GFK v Republic (Criminal Appeal E005 of 2023)
[2024] KEHC 14807 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KEHC 14807 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E005 OF 2023

JRA WANANDA, J

OCTOBER 4, 2024

BETWEEN

GFK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Iten Senior Principal Magistrate's Court Sexual Offence Case No. E015 of 2020 with the offence of defilement contrary to the provision of law described as "Section 8(1)(3) of the *Sexual Offences Act*, No. 3 of 2006". The particulars were that on 30/12/2020, in Elgeyo Marakwet County, he intentionally caused his penis to penetrate the vagina of FJK, a girl aged 14 years. He was also charged with the alternative charge of committing an indecent act with the same girl contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

2. The Appellant pleaded not guilty to the charges and the case then proceeded to full trial in which the prosecution called 5 witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and placed him on his defence under Section 210 of the Criminal Procedure Code. The Appellant then gave an unsworn statement and did not call any other witness. By the Judgment delivered on 15/06/2023, he was convicted on the main charge and sentenced to serve 20 years imprisonment.

3. Dissatisfied with the said decision, the Appellant instituted this appeal on 30/06/2023, against the conviction and sentence. Reproduced verbatim, the Grounds of Appeal are crafted as follows:

    i. That I pleaded not guilty to the trial.

    ii. That the trial Court erred in convicting and sentencing the Appellant without seeing that his right to a fair trial under Article 25(c), 47(1), 49(1)(f), 50(2), 159(2)(b) of *the Constitution* of Kenya 2020 and 108 of the CPC were violated.

iii. That the trial Court erred by failing to recite the provisions of Section 200(3) of the CPC.

iv. That the trial Court erred in convicting me on contradictory evidence of the prosecution.

v. That the trial Court erred in convicting me on uncorroborated evidence brought by the prosecution.

vi. That I pray to be present during the hearing of this Appeal.

4. Subsequently, Messrs Buluma & Co. Advocates came on record for the Appellant and took over the conduct of the Appeal on his behalf. Upon obtaining leave, Advocates filed a lengthy Supplementary Grounds of Appeal premised in the following terms:

i. That the trial Magistrate erred both in law and fact in finding that the complainant was fourteen (14) years of age.

ii. That the trial Magistrate erred in law and fact in believing the testimony of PW1 which was full of contradictions.

iii. That the trial Magistrate erred in law and fact in finding that PW1 had been defiled when the circumstances pointed to the contrary.

iv. That the trial Magistrate grossly erred in law and fact in failing to find that the evidence of PW1 and PW2 was contradictory to each other.

v. That the trial Magistrate erred in law and fact in allowing the Investigating Officer to produce alleged garments that had not been identified by the complainant.

vi. That the learned trial Magistrate erred in law and fact in allowing the production of PExh 5 without specification.

vii. That the learned trial Magistrate erred both in law and fact in failing to find that the medical evidence tendered was in favour of the Appellant herein.

viii. That the learned trial Magistrate erred in law and fact to find that that the case herein was poorly investigated especially on medical evidence.

ix. That the learned trial Magistrate grossly erred in law and fact to find that non-production of the Appellant's alleged blood stained clothes was fatal to the Prosecution's case.

x. That the trial Magistrate erred in law and fact in failing to evaluate and analyze the available medical evidence.

xi. That the learned trial Magistrate erred in fact and in law in making findings that were not supported by the evidence that was tendered by the prosecution.

xii. That the learned trial Magistrate erred both in fact and law in shifting the burden of proof from the prosecution to the Appellant.

xiii. That the learned trial Magistrate erred both in fact and law in finding that the prosecution had proved its case beyond any shadow of doubt.

xiv. That the learned trial Magistrate erred both in law and fact in passing a sentence that was manifestly excessive in the circumstances.

