PNK v Republic (Criminal Appeal 106 of 2018)
[2024] KEHC 9731 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9731 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 106 OF 2018

HM NYAGA, J

JULY 25, 2024

BETWEEN

PNK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment dated 14th December,2018 by Hon. Y.I.Khathambi, Senior Resident Magistrate at Nakuru Sexual Offence Case No. 142 of 2015)

JUDGMENT

1. PNK, the appellant, was charged with the offence of defilement contrary to section 8(1) (2) of the *Sexual Offences Act* No.3 of 2006. The particulars were that on 6th day of July, 2015 within Nakuru County he unlawfully committed an act by inserting his male genital organ namely penis into the female genital organ namely Vagina of MNK a child aged 4 years which caused penetration.

2. He also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars to that charge were that on the same date, place and time as above, he intentionally touched the vagina of MNK a child aged 4 years with his penis.

3. The appellant denied the charges and the case proceeded to full hearing. At the end of the trial, he was found guilty and was convicted. The trial magistrate then proceeded to sentence him to serve life imprisonment.

4. He was aggrieved by the judgment and filed the amended appeal raising the following grounds: -

    1. That the Learned Magistrate erred in law and fact by failing to note that there were evidence showing that the Appellant was suffering from a mental disorder at the time of the incident.

2. The trial court erred in law by failing to note that elements of Defilement were not proved by the prosecution.

3. That the learned trial magistrate erred in law by failing to note that life sentence was against the spirit of *the constitution* as provided under Article 50(p)(q).

Summary of the Prosecution's case

5. At the trial, the prosecution called five witnesses. The first witness for the prosecution who testified as PW1 was the complainant, MNK.

6. She narrated that on the material date she went to play with Popo and she met the Appellant at a place where there were many maize stalks. She said the Appellant was there alone and there was no darkness. She stated that the Appellant gave her 20 shillings and told her to go buy sweets with it. It was her testimony that the Appellant removed her panty and he did not remove his clothes fully. She said the Appellant then lay on her facing downwards while she was facing upwards. She said she felt pain. She showed aunty N the money the Appellant gave her and N took her to the Appellant's house where they found his mother. Later, the Appellant came and found them at their place. She said she was taken to hospital.

7. On cross examination, she testified that she knew the Appellant as he stayed at Faini's Place and reiterated that he took her to the maize farm and did bad manners to her.

8. PW2 was CW. She testified that the PW1 came with 20 shillings and told her that she was given by the Appellant. She said she knew the Appellant as he used to work at Faini's Place who was their neighbour. She said the victim told her that the Appellant had defiled her. She could not remember the exact date of the incident but stated that it was in 2015. She said the complainant was working while dragging her feet and she informed Aunty N. She said Aunty N called Mama Ndungu who examined the complainant's private parts.

9. In cross examination, she stated that Mama Ndungu was not a doctor.

10. PW3 was PC Joan Masese, the investigation Officer. It was her testimony on 6th July, 2015 while at work PW1 was brought by her aunty one N. She said PW1 said that the Appellant took her to the maize field, undressed her and defiled her. That thereafter, she went home and started scratching her private parts. That upon being asked what was wrong, she told C that the Appellant had defiled her. She said her aunty took her to hospital at Pwani and she was referred to Njoro where she was examined. She said the Appellant was arrested and taken to the station by the villagers. She said PW1 who was at the station positively identified him. She stated that upon receiving the complainant's clothes she sent them to the government chemist. She said the child's date of birth as per the Immunization card was 4 years old.

11. When PW3 was recalled, she produced the Government's findings as Exhibit no. 4, the Appellant's inner wear as Exhibit no. 5, Appellant's brown trouser as Exhibit no. 6 and Complainant's Clinic Card as Exhibit no. 8.

12. On cross examination, she stated that she did not visit the scene as she didn't see the need to. She stated that she took the clothes from members of the public when the accused was taken to the police station but confirmed she did not record the same.

13. In re-examination, she stated that exhibits no. 5 and 6 were recovered from the Appellant and that he was wearing the same on the material date.

14. PW4 was Theophina Murage, a nurse from Provincial General Hospital in Nakuru. She stated that examination conducted on the complainant showed that she had fungal infection, hyperaemic vestibule and an intact hymen. She said she examined the complainant two days after the incident and that she had no physical injuries. She said external vaginal swab showed normal pus cells and epithermal cells and no spermatozoa. She produced the PRC Forms as Exhibit No.3. She said the clothes collected were handed over to the investigation officer to take them to the government chemist. She produced them as exhibit 3.

