JKR v Republic (Criminal Appeal 13 of 2023)
[2024] KEHC 14805 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KEHC 14805 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL 13 OF 2023

JRA WANANDA, J

OCTOBER 4, 2024

BETWEEN

JKR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Eldoret Senior Principal Magistrate's Court Criminal Case (Sexual Offences) No. E016 of 2020 with the offence of defilement contrary to the provision of law described as "Section 8(1)(2) of the *Sexual Offences Act*, No. 3 of 2006".

2. The particulars of the charge were that on the night of 15/12/2020 at [particulars withheld] in Keiyo North Sub County within Elgeyo Marakwet County, the Appellant intentionally and unlawfully caused his penis to penetrate the anus of AJ, a child aged 8 years. He was also charged with alternative offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

3. The Appellant pleaded not guilty and the case 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. He then gave a sworn statement and called no witnesses. By the Judgment delivered on 11/08/2021, he was convicted and on 19/08/2021, he was sentenced to serve life imprisonment.

4. Dissatisfied with the said decision, the Appellant instituted this Appeal on 21/08/2021 against both conviction and sentence. He listed the following Grounds of Appeal:

    i. That the trial court erred in law and fact as it failed to hold that the charge sheet was fatally defective.

ii. That the trial court erred in law and facts as it failed to observe that the witness evidence was inconsistent and uncorroborated.

iii. That I am aggrieved the trial court erred in law and facts as it failed to hold that the evidence of identification and recognition was not conclusive.

iv. That the learned trial magistrate erred in law and facts by shifting the burden of proof from the prosecution backyard to the appellant when the evidence failed to link him to the offence.

v. That other grounds would be raised during the hearing.

Prosecution evidence before the trial Court

5. PW1 was the complainant (child victim). She stated that she was 8 years old and a Grade 1 pupil. For this reason, she was taken through voire dire examination upon which the trial Magistrate held that PW1 did not understand the nature of an oath. PW1 therefore gave an unsworn statement. She testified that she knew the accused and called him out by the name "K". She also identified him in the dock and stated that the Appellant is usually in Kapchelal, that she calls him "Baba mdogo" (paternal uncle) and that he is the brother to one Baba C. She testified that she used to sleep in the house of her "Gogo" (grandmother, that on the date of the incident, she was sleeping in Gogo's house at night alone as 'Gogo" had gone to drink. She stated further that she heard the door opening and someone entering the room and who then got onto the bed and started removing her clothes. She then stated that it was K (Appellant) who removed her clothes. She added she did not know who it was but that the person told her that "ni mimi" (it is me) and told her to keep quiet, that he removed the complainant's trouser and then also his clothes then did to her what she referred to as "tabia mbaya" (bad manners) by doing it "from the back" as he was behind her and that she was lying by her side. She stated that she then got up after the incident and went to call "C" and "B" who were sleeping in another house and who went to call "Jeff's" father and they later went to the hospital together with the Appellant. She reiterated that the person who did to her "tabia mbaya" was the Appellant whom she again identified in Court. In cross-examination, she stated that she did not remember the date and time but that she also recognized the Appellant by his voice. She also reiterated that she used to hear the Appellant being called "K". In re-examination, she conceded that she did not know the name of the Appellant well but insisted that he is the one who committed the act.

6. PW2 was one KJ. She testified that she knows the complainant and also the Appellant as the Appellant is her father's younger brother. She stated that the complainant used to sleep in her grandmother's house, that on 15/12/2010 at around 10.00 pm, they finished eating and went to sleep, and that the complainant went to sleep at her grandmother's house as usual. She stated that at 10:50 pm, the complainant came crying saying that the Appellant had removed her clothes and defiled her, that they then woke up their father who went to look for the Appellant, that they took the Appellant to the police station and later took the complainant to hospital. She then produced the complainant's birth certificate indicating that the complainant was 8 years old. In cross-examination, she stated that their father is the one who knew where the Appellant was and that they did not scream because the Appellant would have run away.

7. PW3 was one AKR who testified that the complainant is a daughter to her brother-in-law and that the Appellant is his younger brother. He stated that on 15/12/2020, he was asleep when at 10:30 pm, PW2 (his daughter) and one B (the complainant's sister) came to wake him up, that they told him that the complainant had come crying that she had been raped. He added that he went to his mother's house where he found the Appellant seated on his mother's bed, that the Appellant denied that he had done anything and some altercation then ensued. He testified that the Appellant tried to escape but

was subdued by neighbours who were returning from a function after he fell down, and who tied him up and took him to Kapchelal police post and that the complainant was taken to the dispensary. He testified further that her mother (complainant's grandmother - "Gogo") was away at a circumcision ceremony, and that the Appellant has no house and usually sleeps in one of his mother's houses. In cross-examination, he stated that he had no dispute with the Appellant and denied that he had the Appellant arrested so that he could inherit the Appellant's land.