Prosecution evidence before the trial Court

5. PW1 was the minor-complainant. She was taken through a voire dire examination and allowed to give sworn evidence which she did. She testified that she was 16 years old and that her birthday was 8/02/2006. She referred to her birth certificate and stated she was a class 8 pupil. She testified further that on 3/12/2020 when she had returned home from school at around 7.00 pm, she found her elder sister (PW2) with the Appellant, that she then changed clothes and left the two at the home as she went to the posho mill, that when she came back, she found the Appellant still at their home sitting outside, and who then left as if going to his home but then pulled the complainant who was also sitting outside by the hand behind the house, that he lifted her skirt, pulled down her pants, covered her mouth with his shirt which he had tight around his waist, and raped her. She testified that her sister (PW2) returned and found them and that the Appellant asked the sister not to report the incident and he then left, and that the sister told their mother who then reported to the police. She stated that she was later taken to hospital and she referred to her treatment notes and P3 Form. She testified further that she knows the Appellant's home and that he has a wife. In cross-examination, she stated that she was 15 years at the time of the offence. When referred to the charge sheet which indicated 14 years, she stated that she had not yet reached 15 years. She agreed that her mother and the Appellant had a dispute over money and also agreed that the panty that she was swearing on the date of the incident and which had blood had not been brought to Court as was the sweater and skirt.

6. PW2 was the complainant's (PW1) sister. She stated that the Appellant is a neighbour, that on 3/12/2020 at around 7.00 pm, she was at home with the complainant and the Appellant when she went to the neighbours to bring vegetables, that upon her return, she found the Appellant and the complainant standing behind the house, that the complainant was leaning against the wall and the Appellant was in front, that the Appellant's trouser and inner pant were pulled down while the complainant's skirt was pulled up, that when they saw PW2, the complainant ran to the kitchen and the Appellant pulled up his trousers. She testified that the Appellant pleaded that they should resolve the matter and asked her not to report. She testified further that when she asked the complainant what had transpired, she told PW2 that the Appellant had held her hand and that she could not scream as the Appellant had covered her mouth with a cloth. She stated further that she told her the mother about the incident when the mother returned home. In cross-examination, she stated that she was 18 years of age, not married and that she herself got pregnant at 17 years of age. She stated that the Appellant was arrested on the same day, and that she knew the Appellant since the time when she was young. She stated further that the police had taken the complainant's skirt, inner pant, and blouse but that she was not present when the same were taken. She denied any knowledge of a dispute between the Appellant and her mother over money or that the two families had a land dispute. In conclusion, she stated that she had not seen any blood on the complainant's inner pant.

7. PW3 was the complainant's mother. She testified that the Appellant comes from the same clan as her and that they live in the same village. She stated further that on 3/12/2020, she arrived home at around 7.30 pm from the cattle shed when she found her daughter, PW2 scolding her other daughter, the complainant, that when she asked, PW2 told her that the Appellant had "seduced" the complainant outside the house. She testified that when she asked, the complainant told her that she was seated outside the house and that when PW2 left to go and get vegetables, the Appellant pulled her, covered her mouth, tore her panties and defiled her, that shortly PW2 came and found them and that the Appellant asked PW2 not to report. PW3 testified further that she then called neighbours and the clan elder who advised her to report the matter to the police which she then did and that the Appellant was then arrested. She denied that she had any dispute with the Appellant over land or otherwise. In cross-examination, she agreed that PW2, her other daughter, got pregnant at 17 years and that she had

instituted a case against the man responsible. She however denied that she has done the same in this case. She stated that the complainant's inner part had blood but agreed that she could have been in her periods. She then stated that the complainant told her that they were lying down during the defilement. About the alleged dispute with the Appellant, she stated that her son and the Appellant took money from a person trading in mangoes and escaped to the Appellant's house and that she (PW3) had to step in and refund the money on their behalf. She stated that the Appellant's mother did not pay and denied that she had asked for a refund. She however agreed that she was angered by the same and also agreed that no the complainant's clothes had not been produced. She denied that she was using her children to revenge.

8. PW4 was one Lina Kisok, a Clinical Officer. She stated that the complainant was brought to the hospital on 4/12/2020 around 11 am, that it was alleged that one "Geoffrey" had raped the complainant, that her clothes had blood stains and she had a blood discharge and that examination showed that her cervix was penetrated but there was no injury on the labia. She produced the complainant's P3 Form and the treatment notes. He also produced the P3 Form for the Appellant whom, she stated, came to the hospital on 4/12/2020 and who also had blood stains on his groin and pubis. In cross-examination, she ruled out the possibility that the complainant was on her periods and insisted that the bleeding was as a result of an injury.