15. On cross examination, she stated that the Complainant was able to walk properly and that PRC forms for the Appellant showed it was filled on 7th July, 2015 and the information was obtained from the girl. She said the form for the Appellant had been altered. She said the history of this matter was given on 6th July, 2015 at Njoro Rare.

16. PW5 was Ann Wanjiru Nderitu, a government Chemist. She testified that she received the following items from PC Masses from Nairobi Police station;

    1. Black Skirt indicated to belong to PW1 marked as A
    2. Red underwear indicated to belong to the Appellant marked as B
    3. Blue Long trouser for the accused Marked as C
    4. Blood sample in a container indicated to belong to the Appellant marked as A
    5. Blood Sample in content indicated as of the Complainant marked as B.

17. She said items 1-3 were received on 30th September, 2014 while items 4 and 5 were received on 2nd October,2015.

18. She said she conducted an analysis on the above items which revealed that: -Items 1-3 were not blood stained.Item 1 was stained by semen or spermatozoaitem 1 generated DNA profile that matched DNA profile generated from blood sample item 4 with a probability match being 9/9 x 10.

19. She produced the DNA report as Exhibit No. 7.

Evidence for the Defence

20. At the close of the prosecution case the appellant was put on his defence. He elected to give unsworn evidence and did not call any witness.

21. In his testimony, the appellant recalled that on 6th July, 2015 police officer went to his aunt's place and arrested him. He said he was not informed of the offence that he had committed. He was taken to Njoro Police station and placed in cell. He said he did not know the complainant and had never met her. He also said that he did not know CN and that Identification parade was not done. He disputed that he committed the offence and said that he was framed.

22. In her judgement, the Learned Trial Magistrate found that the age of the complainant was proved by the immunization card and that she was a child aged 4 years. As regards identification, she believed PW1's testimony that she knew the Appellant and that he worked at Faini's since this position was corroborated by PW2. She also held that DNA report confirming that the semen/spermatozoa found on the complainant's clothes marched those of the Appellant was unchallenged and it did place the Appellant at the scene of the crime. The trial court also found that based on PW1's testimony that incident happened during the day was a clear indication that she was able to positively identify the Appellant as the perpetrator, and that the Appellant's defence was weak and did not cast doubt on the

prosecution's case. In regards to penetration, it was the Court's finding that from both the evidence of the complainant and the DNA results, it was established that the complainant was defiled. The trial magistrate opined that the fact that the complainant's hymen was intact did not itself imply that there was no penetration of the genitalia organ of a person by genitalia organ of another person in view of the provisions of Section 2(1) of the *Sexual Offences Act*.

23. The Court therefore found that the prosecution had proved the charge beyond reasonable doubt and found the appellant guilty of the offence of defilement contrary to section 8(1) (2) of the *Sexual Offences Act* No.3 of 2006.

Appellant's Submissions

24. With regard to ground one of the Appeal, the Appellant citing the provisions of Section 9, 11 and 12 of the penal code submitted that it is generally accepted notion that persons who cannot appreciate the consequences of their actions should not be punished if those actions happen to be criminal acts.

25. He argued that the trial magistrate ought not to have assumed without considering surrounding circumstances that the he was not suffering from mental disorder at the time of the commission of the offence.

26. He posited that, it is the duty of the trial courts, where the defence of insanity is raised or where it becomes apparent to the court from the accused person's history or antecedent, to inquire specifically into the question. To buttress his submissions, he referred this court to the cases of *McNaughten Case* (1843) 10 C1 & Fin 200 ; *Kipchirchir Rutto vs R Kabarnet* Criminal Appeal No. E029 of 2022 & *Richard Kaitany Chemagong vs Republic; Criminal Appeal No 150 of 1983*.

27. On the second ground of the Appeal, precisely on the age of the complainant, he submitted that no birth certificate, school leaving certificate or a clinical card was produced to prove that she was 4 years old.

28. He argued that in defilement matters age of the minor is crucial. To support this position, reliance was placed on the cases of *Francis Omuroni vs Uganda* Court of Appeal in Criminal Appeal No.2 of 2000 & Court of Appeal in *Kaingu Elias Kasomo vs Republic* Criminal Case No. 504 of 2010.

