



**Muthoni v Republic (Criminal Appeal 4 of 2020)
[2023] KEHC 1454 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1454 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL 4 OF 2020
FR OLEL, J
FEBRUARY 16, 2023**

BETWEEN

EDWIN KINYUA MUTHONI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal Arising from the Original Conviction and Sentence
in Gichugu S.O. Case No.13 of 2019 Delivered on 17th January 2020)*

JUDGMENT

Issues:

Conviction in uncorroborated and contradictory evidence, Failure by crucial witnesses to testify & failure by the trial court to take into consideration the appellant defence and mitigation

Background

1. The Appellant herein Edwin Kinyua Muthoni was on September 5, 2019 charged for the offence of defilement contrary to section 8(1) as read together with section 8(4) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on diverse dates between August 22, 2019 and September 4, 2019 in Ngariama location Kirinyaga East Sub County within Kirinyaga County unlawfully caused your penis to penetrate the vagina of JWM a child aged 17 years old.
2. The Appellant was further in the alternative charged with the offence of indecent assault with a child contrary to section 11(1) of the Sexual Offence Act No 3 of 2006. . The particulars were that on diverse dates between August 22, 2019 and September 4, 2019 in Ngariama location Kirinyaga East Sub County within Kirinyaga County unlawfully and intentionally caused his penis to come into contact with the vagina of JWM a child aged 17 years.



3. The appellant denied the charges leveled against him before the trial court. The prosecution called five witnesses who testified as against the appellant and after considering the said evidence, the appellant was placed on his defence. He opted to give unsworn evidence. At the conclusion of the trial the appellant was found guilty of defilement and was sentenced to serve 15 years imprisonment. Being dissatisfied with the lower courts judgment, the appellant has appealed to this court against both conviction and sentence.

Facts at Trial

4. PW I testified that she was a student at [Particulars Withheld] Secondary school and was 17 years old. She testified that she was staying with her Aunty at [Particulars Withheld] town. On August 22, 2019 she meet the appellant who greeted her and introduced himself. The appellant requested PWI if they could meet the following day and indeed they meet and the appellant declared his feeling for her and asked her for as relationship. On the said date (August 23, 2019) the appellant did take the complainant to his house in the evening where according to PWI the appellant removed her cloths and inserted his penis into her vagina. The appellant later at night escorted PWI back to her auntie's place.
5. On the following day PWI returned to the appellant's house and during the night they engaged in sexual intercourse. The complainant did not return to the Aunties house until the following morning. Her Aunty looked for her at night and did not find her. The following day her aunty was informed she had been seen at the market. She went and picked her up. She inquired from PW 1 where she had slept and after a lot of prodding, PW1 admitted to have slept at the appellant house and to have had sexual intercourse with him.
6. PWI was then sent to go leave with her other Aunty at [Particulars Withheld] town. She returned to the appellant's house after a few days and informed the appellant that she suspected that she was pregnant. She testified that they continued to have sexual intercourse for the period she was at the appellant house until they were arrested on the fourth day and taken to the police station. On cross examination she confirmed that she had her first sexual intercourse with the appellant in August 2019 and that it was the appellant who broke her virginity.
7. PWII PSM a resident of [Particulars Withheld], testified that she was an Aunty to PWI. She stated that she goes to school at [Particulars Withheld] secondary school and was 17 years old (Born on February 5, 2003). She produced the Birth certificate as P Exhibit 1. She also stated she knew the appellant as she often sees him within [Particulars Withheld] town where he was employed at a butchery.
8. On August 29, 2019 she returned home from work and found that PWI had not returned to the house. She looked for her but did not find her. The following day when she came back home, she was told that PWI had come back home, while she was at work and she was at the market. She went to [Particulars Withheld] market and indeed found PWI. She directed her to accompany her back home. Once at home she inquired where she had been and after prodding her PWI confessed that she had slept at Edwin's house the previous night. She further confessed that they had engaged in sex with the said Edwin.
9. PWII stated that the following day she looked for the appellant and warned him against having an affair with a minor, but the appellant denied any liaison with PWI. The following day PW2 escorted PWI to [Particulars Withheld] since census was to be conducted. After census week PWI returned to [Particulars Withheld] town and went to the appellant's house. Her Aunties looked all over for her all once they discovered that she was missing and eventually got information that PWI was at the appellant's house. PW2 went to check as the said house was next to the road and indeed saw PWI seated



by the door. She informed the village elder, assistant chief and the police and both the appellant and PWI were arrested.