9. PW5 was one Albert Mukwami, a Police Constable at Arror Police Station. He stated that on 3/12/2020, the complainant reported that one "Babylon" had defiled her, and that they went and arrested him. He stated further that he obtained the complainant's birth certificate, that he escorted the Appellant and the complainant to hospital and that upon examination, it was established that the complainant had been defiled. He testified further that the Appellant had blood stains on his genitals and underpants and that the complainant was in her periods (menses). He then produced the garments alleged to have been worn by the complainant at the time of the defilement and also produced the birth certificate. He stated that the complainant was 14 years old.

Defence evidence

10. After the Court found that the Appellant had a case to answer and placed him to his defence, he gave unsworn testimony as DW1. He prayed that he be acquitted and denied that he had committed the offence.

Hearing of the Appeal

11. Although the parties agreed to file written Submissions, I did not come across any such Submissions filed in the Court's CTS platform up to the time that I concluded this Judgment.

12. However, a hard copy version of the Appellant's Submissions was hand delivered to the Court Assistant although, as aforesaid, there is no evidence that the same was formally filed in the Court CTS platform as required. For this reason, I am not obligated to consider the same. Nevertheless, and in the interest of justice, I will still consider it.

Appellant's Submissions

13. In respect to the issue of "penetration", Counsel for the Appellant submitted that the medical evidence tendered by the prosecution ruled out penetration since in the Appellant's P3 Report, the medical officer who examined the Appellant made an entry that "both had blood stained despite of minimal attempt to penetrate to vagina ….". He cited the case of ION vs Republic [2016] eKLR. He also faulted the trial Magistrate for misconstruing the entry in the P3 Report arising from examination of the complainant and finding that the medical evidence showed penetration of the cervix. He submitted

that the medical officer did not, in the Report, make any conclusion that the complainant had been penetrated and submitted that such conclusion was the Magistrate's own imagined evidence. He submitted that without the officer's conclusion, the entry that "the cervix was well-penetrated" raised several questions such as; was the alleged penetration recent or older? Was the purported penetration a result of intrusion or a natural occurrence in a growing teenager? Can one tell the penetration of the cervix when it is in fact full of blood discharge? Counsel also pointed out that in the complainant's P3 Report, the entry made is that there was "blood discharge, no injury to both labia/genitalia ....." and submitted that "genitalia", by definition includes the "cervix" which the medical officer found had no injury. On the submission that the trial Magistrate relied on evidence that had not been adduced by the parties, Counsel cited the case of D.K.D. v Republic [2016] eKLR.

14. He submitted further that the circumstances at the time of the alleged offence were that it was not easy to tell whether indeed the offence was committed since the evidence before the Court was that the complainant was having her monthly periods (menstruation). According to him therefore, the blood referred to in form of stains or discharge was a result of natural occurrence and had nothing to do with defilement. He also contended that the matter was poorly investigated since the Investigating Officer did not collect any samples such as clothing, hair, and vaginal swabs from the complainant or the Appellant for testing at the Government Chemist.

15. Counsel also observed that from the evidence, the complainant's pants were not removed but were allegedly only pulled down and that how far down the pants were allegedly pulled down is not known. He urged that any human being especially at the age of the complainant would have put up some form of resistance with some struggle ensuing. He also urged that PW2 testified that she only saw the Appellant and the complainant just standing and that the complainant saw her and ran off to the kitchen. According to him, had the complainant been truly defiled, she would have taken advantage of PW2's arrival to narrate her ordeal to her rather than run away then wait to be "scolded" by PW2. He submitted that PW2's testimony was that the Appellant had merely "seduced" the complainant and that the idea of defilement was an afterthought.

16. It was also Counsel's contention that the evidence was contradictory since PW1 (complainant) indicated that she left home at 7.00 pm for the posho mill leaving the Appellant with PW2, and that PW2 also alleged to have left the complainant with the Appellant and went to a neighbour's home to bring vegetables at 7.00 pm and yet PW3 also alleges that she arrived at 7.00 pm from the cattle boma. He also submitted that by 7.00 pm darkness had set in.