29. In regards to penetration, the Appellant submitted that the same can be proved by evidence of the complainant and or supported by the evidence of medical examination. He argued that PW2 and PW3 were children of tender years and their evidence needed corroboration. In support of this position, he made reference to the case of *R vs Baskerville* [1916] 2 KB 658, 86 LJKB 28, 115 LT 453, CCA.

30. Citing the case o*f Thuo vs Republic* [1988] K.L.R. 763, he faulted the trial magistrate for failing to warn herself on the danger of basing a conviction on evidence of a single witness who was a child of tender years.

31. The Appellant making reference to the evidence of PW4, submitted that the complainant neither had bruises in her genitalia nor discharge and her hymen was intact. He submitted that the P3 & Post Rape Care (PRC) forms produced did not support the evidence of penetration. To bolster this position, he relied on the case of *J M M vs Republic* [2016] eKLR.

32. With regard to ground three of the Appeal, the Appellant argued that recent law developments have clearly shown that courts can divert from mandatory sentences enshrined in the *Sexual Offences Act*. To buttress this position, he placed reliance on the cases of *Philip Mueke Maingi & 5 Others vs Republic*, Petition No. E017 OF 2021; S vs. Malgas 2001 (1) SACR 469 (SCA); *Dismas Wafula Kilwake vs Republic* [2019] eKLR; & *Yawa Nyale vs Republic* [2018] eKLR

33. He submitted that at the time of incarceration he was a young man and that the need to rehabilitate and reintegrate offenders into society to eke a meaningful living after imprisonment is one of the objectives of punishment. He thus urged this court to exercise its powers and discretion and review the sentence imposed by the trial court.

Respondent's Submissions

34. The respondent, in opposing the appeal, submitted that the charge against the appellant was proved beyond reasonable doubt. As regards the age of the victim, reliance was placed on the clinic booklet.

35. In regards to penetration, reliance was placed on the evidence of PW1 and PW5. On identification, the respondent reliance was placed on the evidence of PW1 and PW2. It was submitted that there was no darkness at the time of the incident and as such the complainant was able to identify the Appellant who was known to her.

36. With respect to the Appellant's defence, the Respondent submitted that the same was a mere denial and not strong enough to rebut the Prosecution's case.

37. The Respondent argued that all ingredients of the offence herein were established beyond reasonable doubt and urged this Honourable Court to uphold the conviction.

38. On sentencing, the Respondent submitted that the Appellant abused the trust bestowed upon him by the society and instead took advantage of a young girl who was four years at the time of the incident. Citing the case of *Evans Nyamari Ayak vs Republic* Kisumu Criminal Appeal No. 22 of 2018, the Respondent posited that the sentence meted against the Appellant was severe and deterrent sentence. However, in light of the above case, it submitted that the court may order that life sentence do translate to 30 years' imprisonment.

Analysis and Determination

39. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno vs Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

> " 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 vs. Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala Vs. R.* (1957) EA. 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 finding and conclusion; 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 vs. Sunday Post* [1958] E.A 424."

40. Similarly, in *Kamau Njoroge vs Republic* [1987] eKLR, the Court of Appeal stated:

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions

though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."

41. This Court in determining this appeal ought to satisfy itself that the ingredients of the offence of defilement were proved and as so required in law and beyond any reasonable doubt. The key ingredients of the offence of defilement include the proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence.

42. These ingredients were restated in the case of *Dominic Kibet Mwareng vs Republic Criminal Appeal No 155 OF 2011*, the learned judge noted that:

> " The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant"

43. Before I proceed to consider whether the ingredients of the charge were proved, I will first determine whether the appellant was suffering from a mental disorder at the time of the offence.

44. The Appellant submitted that he was suffering from a mental disorder and that this issue was not sufficiently addressed by the trial court and as a result he was prejudiced.

45. I have perused the lower court record. I note when the Appellant first appeared before court for plea taking, the charge was read to him in a language that he understood and he pleaded not guilty. When the trial commenced, the Appellant seamlessly participated and cross examined the witnesses and there was nothing to suggest that he was suffering from a mental disorder.

46. On 29th September, 2016, after PW4 had testified, the Appellant's counsel informed court that the Appellant might be of unsound mind. Consequently, the trial court directed that he be taken to Provincial General Hospital for psychiatric examination. On 24th October, 2016, the trial court noted that the psychiatric report indicated that the Appellant was unfit to stand trial. On a further mention date of 26th October, 2016, the prosecution applied to have the Appellant re-examined on grounds that the information in the said report was obtained from his brother on phone and that throughout the proceedings the Appellant participated actively. The prosecutor further told court that he was not satisfied with Dr. Njau's Report and prayed that the Appellant do undergo another psychiatric examination at Moi Teaching and Referral Hospital.

