accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. (See *George Kioyi v R* Cr. App. No. 270/2012 (Nyeri) and *Jacob Odhiambo Omumbo* v. R. Cr. App No. 80 of 200 (Kisumu).)

41. In this case, it is clear from the evidence adduced before the trial court that the complainant's evidence was adequately corroborated by the medical evidence. More so, the victim, upon being defiled, she went and reported to PW2 who called the complainant's father and notified him of what had transpired to his daughter.

42. Further, the complainant's evidence remained unchallenged even under cross-examination.

43. Weighed against the evidence presented by the prosecution was the evidence adduced by the appellant who denied committing the offence and instead testified on matters that happened days after the incident occurred, claiming that he did not know the complainant. I further note that PW4, the complainant's father testified in cross-examination how the appellant implored him to look after his family after the appellant learnt that the police were after him. This simply means that the appellant was sub-consciously aware of what he had done and the consequences that would follow.

44. The aforementioned all point to the fact that the complainant's testimony was the truth, it was well corroborated. Accordingly, then her testimony on penetration was proved and I find as such.

45. As to whether the appellant was the perpetrator, despite the appellant's testimony that he did not know the complainant, he admitted knowing the complainant's father. It also merged in cross-examination of the complainant that the appellant offered to let her stay with his family for the duration of her studies if she kept quiet about the incident. PW2 also testified that he knew the appellant as the complainant's uncle who stayed with her. It is thus clear that the complainant knew the appellant well and recognized him as the perpetrator hence his testimony that he knew her not was a lie.

46. In the circumstances, I find that the appellant was properly recognized as the perpetrator of the offence.

47. The appellant pleaded that there were inconsistencies and contradiction in the testimonies of the prosecution witnesses. However, it is evident as laid out hereinabove that the evidence adduced by the prosecution witnesses corroborated each other. The appellant did not even say what contradictions he found fatal to the conviction being challenged.

48. On contradictions, the Court of Appeal addressed itself on the issues of contradictions in the case of *Richard Munene v Republic* [2018] eKLR that:

> " .... only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

49. Accordingly, it is my opinion that there were no contradictions and inconsistencies sufficient to create doubt in the mind of the trial court as to the appellant's guilt. This ground of appeal therefore fails and is dismissed.

50. The appellant also raised the issue that the prosecution failed to call crucial witnesses to prove their case specifically. I am alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of *Evidence Act* (Cap 80) Laws of Kenya provides: -

> " 143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"

51. In the case of *Bukenya v R* (UGC 1952), the court addressed itself thus: -

> " (i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
>
> (ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.
>
> (iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."

52. In the case of *Donald Majiwa Achilwa and 2 other v R* (2009) eKLR the Court stated as follows:

> " The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See *Bukenya & Others v. Uganda* [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."

53. In the case of *Keter v Republic* [2007] 1 EA 135 the court held *inter alia* thus:

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

54. In the instant case, the prosecution was at liberty to call the witnesses they deemed necessary to establish and prove their case. The trial court was in my opinion not at liberty to determine which witnesses are sufficient to prove the prosecution's case. Accordingly, I hold that this ground of appeal fails.

55. In the end, I find and hold that the prosecution proved the guilt of the appellant herein beyond reasonable doubt and therefore the appeal against conviction fails and is hereby dismissed. The

conviction of the appellant for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* was sound and the same is hereby upheld.

Whether the sentence meted out of the appellant was harsh and excessive

56. The appellant has impugned the judgment of the trial court in imposing a sentence of 20 years' imprisonment. He argues that the sentence is unconstitutional due to its mandatory nature as it takes away the trial magistrate's discretion to pass sentence and thus deprives the appellant the right to a fair trial.

57. The role of this court in an appeal is not to interfere with the discretion of the trial court on the sole ground that the sentence meted out is severe, unless it was manifestly excessive. The Court of Appeal of East Africa stated in *Wanjema v Republic* [1971] EA 494 that:

> " An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case"

58. The sentence provided for under section 8 (3) of the *Sexual Offences Act* is as follows:

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen is liable upon conviction to imprisonment for a term not less than twenty years."

59. In this case, the child was found to be a twelve-year-old child. Before sentencing the appellant, the trial magistrate heard his mitigation to the effect that he was a father to children and pleaded for leniency. Further, that he had been in custody for about one year.