17. In conclusion, Counsel submitted that the complaint's garments" produced by PW5 as exhibits had not been identified by the complainant or any other witness who testified before the Investigating Officer, that at the time that the complainant testified, she stated that she did not see the clothes that were being referred to in Court. He also pointed out that the clothes were lumped together and referred to as "garments" thus losing their evidential value. According to him, each piece of cloth should have been identified separately and if there was anything linking the Appellant to the alleged crime, then such ought to have been set out clearly.

Determination

18. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See Okeno vs. Republic [1972] E.A 32).

19. As aforesaid, the Charge Sheet describes the provision under which the Appellant was charged as "Section 8(1)(3) of the *Sexual Offences Act*, No. 3 of 2006". Needless to state, no such provision exists.

The description in the charge sheet was therefore evidently incorrect. It is however clear to me that what was meant to be cited was "Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, No. 3 of 2006". I have not however found any evidence indicating that the Appellant was prejudiced in any way by this error. In any case, the same has not been raised as a ground of Appeal. I will not therefore turn into an issue herein.

20. Further, I believe that the defect is curable under Section 382 of the Criminal Procedure Code which provides as follows:

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

21. Similarly, the Court of Appeal, in the case of Fappyton Mutuku Ngui v Republic [2014] eKLR, while dealing with a similar error as herein, namely, inaccurate reference to "Section 8(1) as read with Section 8(2)" as "Section 8(1)(2)" of the *Sexual Offences Act*, held as follows:

> "
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> "30. We now turn to the issue of the defective charge sheet. The appellant argues that he was charged contrary to 'section 8(1) (2)' of the *Sexual Offences Act* when in fact there is no such section. We note that the appellant did not raise this issue in his first appeal. Despite this, the High Court addressed it in its judgement in light of any prejudice or miscarriage of justice that the appellant may have faced as a result. The High Court relied on Section 382 of the Criminal Procedure Code which provides that:
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> .....
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> PARA 31. The first appellate court was of the opinion that this defect was curable under section 382 cited above; the appellant had participated fully in his trial because he knew the charge that was facing him, and the trial process was fair. There was no prejudice that faced the appellant. We concur with the High Court and learned counsel for the respondent that the appellant was well aware of the charges he was facing, he had sufficient notice of the charges facing him and that he participated vigorously in the trial process. Furthermore, the charge sheet outlines the essential ingredients and particulars of the offence. We therefore find no merit in this ground of appeal and dismiss it."

22. In the circumstances and from the documents and/or pleadings record, it is evident that the two broad issues that arise for determination in this matter are the following:

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

    b. Whether the sentence of 20 years imprisonment was justified.

23. I now proceed to analyze and determine the said issues

Whether the charge was proved case beyond reasonable doubt

24. Sections 8(1) and 8(3), respectively, of the *Sexual Offences Act* provide as follows:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

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

26. Regarding "age", the importance of proof thereof was underscored by the Court of Appeal in the case of Hadson Ali Mwachongo v Republic [2016] eKLR, as follows:

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

27. The manner of proving age was well explained in the Ugandan case of Francis Omuroni v Uganda, Court of Appeal; Criminal Appeal No. 2 of 2000, as follows:

> " 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 birth certificate, the victim's parents or guardian and by observation and common sense..."

28. In this instant case, the complainant stated that she was 15 years at the time of the incident, 3/12/2020. The birth certificate produced in evidence indicated that she was born on 8/02/2006. This means that on 3/12/2020, the alleged date of the incident, she was about 14 years and 10 months. I therefore find that it was sufficiently proved that the complainant was a minor at the date of the incident.