8. PW4 was Dr. Sharon Anyango, a medical officer at Iten County Referral Hospital who produced the complainant's P3 Form. She testified that she examined the complainant on 16/12/2020 and who complained of pain in her anal region, that the complainant said that someone known to her had defiled her, that her clothes had tears or blood, that her genitalia was okay but her anal region had a tear and that she was in severe pain, a sign of penetration. In cross-examination, she stated that the complainant was walking but with a lot of pain, and that she also had bruises in her anal region.

9. PW5 was Corporal Kiptum Ruto attached to Tambach Police station. He testified that on 16/12/2020 he was instructed by his superior to proceed to Kapchelal Police Post where a suspect (Appellant) had been arrested for the offence of defilement, that when he reached there, he found the Appellant in custody having been arrested on 15/12/2020, and that he later recorded statements and issued a P3 Form to the complainant. He testified further that when the P3 Form was returned to him, it indicated that the Appellant had penetrated the complainant in her anus, and that he therefore charged the Appellant with the offence in Court. He stated that the complainant was 8 years old according to her birth certificate as she was born on 09/03/2012. He stated further that the Appellant had been assaulted as he was found red-handed in the act.

Defence evidence

10. As aforesaid, the Appellant gave sworn testimony as DW1 and called no other witness. He confirmed that the complainant is his brother's child and stated that on 15/12/2020, he woke up up at 8.00 am and went to work, that while at work, he was arrested and taken to the police station where he spent the night after which he was brought to Court and charged with the offence. He denied committing the charge and stated that his brother had a grudge against him and which is why the case was brought. In cross-examination, he stated that he has a dispute with his brother and not with the complainant or with the other witnesses.

Hearing of the Appeal

11. The parties were then granted leave to file written Submissions. However, only the Appellant's Submissions, filed on 24/11/2024, is on record. I have not come across any Submissions filed by the State.

Appellant's Submissions

12. The Appellant submitted that prosecution witnesses gave contradictory accounts. He referred to the testimony where the complainant is alleged to have claimed that the Appellant did to her 'tabia mbaya' meaning that she was defiled and submitted that there is however nowhere where the complainant stated that she felt pain or cried and that this contradicted PW3's evidence who stated that the complainant had come crying that she had been raped.

13. On identification, he submitted that the incident occurred at night and that there was no light in the house meaning that the complainant could not identify the perpetrator. He submitted that the complainant's allegation that she identified the Appellant by his voice is a lie and that he is a scapegoat as his brother has a grudge against him over land that they were given after their father died.

14. He also submitted that he was arrested on 15/12/2002 and was arraigned on 17/12/2020 which was 2 days later, that therefore, his constitutional rights were violated because he was incarcerated in police custody for a period longer than that provided for by Article 49 of *the Constitution*.

15. He submitted further that the trial Court appears to have had an interest in the case since even after observing that the charge sheet was defective, it did not do anything about it. He also alleged that although he requested to be supplied with witness statements, he was not supplied with the same until the close of the trial and that this therefore shows that the trial Court was biased against him.

16. Regarding sentence, he cited the case of HCCR Misc. Application No. E007 of 2023 – Boniface Keya vs Republic in which, he submitted, Mrima J ruled that life sentence being indefinite is unconstitutional and further, that the Judge ordered that any prisoner serving a life sentence within West Pokot and Trans Nzoia, who was sentenced by a Court within the said Counties and has no pending appeal be presented before the trial Court and re-sentenced. He prayed that the same be applied to this case.

Determination

17. 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).

18. I find the issues that arise for determination herein to be the following:

    a. Whether the Appellant was presented in Court outside the 24 hours requirement and if so, the effect thereof.

    b. Whether the Prosecution failed to supply the Appellant with statement statements.

    c. Whether the charge sheet was defective and whether such defect renders the conviction a nullity.

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

    e. Whether the sentence of life imprisonment was proper.