10. The witness further testified that PWI was taken to Kirinyaga sub county hospital where she was examined and issued with treatment notes and P3. The doctor who examined PWI confirmed that she had engaged in sexual intercourse. She also reaffirmed that she knew the appellant as he sells meat at a butchery within [Particulars Withheld] town, where she had been seeing him. She also confirmed that she knew the appellants house. In the said compound there was the appellant's house and a second house belonging to his brother. She stated that she was sure the house where she found PWI belonged to the appellant. She concluded by stating that she had no grudge or dispute with the appellant and identified him as the person on the dock.
11. On cross-examination PWII stated she got information that PWI was in the appellant's house, but her informant was not in court. She told court that her evidence was truthful and that she was not lying. On the 1st incident when PWI slept out she did not report to the police, but reported on the second instant she found PWI at the appellant house. Finally she stated that she did not take photographs when arrest was effect of PW 1 from his house.
12. PW4 Pc Issabin Hussein, who worked at Githure police station said that one PS came and reported that her niece was missing and had been found in the house of the appellant. He together with Pc Airo went and arrested the appellant at his place of work and proceeded to his house which was pointed out by the said PS. They found PW1 within the said house and arrested both of them. On cross examination he confirmed he was the arresting officer and the reason of arrest was that he was harboring child within his house. PWI also admitted that the house belonged to the appellant.
13. PW5 Pc Jackson Kishe confirmed that the arrested duo were handed over to him. He booked them and referred the girl for treatment at the hospital, where the P3 form was filled. He interrogated the complainant and she confessed to have had an affair with the appellant. PW I was aged 17 years. He recorded their statement and charged the appellant who was before court. In cross examination he confirmed he knew the appellant as the person brought to the station by the arresting officers
14. The final prosecution witness was PW 5 Dr Martin Wachira. He testified that he had three years' experience as a medical doctor having graduated for Kenyatta University. He examined PWI on September 4, 2019 at about 5.15pm. The history was that she had disappeared from home for three days and was living with a man well known to her. On examination he found her condition to be fair and her hymen was not freshly broken. They conducted vaginal swab and spermatozoa was seen and pus cells too. This showed that there was sexual intercourse that occurred. He produced the treatment notes, P3, PRC form and laboratory Results. He concluded that the child had engaged in sexual intercourse with a man and that there was penile penetration.

The Appellant was put on his defence and opted to give unsworn statement. He stated that he doesn't understand why the complainant brought forth charges as against him, yet he did not do anything to her. He further stated that if the court were to find him guilty he would seek for a non-custodial sentence as he was a young man.

15. The trial court did consider all the evidence present and found that the prosecution had proved their case beyond reasonable doubt and proceeded to sentence the appellant to fifteen (15) year imprisonment.



Submissions

16. The Appellant raised 4 grounds of appeal in the amended memorandum and grounds of appeal filed in court on January 11, 2023. The grounds are –
- i) The trial Magistrate erred in law and fact in convicting me on uncorroborated evidence adduced by the prosecution witness.
 - ii) The learned trial Magistrate erred in both facts and law in failing to consider that the prosecution case was fully contradicted and unreliable.
 - iii) The learned trial Magistrate erred in law and fact by not making consideration that crucial witnesses were never called upon to testify and be cross examined.
 - iv) That the learned trial magistrate erred in law and fact in failing to take into account my principal, defense and mitigation.
The appellant had earlier filed the initial grounds of appeal where he raised the same issues but it had two more grounds namely that;
 - v. The trial magistrate erred in law and fact by shifting the burden of proof contrary to the provisions of law.
 - vi. The trial magistrate erred in law and facts by not considering the evidence produced in court was insufficient to hold a conviction