47. On 3rd May,2017 when the matter came up for mention to confirm the mental state of the appellant, the trial court ruled as follows: -

> " I have seen the report dated 7th March,2017 which shows that the accused person suffers from depression but he is on medication. The report severely contradicts the earlier that the accused person suffers from mental retardation opinion evidence is not binding on any court after considering that. This case proceeded substantially with the accused representing himself whereby he completely cross examined witnesses which a person who is unfit to stand trial can't do. I direct that the matter proceeds to its logical conclusion. In any case my opinion is that Dr. Njau has no power to determine if an accused person is fit to stand trial or not. He should be limited to telling the court based on his examination what the mental status of an accused person is. The test for the court's determination"

48. After delivery of the above ruling, the hearing of the prosecution case proceeded on 9th November, 2017. At the close of the prosecution case, the Appellant elected to tender unsworn evidence. The issue of the Appellant's state of mind never arose again.

49. I have seen Dr. Njau's report dated 19th October,2016. In conclusion, it states that "PN suffers from intellectual disability, and due to this condition, he is not capable of defending himself in a court of law and in my opinion, he is unfit to stand trial"

50. Subsequent mental state assessment report dated 30th July, 2018 from Moi teaching and Referral Hospital indicates that the Appellant was previously treated for depression but was currently stable.

51. The report dated 7th March,2017 that the trial court mentioned in the aforesaid ruling is not on record.

52. Be that as it may, I agree with the trial's court view that doctors' opinions are not binding on court. The trial court had the advantage of observing the demeanour of the Appellant and it was satisfied there was nothing to suggest that he was mentally challenged as he actively participated in the matter and even cross examined the witnesses.

53. In *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs Augustine Munyao Kioko* Civil Appeal No. 203 of 2001 [2007] 1 EA 139 the Court of Appeal, held that:

> " Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

54. The Court of Appeal had stated in *Dhalay vs. Republic* (1995 – 1998) EA 29 as follows:

> " Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it."

55. In the instant case there was a contrary opinion on the mental state of the Appellant from Moi Teaching and referral hospital. Having perused the record, I find that the Appellant indeed actively participated in the proceedings and an insane person cannot do such.

56. There was no evidence to show that the Appellant was mentally unstable at the time of commission of the offence. The trial court ruling on this issue was sound and I uphold it.

57. I will now move to determine whether ingredients of the offence herein were sufficiently proved.

i). Age of the Complainant:

58. Age may well be proved by age assessment report, birth certificate, the victim's parents or guardian and by observation and common sense. In other words, in assessing age, a holistic approach must be undertaken, taking into account a wide range of information, including not just medical opinion but a variety of other information and circumstances.

59. In *Francis Omuroni vs Uganda*, CR. A 2/200 it was held:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in

the absence of any other evidence. Apart from medical evidence age may also be proved by a birth certificate, the victim's parents or guardian and by observation and common sense. ...."

60. In the instant case, during voire dire examination on the complainant, she stated that she did not know her age. When she was recalled and during the same examination, she stated that she was 7 years old.PW3 in her evidence stated that the complainant was 4 years old as per her immunization card. She produced the complainant's clinic card as exhibit no. 8. The said card indicate that the complainant was born on 8th November, 2010. At the time of commission of the offence therefore PW1 was 4 years old. The trial court relied on this card in determining the age of the complainant.

61. Rule 4 of the *Sexual Offences Rules* of Court 2014 provides 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."

62. In *Mwalengo Chichoro Mwajembe vs Republic, Msa. App. No. 24 of 2015* (UR) the court held: -

> "..... the question of proof of age has finally been settled by decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof...."

63. Guided by the above statute provision and precedent, I opine that the Complainant's immunization card produced in evidence was credible proof of her age. I am satisfied that the prosecution proved beyond reasonable doubt that the minor was 4 years old at the time the offence.