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

a. Whether the Appellant was presented in Court outside the 24 hours requirement and if so, the effect thereof

20. Although the Appellant alleged that he was arrested on 15/12/2007 and presented in Court on 17/12/2020 and thus outside the 24 hours stipulated under Article 49 of *the Constitution*, the Charge Sheet indicates the date of arrest as 16/12/2020. Going by that date therefore, there is no evidence before this Court that the Appellant was arraigned beyond 24 hours.

21. In any event, the Court of Appeal, in case of Julius Kamau Mbugua vs. Republic [2010] eKLR, though dealing with the old Section 72(3) of the now repealed Constitution, stated as follows:

> "..... the violation of the appellant's right to be produced in court within 24 hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy in damages for the violation of his Constitutional rights."

22. In light of the said guideline and also the fact that there is no evidence that the Appellant raised this issue before the trial Court, I decline to entertain the issue at this appellate stage.

b. Whether the Prosecution failed to supply the Appellant with statement statements

23. As in the issue above, although the Appellant alleges that he was not supplied with Witness Statements, there is no evidence that the Appellant raised this issue before the trial Court. In the circumstances, I also decline to entertain this issue at this appellate stage.

c. Whether the charge sheet was defective and whether it affected the conviction

24. Although the Appellant alleged that the Charge sheet was defective, he did not identify or elaborate any such alleged defect.

25. I however note that the Charge Sheet describes the provision under which the Appellant was charged as "Section 8(1)(2) 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(2) 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.

26. 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."

27. 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:

> "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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> 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."

28. In regard to what should be contained in a Charge Sheet, Section 134 of the Criminal Procedure Code provides as follows:

> " Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

29. In addition, it was held in Sigilani vs Republic, (2004) 2 KLR, 480 that:

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

30. Applying the test above and upon keenly perusing the charge sheet, I find that the particulars of the offence were clearly spelt out as were the date of the offence, the place of the offence, the act constituting the offence and the name of the victim. Although therefore the Charge Sheet was evidently defective, I find the same to have been a minor defect that did not go the root of the matter. Although I acknowledge that the Appellant is a layman and was unrepresented at the trial, I note that he did not raise any objection before the trial Court or raise any contention that the charge sheet was defective. He fully participated in the trial in clear demonstration that he understood the charge, he cross-examined the witnesses and was able to put up an appropriate defence. This is sufficient indication that the Appellant understood the particulars of the charge he faced. The offence was disclosed and stated in a clear and unambiguous manner, there is no allegation that because of the way that the charge sheet was drafted or framed, the Appellant was unable to plead to a specific charge that he could not understand or that he was unable to prepare his defence. In the circumstances, the Appellant cannot be said to have been prejudiced.

d. Whether the charge was proved case beyond reasonable doubt

31. 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.

32. Regarding "age", Section 8(1) and 8(2) 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.
>
> (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."

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

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

34. 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..."

35. Age may therefore be proved by way of Certificate of Birth or age assessment by a qualified doctor or through other credible evidence such as baptismal card, notification of birth or school records or the evidence of parents or guardian.

36. In this case, evidence of the victim's age was provided through the Certificate of Birth which indicated that she was born on 9/03/2012. The incident of defilement having been alleged to have occurred on 15/12/2020, the conclusion is that at that date, the victim was 8 years and about 8 months, which therefore tallies with the age of 8 years stated in the Charge Sheet. In view thereof, I cannot find any reason to fault the trial Magistrate's finding that "age" was proven. This ground, too, therefore fails.

37. In respect to proof of "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."

38. PW4, the doctor who examined the complainant produced the P3 Form filled on 16/12/2020 which indicated that the complainant had injuries in her anal region. According to the doctor, "penetration" was evidenced by the tear, lacerations and bruises on the complainant's anal region and which caused her to have severe pain. In view thereof, I cannot also find any reason to fault the trial Magistrate's finding that "penetration" was proven. This ground, too, therefore fails.

39. 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".

40. In this case, the complainant and the Appellant are both members of one extended family as are PW2 and PW3. They are all therefore well known to one another. In fact, the Appellant confirmed that the complainant was his brother's daughter. The incident therefore occurred within the family setting and in the house of the complainant's grandmother who was away at the time of the incident. The complainant also stated that she recognized the Appellant by his voice. Additionally, there is evidence that the Appellant was found at the scene of the crime by PW3, his brother, and that he was even assaulted by neighbours for the offence and who then arrested him as he attempted to escape and took him to the police station.