Submissions

17. The appellant did file written submissions where he alleged that the court relied on falsehood that had been tabled by the prosecution as evidence and that evidence was used to frame him up. He stated that the charge sheet stated that the offence took place on diverse dates between August 22, 2019 to September 4, 2019 yet PW 1 stated that she was his girlfriend and that they had dated for a period of one month. In cross examination PW I stated that the last time they had sexual intercourse was on April 7, 2019, while also alleging that the first time they had sexual intercourse was August 23, 2019.
18. The appellant also had a bone to pick with PW2 who stated that on August 23, 2019 she came from work and found that PW 1 was not at home, she looked for PW1 until 10pm and then went to sleep without seeing her, while PW1 alleged that she went back to PW2 house at 10pm and her aunty asked her where she had been. The appellant also stated PW2 did not name the person who told her PW1 was in his house nor did she take pictures to indeed prove that she was found in his house.
19. The appellant further stated that crucial witnesses were not called to testify, especially PW1 Aunty at [Particulars Withheld] called JNW and other witnesses who were present during the arrest. He also stated that there was no examination of either his urine, spermatozoa blood or even DNA to conclusively prove that indeed he was the culprit who defiled PW1. The appellant relied on the case of *Bukenya & Another Vrs Republic (1972) EA 549*, *Mary Wanjiku Gichira Vrs Republic Cr Appeal No 17 of 1998*, *John Kenga Vrs Republic Cr Appeal No 1126/1984* and the case of [Gitonga Reuben Vs Republic Cr Appeal No 349 of 2009](#) to support his submissions.
20. The final issue raised by the appellant is that his defence and mitigation was not considered and prayed for leniency as he was 26 years old and a non-custodial sentence under Section 216 of the [Criminal Procedure Code](#) should have be considered. On sentencing he submitted that the sentence imposed was the minimum mandatory sentence and the court ought to have considered mitigating factors. He relied on the case of *Philip Mueke Maingi and others vr Republic in Constitutional Petition No E017/2021* At



Machakos and also Edwin Wachira & others Vrs Republic In Constitutional petition No 97 of 2021 at Mombasa to find reasons to interfere with the sentence imposed.

21. The state did file their written submission on January 17, 2023. The supported both the conviction and sentence as being proper and sound and prayed for the appeal to be dismissed.

Analysis and Determination

22. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by *Okeno Vs Republic (1927)EA 32* & *Pandya Vs Republic (1975) EA 366*.
23. Also in *Peter's vrs Sunday Post(1958) EA 424* it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.
24. The ingredient provided for under section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006 which must be proved for a conviction to ensue are; Age of the victim (must be a minor), penetration and proper identification of the perpetrator. (see *Wamukoya Karani Vs Republic Criminal Appeal No 72 of 2013*)
25. This court has independently re assessed the evidence adduced and as a fact finds that all the three ingredient's to prove the offence of defilement were adequately prove beyond reasonable doubt by the prosecution. PW 2 PSM did produce the complainant's birth certificate as PExhibit 1, which document confirmed that indeed the complainant was aged 17 year. The complainant also testified that she was born on March 5, 2003 and stated that she was a student at form one at xxxx secondary school. Age of the complainant was thus conclusively proved by the facts and evidence presented.
26. The second issue is penetration and proper identification. Based on the facts presented to court, the appellant meet PW1 at Githure town and approached her for friendship on August 22, 2019. The following day both parties met again and this time PW 1 agreed to go to the appellant's house. She stated;

' On August 23, 2019 I met Edwin, I went to his house. we ate then went to sleep. At night he removed my cloths I wore a trouser, he removed my trouser and panty he removed his trouser then he started to have sex. He took his penis and inserted it on my vagina. It was at 10pm he told me he would take me to my Aunties house. He took me to my Aunties house. He stood by the gate as I went in to my Aunties house.'
27. PW 1 further stated that the following day she went to [Particulars Withheld] town and again meet the appellant at night. They went back to his house. She stated that;

' On that night we had sex. We slept unto morning'.



The appellant was taken to her auntie's place in [Particulars Withheld] for a few days and then returned to the appellant's house as she suspected she was pregnant. She testified that she stayed with the appellant for a few days. According to her testimony;

' The 1st day after my return we had sex at night. The 2nd day after my return we did not have sex. The 3rd day we had sex. The 4th day we were arrested by the police.'

On cross examination by the appellant PW 1 further stated that;

' What I have told the court tis the truth. We 1st meet in August 2019. I don't recall the exact date. You were the one who broke my virginity. You broke my virginity when I first went to your house. It was August. I cannot recall the exact date.'

28. PW5 Dr Martin Wachira confirmed that he examined PW1 on September 4, 2019. she is reported to have disappeared from home for three days. She was living with a man well known to her. The patient informed him that they had had sexual intercourse over a period of time and that they did not use protection with the said man, whom she was living with. On examination he confirmed that the hymen was broken but not freshly broken and laboratory tests confirmed presence of spermatozoa, which confirmed she had engaged in sexual intercourse. He produced the medical report and made a finding that there was penile penetration.
29. The complainant's Aunty one PSM too did testify as PW2 that on August 22, 2019, PW1 was not in the house when she returned at 9pm. She looked for her and did not succeed in finding her. The following day she was informed by Lillian that PW1 was at the market where they sell their wares. She indeed went and found her there. They went home and upon a lot of prodding she confessed to have 'Edwin's place and they had sex with Edwin'.
30. PW2 stated that on the following day she went and looked for Edwin and warned him that PW1 was a minor and school going and that Edwin should leave her alone. She escorted PW1 to [Particulars Withheld] since census was about to be conducted. After about three days or so she was called by PW1 aunty JN to report that she had disappeared again and had not returned home. She was later informed by another lady that she had seen PW1 at Edwin's house. She stated that the house was by the road side and indeed when she went to check, she saw PW1 seated by the door at the appellant's house. She reported to the block leader and assistant chief and they organized for the arrest the arrest of the two.
31. The above evidence in my view were sufficient enough to establish penetration as defined under section 2 of the [Sexual Offences Act](#) and also positively identify the perpetrator.