29. Regarding "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."

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

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

31. In this case, the complainant testified that she was defiled by the Appellant. Medical evidence (P3 and treatment notes) was then provided by PW4, the Clinical Officer who testified that the complainant's clothes, including her inner clothing, were blood-stained, and that the complainant claimed that she was in her monthly periods. She also stated that she examined the Appellant whose clothes she found to have been blood-stained around his pubis and groin area. PW4 ruled out the possibility that the blood on the Appellant and the complainant's clothing was menstrual discharge and insisted that the same was caused by an injury. I however note that she did not clearly explain how she arrived at this conclusion. However, according to her, examination revealed that the complainant's cervix had been "well penetrated" and she thus concluded that the complainant was defiled. There being no contradictory evidence, on the strength of PW4's evidence, I do not find any reason to fault the learned Magistrate for accepting that piece of evidence and finding that penetration was proved.

32. There is also considerable corroboration of the above evidence in terms of PW2's testimony who testified that when she returned home, she found the Appellant and the complainant standing behind the house with the complainant leaning against the wall and the Appellant in front. She testified further that the Appellant's trouser was pulled down and the complainant's skirt was lifted up. This, to my understanding, indicates is that the Appellant was having carnal knowledge of the complainant. Counsel for the Appellant appears to argue that because the Appellant and the complainant were allegedly standing, and because there was no evidence of resistance, and because the complainant simply ran away when she spotted PW2 (her elder sister), the act may have not amounted to defilement. This seems to be an argument that the sexual act, if any, was perhaps consensual. Well, this may be true but is of no assistance to the Appellant since even if indeed the complainant had seemingly agreed to the sexual act, in law, in view of her age, she was incapable of giving consent thereto. Being a minor, any sexual act with her, whether consensual or otherwise, in law, would still amount to defilement.

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

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

34. In this case, the complainant, her sister and her mother all testified that the Appellant lives within the same neighbourhood as they and is well known to them. According to the mother, they are from the same clan and according to the complainant's sister, PW2 has been known to her since her childhood. Further proof of familiarity between the persons concerned is the evidence that the incident, in fact, occurred when the Appellant had gone for a visit at the complainant's home. While giving his testimony, the Appellant, too, confirmed that he is well known to the complainant's family. I also note that the incident occurred around 6.00-7.00 pm thus before complete sunset. This was therefore a case

of identification by recognition and I am satisfied that in the circumstances, the element of mistaken identity on the part of the complainant and her sister as regards the identity of the Appellant as the person who defiled her would be too remote.

35. On this point, I am guided by the holding made in the case of Anjononi & Others vs Republic [1981] KLR 594, where it was stated as follows:

> "recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

36. I therefore agree with the trial Court's finding that the Appellant was sufficiently identified.

37. The Appellant alleged that he was framed by the complainant's mother with whom he had a dispute over money and/or on land. Although the complainant's mother indeed confirmed that he had an issue with the Appellant over refund of some money, the Appellant did not demonstrate that the same amounted to a sufficient motive to frame him for committing such a heinous act. For such framing to succeed, the complainant's mother would have had to rope in her entire family, the police, and even the hospital staff into the scheme. This would not be a simple or easy feat to achieve and it has not been demonstrated that the complainant's mother managed to "pull off" such a difficult task or that she even had the capacity to do so. I am therefore satisfied that no sufficient motive for framing the Appellant was demonstrated.

38. Accordingly, I find that the trial Court had before it, sufficient material to support its finding that the prosecution proved its case beyond reasonable doubt. I cannot therefore find any ground to fault the trial Court for convicting the Appellant for the offence of defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

Whether the sentence of 20 years imprisonment was justified

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

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

40. In applying the above guidelines, I observe, as already cited above, that regarding sentence, Section 8(3) of the *Sexual Offences Act* provides as follows:

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

41. In view of the above, it is clear that the sentence imposed by the trial Court, although the minimum prescribed, was within the law. Nevertheless, it is also true that there has recently been emerging

jurisprudence that strict adherence to mandatory or minimum sentences should now be discouraged and that Courts should retain the discretion to depart from such sentences. In connection to this, the Supreme Court in the case of Francis Karioko Muruatetu and Another vs Republic [2017] eKLR, while dealing with a case of murder, stated as follows:

> "(66) It is not in dispute that article 26(3) of *the Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of *the Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."

42. The Supreme Court then directed the Attorney General, the Director of Public Prosecutions and other relevant agencies to prepare a detailed professional review in the context of the Muruatetu Judgment with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the Petitioners therein. The Attorney General was then given 12 months to submit a progress report on the same.