41. In the circumstances, it is evident that this was a case of "recognition" rather than "identification" of a stranger. Such evidence of "recognition" is clearly more reliable and believable in "identification". In respect thereto, in the case of Reuben Tabu Anjononi & 2 Others v Republic [1980] eKLR, the Court of Appeal guided as follows:

> "..... This was, however, a case of recognition, not identification, of the assailants; 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. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported).
>
> We consider that in the present case the recognition of the appellants by Wanyoni and Joice to whom they were previously well known personally, the first appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the appellants kept flashing about in Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the robbers left, Wanyoni reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three appellants to the police as the robbers who had robbed him.
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> We are satisfied that there was no mistake as to the identity of the three appellants and they were properly found guilty of the offence with which they were charged in count 1."

42. In light of the foregoing, it is my considered view that the complainant's evidence was satisfactorily corroborated and as such, I am satisfied that the trial Magistrate correctly found that the Appellant had been positively identified.

43. In his defence, the Appellant alleged that his brother, the complainant's father, had framed the Appellant because he had a grudge against the Appellant. I note however that the Appellant did not produce any evidence whatsoever to prove these allegations at all. I therefore do not find any fault on the part of the trial Magistrate for disregarding this defence.

44. In the end, 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 suggest that the trial Court erred in convicting the Appellant for the offence of defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

i. Whether the sentence of life imprisonment was justified

45. 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".

46. In applying the above guidelines, it is to be recalled that Section 8(2) of the *Sexual Offences Act* under which the Appellant was charged, provides as follows:

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

47. Section 8(2) above therefore prescribes only one mandatory sentence – life imprisonment. In view of the above, it is clear that the sentence imposed by the trial Court 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 mandatory sentences. In connection to this issue, 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."

48. 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. The Attorney General was then given 12 months to submit a progress report thereon.

49. 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).

50. 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 Supreme 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;
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> .....
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> 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".
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> 11. .....
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> 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.
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> .....
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> 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;

    ....."

51. Recently, just 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 the Appellant, the Supreme Court stated as follows:

    52. We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance.

    .....

    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.

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

53. The above observation does not however stop this Court from assessing whether the sentence was proportionate.

54. Regarding sentence, Majanja J, quoting Muruatetu 1, in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, stated as follows:

> "The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;
>
> (a) age of the offender;
>
> (b) being a first offender;
>
> (c) whether the offender pleaded guilty;
>
> (d) character and record of the offender;
>
> (e) commission of the offence in response to gender-based violence;
>
> (f) remorsefulness of the offender;
>
> (g) the possibility of reform and social re-adaptation of the offender;
>
> (h) any other factor that the Court considers relevant.

55. Applying the above reasoning to the facts of this case, I have considered the Petitioner's mitigation before the trial Court and also the circumstances of the case. The complainant was 8 years old at the time of the time of the incident. The Appellant was her uncle and took advantage of the fact that the complainant's grandmother was away and defiled her. The Appellant abused the trust bestowed upon him by the society and instead of protecting the complainant, turned out to be her tormentor. The incident, no doubt, caused and will continue causing the complainant psychological trauma and distress for the rest of her life. The objectives of sentencing, specifically deterrence, remain pertinent

when the Court is imposing a sentence. While it is not in question that considering the gravity of the offence, the Appellant indeed deserved a stiff deterrent sentence, I believe that he should also be given the opportunity for rehabilitation. It was therefore upon the trial Court to impose a sentence that is proportionate to the offence committed.

56. In the circumstances, and having taken into account all the factors mentioned hereinabove, I am of the view that the sentence of life ought to be reviewed. I am also of the view that the Applicant has now suffered substantial retribution for his actions.

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

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

58. Regarding the proviso to Section 333(2) of the Criminal Procedure Code which requires that the period spent in custody during a criminal trial, before sentencing, be taken into account when computing sentence, I note that although was admitted to bail/bond, there is no evidence that raised the same and was in fact released. My perusal of the record reveals that he remained in custody from the date of his arrest on 15/12/2020 until the date that waw sentenced, 19/08/2021

Final Order

59. In the premises, I order as follows:

    i. The Appeal on conviction fails and is dismissed.

    ii. However, the sentence of life imprisonment imposed by the trial Court is hereby set aside and substituted with a sentence of 25 years imprisonment.

    iii. The sentence shall run from the date of the arrest of the Appellant Court, 15/12/2020.

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

Appellant present (virtually from Iten Law Courts)

Court Assistant: Brian Kimathi