Prosecution Case not Corroborated

32. The appellant also raised this issue as his first ground of appeal.
33. No doubt it is good practice where possible to have the evidence of a minor to be corroborated. What is corroboration? The meaning of corroboration as defined or stated in the Nigerian case of *Igbine Vs The state (1997) 9 NWLR (Pt 519) 101(a) 108* is thus

' Corroboration means, confirmation, ratification, verification or validation of existing evidence coming from another independent witness or witnesses.'



34. It was also held in *Mukungu Vs Republic (2002) 2 EA 482*, the court of appeal citing with approval *Mutonyi Vrs Republic (1982) KLR 2003* held that;
- 'An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particulars that the crime has been committed but also the accused committed it. See Republic Vrs Manilal Ishwerlal Purohit(1924) 9 EACA 58,61'
35. It is therefore clear that corroborative evidence or material evidence ought to confirm, ratify, verify or validate the existing evidence and such must emanate from another independent witness or witnesses. It must affect the accused by connecting him or tending to connect him with the crime confirming in some material particular not only the evidence that the crime has been committed but also that the accused did commit the same.
36. From the evidence on record, in particular the evidence of PW1, PW2 and PW5 corroborate each other as to the fact that the appellant had sexual intercourse with PW1, who also liberally admitted on oath the appellant was her boyfriend and that had sexual intercourse severally with her. She also admitted was arrested at the appellant's house and this was confirmed by PW2 who was also present during the arrest. Finally the medical evidence presented by PW5, who also confirmed that PW1 had been penetrated and a vaginal swab test taken did returned a finding that she had spermatozoa, which confirmed she had been engaged in sexual intercourse.
37. The corroboration in this case is strong and cogent. The appellant in his cross examination and or defense did not impeach the same in any manner. The appellants ground as raised above also lacks legal grounding as it is now commonly accepted in sexual offence matters that the court can convict on the basis of the evidence of a minor, (if for reasons to be recorded)the court is satisfied that the alleged victim was tell the truth. See *Mohammed Vr Rep (2008) 1KLR G & F 1175*, *Sabil Omar Vrs Republic (2017) eKLR* amongst many others.

The Magistrate failed to consider the contradiction in the Prosecution Case

38. At paragraph 16 and 17 of this judgment this court has highlighted the issues raised by the appellant as regards contradiction in the evidence of the prosecution which to him are weighty enough for the court to use to reconsider the conviction entered into.
39. The law as regards the issue of contradictions and discrepancies is very clear. It is trite law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. (see Uganda vrs Rutaro (1976) HCB; *Uganda Vrs George W Yiga (1979) HCB 217*)
40. Again in the case of *Jospeh Maina Mwangi Vrs Republic Criminal Appeal No 73 of 1993*, held inter alia that;
- ' In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the criminal procedure code viz, whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.



41. In *Twahengene Alfred-Vrs-Uganda Criminal Appeal No 139 of 2001(2003) UGCA*

' It was held that it is not every contradiction that warranted rejection of evidence contradiction unless satisfactorily explained will not necessarily lead to evidence of a witness being rejected.'

42. The role of the appellate court in the circumstances as spelt out in numerous cases is to assume the role of the trial court, reconcile the inconsistencies and determine whether they were prejudicial to the appellant and therefor fatal to the prosecution case or were inconsequential to the appellant conviction and sentence.

43. The issue issues raised as contradictions by the appellant are minor and are mostly with regard to time when he meet the appellant or when she went back home, whether she met her aunty on August 23, 2019 when she went back home at 10pm or not. The other issue raised was the period which the appellant had known the complainant or if they last had sexual intercourse in April 2019.

44. While it is true that there are inconsistencies as regards part of the evidence adduced, they are minor and do not prejudice the appellant in any manner. PW 1 did confirm having sexual intercourse with the appellant and also confirmed being arrested at his house. The medical evidence presented also supported this fact. I hold that the prosecution case was well corroborated and the inconsistencies identified are minor and inconsequential to the trial courts findings on his guilt and subsequent conviction and sentence.