43. On the strength of the said Murautetu decision and reasoning, the High Court and even the Court of Appeal routinely reviewed mandatory minimum sentences imposed on convicts for different offences other than murder, including for sexual offences and robbery with violence. Examples are the Court of Appeal decisions in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR, the case of GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), and also the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR. I may also mention the oft-cited decision of Odunga J (as he then was), in the case of Maingi & 5 others *v Director of Public Prosecutions & another (Petition E017 of 2021*) [2022] KEHC 13118 (KLR).

44. However, by the clarification made by the same Supreme Court in its subsequent directions given in Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Court made it clear that Muruatetu only applied to murder cases, and not to any other type of case, not even sexual offences. This is how the Supreme Court put it:

> "7. In the meantime, it is public knowledge, and taking judicial notice, we do agree with the observations of both Mr. Hassan and Mr Ochiel, that while the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to section 296(2) of the Penal Code, and others under the *Sexual Offences Act*, presumably assuming that the decision by this court in this particular matter was equally applicable to other statutes prescribing mandatory or minimum sentences. We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision.
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> .....
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> 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;

.....

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. .....

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.

.....

18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:

i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the Penal Code;

....."

45. Recently, just about 2 months ago, the Supreme Court reiterated and restated the above directions when dealing with an Appeal emanating under the Sexual Offence Act. This was 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). In setting aside the decision of the Court of Appeal which had applied the Muruatetu reasoning in setting aside the mandatory minimum sentence of 20 years imprisonment imposed on an Appellant, the Supreme Court stated as follows:

52. We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual*

Offences Act. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance.

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57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.

.....

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. .....

.....

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

.....

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

46. In view of the decision and guidelines expressly set out by the Supreme Court as above, this Court will be acting ultra vires were it to set aside the sentence of 20 years imprisonment on the sole basis that the same, being a mandatory minimum sentence stipulated by statute, is unconstitutional. As clearly spelt out by the Supreme Court, Muruatetu is not applicable to cases under the *Sexual Offences Act*.

47. My above observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh. In view thereof, I cite Majanja J, quoting the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR) in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, where stated as follows:

> "The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the

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

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

48. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

> " With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment."

49. In this case, applying the above principles to the facts of this case, I have considered the circumstances of the case. The offence of defilement is a serious one. As aforesaid, even if the complainant had seemingly agreed to the sexual act, in law, in view of her age, she was incapable of giving consent thereto. For the said reasons, I agree that the Appellant merited a stiff punishment. The Appellant was also given the opportunity to mitigate, which he did by pleading for a lenient sentence. Whereas the Appellant claims that he has been rehabilitated, the objectives of sentencing, specifically deterrence, remain pertinent when the Court is imposing a sentence.

50. I however also consider the mitigating circumstances that the Appellant was himself a youth when he committed the act. From the record, he was born in the year 1997 which means that he was only about 23 years of age when he committed the offence, and about 26 years when he was sentenced 3 years later. From the evidence on record, the Appellant also used minimal violence and was not armed with any weapon and did not act in any depraved manner. Although the Petitioner will have to lose a portion of his productive age while in custody, I believe that he still has a role to play in the society. I trust that he has had ample opportunity to reform while in remand and in prison and will be ready to be released back to the society to achieve social re-adaptation and rehabilitation. He is also evidently remorseful and I believe that he has now suffered substantial retribution for his "sins"

51. It was upon the trial Court to impose a sentence that is proportionate to the offence committed. Taking into consideration all the extenuating and aggravating factors in this case, while acutely aware of the intrinsic seriousness and gravity of the offence the Appellant committed, I am of the view that the sentence imposed was manifestly excessive and harsh.

Final Order

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

    i. The Appeal against conviction fails.

    ii. The sentence of 20 years imprisonment imposed by the trial Court against the Appellant is however set aside and substituted with a sentence of 10 years imprisonment to be computed from the date of sentence, namely, 15/06/2023.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF OCTOBER 2024

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Kirui for the State

N/A for Appellant

Buluma for Appellant

Court Assistant: Brian Kimathi