64. On penetration, the complainant testified that the Appellant removed her panty and his clothes partly then lay on her facing downwards while she faced upwards. She said she felt pain. This evidence was unshaken during cross examination. PW3 testified that the clothes the Appellant wore on the date of arrest were sent to the government chemist for analysis. PW4, the government analysis confirmed that the Complainant's skirt was stained with semen and analysis conducted on the semen matched DNA profile generated from the Appellant's blood samples. Based on this evidence alone and considering that penetration need not be complete as provided under Section 2 of the *Sexual Offences Act*, I opine that the penetration was proved beyond reasonable doubt.

65. My above position is further buttressed by the holdings in the following cases;

1. *Mark Oiruri Mose vs R* (2013) eKLR the Court of Appeal stated thus:

> " 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"

2. *Erick Onyango Ondeng vs Republic* (2014) eKLR where court noted: -

> " In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured. "

3. *Martin Nyongesa Wanyonyi vs Republic Criminal Appeal no. 661 of 2010*, (Eldoret), D. K. Maraga, J (as he then was), D. Musinga& A. K. Murgor JJA citing *Kassim Ali vs Republic Criminal Appeal No. 84 of 2005* (Mombasa) where the court stated that:

> " The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence"

66. The other ingredient is the Identity of the perpetrator. The Complainant testified that the Appellant was a person known to her as he used to work at Faini's place. PW2 corroborated this testimony. She similarly knew the accused person. PW5's testimony established that the semen noted on the Complainant's skirt belonged to the Appellant. The Appellant did not challenge this testimony. On his part, he said that both PW1 and PW2 were unknown to her. I agree with the trial court's position that his evidence was weak and did not cast doubt on the prosecution case and that the semen that was found in PW1's skirt placed him at the scene of the crime.

67. After duly considering the entire evidence on record regarding this issue, I am satisfied that the prosecution sufficiently proved that the appellant was the perpetrator.

68. Turning to the issue of sentence, the appellant argues that the sentence of life imprisonment was not in tandem with the recent law developments which have diverted from the mandatory minimum sentences enshrined in the *Sexual Offences Act*. He posited that the minimum mandatory sentences do not prima facie permit the court to consider peculiar circumstances of the case in order to arrive at an appropriate sentence. It is true that there is a myriad of Court of Appeal decisions which hold that the provisions of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Some of those cases include *Dismas Wafula Kilwake vs Republic* Criminal Appeal No. 129 of 2014 [2018] eKLR, *Christopher Ochieng vs R KSM Criminal Appeal No. 202 of [2018] eKLR 2011, Jared Koita Injiri v R* KSM Criminal Appeal No. 93 of 2014 [2019]eKLR and *Evans Wanjala Wanyonyi vs Republic* Criminal Appeal No. 312 of 2018 [2019] eKLR. The Court in *Christopher Ochieng* (supra) reduced a sentence of life imprisonment to 30 years for the defilement of an 8-year-old girl. In Jared Koita Injiri (supra) the Court revised an imprisonment of life downwards to 30 years for the defilement of a girl aged 9 years.

69. However, the Supreme court recently in the Petition No. E018 of 2023 *Republic vss Joshua Gichuki Mwangi (Respondent) & Initiative for strategic litigation in Africa & 3 others (Amicus curia)* delivered on 12th July,2024 with regard to the mandatory death sentence in offences other than murder held as follows: -

> "(51) In light of the structural and supervisory interdicts issued, the Court issued the Muruatetu Directions, wherein it, inter alia, pronounced itself on the application of its decision in the Muruatetu Case to other statutes prescribing mandatory or minimum sentences as follows: "
>
> 10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it. In that paragraph, we stated categorically that:

"[48] Section 204 of the *Penal Code* deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be SC Petition No. E018 of 2023 26 regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under article 25 of *the Constitution*; an absolute right".

Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to section 204 of the *Penal Code* and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases

11. The ratio decidendi in the decision was summarized as follows:

"69. Consequently, we find that section 204 of the *Penal Code* is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".

We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute." .....

14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.

15. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases." [Emphasis ours]...."

70. In light of the above, it is clear that Muruatetu's case is inapplicable to the offence herein. The above decision is binding on this court. According to the same this court can only impose the sentences as provided in the *Sexual Offences Act*.

71. In this case the applicant was charged under section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The said provisions states:

> " 8.
>
> (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."

72. The trial court rightly sentenced him to Life imprisonment and in light of the reasons advanced above, this court will not interfere with this sentence.

73. In the end, the Appellant's Appeal lacks merit and I hereby dismiss it.

74. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS DAY OF 25TH DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer/Miruya

State counsel Nancy

Appellant Present