60. The trial court also called for a Probation Officer' report which was filed, dated 20.7.2015. In the said report, the appellant maintained his innocence saying he did not know the complainant and that he came to know of the offence at the police station. The probation officer reported that the appellant was aged 35 years old, was married with four children, one of whom was only about one year old. That the appellant used to stay with the minor and even caused her admission in the school. He concluded that the appellant was not remorseful saying he could not be remorseful for what he did not commit.

61. It is thus clear that the appellant was given a chance to mitigate hence it cannot be said that his right to mitigation was violated.

62. However, I note that the sentence was passed on 17/9/2015 and the trial court in sentencing the appellant did not consider the mitigations owing to the mandatory nature of the sentence as provided for in section 8(3) of the *Sexual Offences Act* which is not less than 20 years imprisonment.

63. Sentencing is in the discretion of the trial court. In this case, the penalty section uses the words... is liable to...Although the mandatory sentence is minimum, these words have been interpreted in several cases as giving discretion to the trial court to sentence up to a maximum and not minimum, and especially taking into account the principles espouse din the *Francis Karioko Muruatetu & Another v Republic* [2017] on the unconstitutionality of mandatory death sentence in murder cases. The Apex Court found that mandatory death sentence is unconstitutional to the extent of its mandatoriness as it deprives the trial court of the discretion to mete out appropriate sentence having regard to the mitigation and circumstances of the offence.

64. In *Thomas Wambu Wenyi v Republic* Criminal Appeal No. 21 of 2015, the Court of Appeal quoted with approval, the following words of Sir Henry Webb C.J. in the case of *Kichanjele S/O Ndamungu v*

Republic (1941) 8 EACA 64, wherein the learned Chief Justice stated as follows, regarding the proper construction of the words "liable to":

> " The wording used throughout the code is 'shall be liable to', but a consideration of the various sections shows, in our judgement, that the use of the words 'shall be liable to' does import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limited indicated."
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> 20. The learned Judges of Appeal stated that the use of the words:
>
> > " shall be liable to imprisonment for life with hard labour in Section 145 of the *Penal Code*, gave room for the exercise of judicial discretion."

65. Later, the Court of Appeal (Okwengu, Makhandia and Sichale JJA in *Caroline Auma Majabu v Republic* [2014] eKLR at Mombasa in an appeal where the appellant had been convicted of trafficking in narcotic drugs and sentenced to a manadatory prison term and where the words used in the penalty section were ...liable to.. had this to say:

> " [10] As regards the appeal against sentence under section 361(1)(a) of the *Penal Code*, referred to above, severity of sentence is a matter of fact which cannot be considered on second appeal unless an issue of law arises therefrom. In sentencing the appellant, the trial magistrate stated as follows:
>
> > "I note that this offence is very serious and also very prevalent. A sentence to discourage it is called for. Section 4 (a) of the *Narcotic Drugs and Psychotropic Substance Control Act* is mandatory. I sentence the accused to pay a fine of Kshs.1,000,000/- and in addition serve life imprisonment"
>
> (11) On her part, the learned Judge of the High Court followed *Kingsley Chukwu v R* Criminal Appeal No. 69 of 2010 (actually Criminal Appeal No. 257 of 2007 cited as *Kingsley Chukwu v R* 2010 eKLR), where the Court differently constituted held that a person convicted for an offence under Section 4(a) of the *Act* shall be fined Kshs.1000,000/- or three times the value of the drug whichever is greater and in addition to imprisonment for life. With respect, that is not the purport of section 4(a). We find it appropriate to revisit the question whether section 4(a) of the *Narcotic Drugs and Psychotropic Substance Control Act* states provides for a mandatory sentence.
>
> (12) Section 4(a) of the *Narcotic Drugs and Psychotropic Substance Control Act*, sets out the penalty for trafficking in the following terms:-
>
> > 4. Penalty for trafficking in narcotic drugs, etc.
> >
> > Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable—

(a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life”

(13) In our view, the word “shall” is used in relation to the guilt of the offender and the word used in relation to the sentence is “liable”. The *Concise Oxford English Dictionary* 12th Edition defines the word “liable” as

“(i) Responsible by law, legally answerable, (liable to) subject by law to;

(ii) (Liable to do something) likely to do something;

(iii) (Liable to) likely to experience (something undesirable).

Black’s Law Dictionary defines “liable” as

i. Responsible or answerable in law; legally obligated,

ii. Subject to or likely to incur (a fine, penalty etc.)

(14) Applying the above definition, the use of the word “liable” in section 4(a) of *Narcotic Drugs and Psychotropic Substance Control Act* merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms. The following examples from the Penal Code provides such mandatory sentences expressly and concisely as follows:

204. Any person convicted of murder shall be sentenced to death.

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(2) which provides capital punishment for the offence of robbery provides as follows:

“if the offender is armed with any dangerous or offensive weapon or instrument or is in company of one or more other person (s) or of at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other personal violence to

any person he shall be sentenced to death"

(15) The *Sexual Offences Act* , is another legislation which provides for a mandatory sentence. Section 3 of that Act which provides the penalty for the offence of rape provides as follows:

> (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.
>
> Although the word used in section 3 of the *Sexual Offences Act* is "liable", the provision is clear that the sentence provided is minimum by use of the words "shall not be less than", thus giving allowance for discretion on the upper limit and not the lower limit. In the case of section 4(a) of the *Narcotic Drugs and Psychotropic Substance Control Act*, the provisions does not contain such clear and unambiguous language with regard to mandatory sentence. In our view, this leaves room for judicial discretion and we would be reluctant to adopt an interpretation that would defeat or muzzle the exercise of such judicial discretion. With respect, we must depart from the finding in *Kingsley Chukwu v R* (*supra*) as the same was made per in curium. Both the trial magistrate and the learned Judge misdirected themselves in holding that the sentence was mandatory, and failing to exercise their discretion by addressing the appellant's mitigating circumstances. An error of law was thereby committed which justifies the intervention of this Court.

(16) Further, the appellant was sentenced to pay a fine of Kshs.1,000,000/- in addition to a life sentence for possession of seven sachets of heroin worth Kshs.700/-. We are somewhat disturbed by the apparent disparity in the sentencing given the minimal amount of the narcotic drugs which the appellant was found in possession of. Given the gravity of the sentence provided for trafficking, it would appear to us that the sentence for trafficking was a maximum sentence intended for drug barons and serious drug dealers dealing with drug worth thousands if not millions of shillings, and not small timers such as the appellant found in possession of a few sachets of heroin worth a few shillings. While we do not encourage small time trafficking in drugs, we are of the view that the sentences imposed in such cases should be realistic and should aim at rehabilitation rather than incarcerating and completely destroying the offenders.

(17) The appellant has pleaded with us that she has health problems being H.I.V positive. In her mitigation before the trial magistrate, she also pleaded that she had two children. Having taken into account her mitigating factors and also taken into account that she has been serving sentence for the last four years, we find that the order that commends itself to us is an order for a conditional discharge under section 35(1) of the *Penal Code*.

(18) Accordingly, we dismiss the appeal against conviction but allow the appeal against sentence. We set aside the sentence of life imprisonment and the fine of Kshs.1,000,000/- and substitute thereof an order for the appellant to be discharged forthwith under section 35(1) of the *Penal Code* on condition that she does not commit any offence for the next one year."[emphasis added]

66. The trial magistrate, in my humble view, did not consider the mitigations by the appellant who was also a first offender. In addition, despite the appellant having pleaded that he had been in prison for a year, the trial court did not take into account the provisions of section 333(2) of the *Criminal Procedure Code* which mandate that in sentencing, the court should take into account the period that the offender had been in custody during the trial. In this case, the appellant was not released on bond and from the court proceedings in the lower court, despite being granted bond, the title deed availed as security was found to be mutilated hence it was rejected, bond terms enhanced from kshs 100,000 to Kshs 200,000 which the appellant never raised until he was convicted and sentenced.

67. The appellant was arrested on 8/9/2024, according to the charge sheet and taken to court for plea on 9/9/2014. As at 17/9/2015 when he was sentenced, he had been in custody for over one year.

68. Accordingly, having dismissed the appeal against conviction, I allow the appeal against sentence. I hereby resentence the appellant taking into account the mitigations and the period spent in custody from 8/9/2024 to 17/9/2015. I set aside the mandatory twenty years imprisonment and substitute the same with fifteen years imprisonment to be calculated from 8/9/2014, the date of arrest.

69. The trial court file with copy of judgment to be returned forthwith. Signal to issue.

70. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 1ST DAY OF FEBRUARY, 2024

R.E. ABURILI

JUDGE