Crucial Witness not called to Testify.

45. The appellant alleged that the appellant's parents were not called to testify, PW1 friend called Lillian and the two police men who arrested him were also not called to testify yet they were crucial witnesses. There was a lady called Mama Max who was present during her arrest too was not called to testify.

46. The appellant under these submission also stated that the prosecution ought to have carried out further medical examination on him to extract DNA spermatozoa test and urine to confirm that indeed there is scientific evidence linking him to the crime.

47. The law on the number of witnesses to be called id found in Section 143 of the *Evidence Act*, Cap 80 which states;

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

48. This legal principal was affirmed in *keter vrs Republic (2007) EA 135* as follows;

' The prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubt.'

49. The witness called by the prosecution were sufficient to establish the case as against the appellant. The appellant knew some to the witnesses not called, like, 'Lillian and Mama Max' he had the opportunity to call them to boost his defence but opted not to do so. The appellant alleged that the arresting officers were not called but this is not true as PW 3 Pc Issbin Hussein testified as to his arrest & 4 Pc Jackson Kishe as the investigating officer.



50. The appellant also suggested in his submissions that DNA needed to be taken to scientifically prove that he was the guilty party. As stated aptly in the case of *AMI V Republic (2012) eKLR*

' The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.'

51. It was also stated in *Kassim Ali Vrs Republic (2006) eKLR* ;

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

Mitigation and Defense not Considered.

52. The accused averred that the trial magistrate did not consider his defense and later his mitigation when the sentencing was being melted out. Having looked at the trial court's judgment at the past page of the proceedings (page 81) it is clear that the trial court did consider the appellant defense and stated that he had a feeble defense that did not displace the prosecution evidence. Also while melting out the sentence the trial court did state that it had considered the appellants mitigation. This ground of appeal has no basis and there fails.

The Sentence Imposed.

53. Though this ground was not raised in the grounds of appeal, the appellant submitted on the same in his submission. In light with provisions of Article 50(2) of the *Constitution* of Kenya 2010, it is within his right to have this ground determined. The appellant stated that the 15 years he was sentenced was harsh and the minimum mandatory sentence as provided for under the Sexual offence Act, tied the trial courts hand and thus the magistrate did not exercise his discretion in the proper manner . He relied on the case of Philip Mueke Maingi and others vr Republic in Constitutional Petition No E017/2021 At Machakos and also *Edwin Wachira & others Vrs Republic In Constitutional petition No 97 of 2021* at Mombasa to find reasons to interfere with the Sentence Imposed.

54. In Maingi & 5 others Vs Director of Public Prosecution & Another (Petition No E117 of 2021) (2022) KEHC 13118 (KLR) the Petitioners who were convicts serving offences under *Sexual Offences Act* No 3 of 2006 sued the Attorney General and sought for declaration that the mandatory nature of sentence under the *Sexual Offences Act* were unconstitutional as it fettered the discretion of Judges and Magistrates in meting out sentence. Justice GV Odunga vide his considered judgment dated May 17, 2022 did find that –

' To the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentence fall foul of Article 28 of the *Constitution*. However, the courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be mandatory minimum prescribed sentences.

55. The provision of section 8(1) as read together with provisions of section 8(4) of the *Sexual Offences Act* No 3 2006 and legislation that was in force before commencement of the *Constitution* of Kenya 2010 must be considered with adaptation, qualification and exception when it comes to the mandatory minimum sentence and in particular when the said sentences do not take into account the dignity of the individual as mandated under article 27 of the *Constitution* and as appreciated in the Francis Muruatetu case and applied by courts in several cases . see *Christopher Ochieng Vrs Republic Kisumu CA Criminal Appeal No 202 of 2011, Jared Koita Injiri Vrs Republic Kisumu CA Criminal Appeal No 92 Of 2104.*



56. The trial magistrate did consider the appellants mitigation and also stated that he was aware of the emerging jurisprudence around minimum sentencing as relates to sexual offences. Having taken into consideration all those circumstance's he found that the accused was warned not to engage with a child but did not heed to the said warning. The magistrate proceeded to sentence him to 15 years.
57. This court is guided by the principles in the court of Appeal case of *Bernard Kimani Gacheru vs Republic (2002) eKLR*. Where it was stated;
- ' It is now settled law, following several authorities by this court and by the high court, that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing 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 some wrong material or acted on a wrong principal. Even if the appellate court feels that the sentence is heavy and that the appellate court might have itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless any of the matters above are shown to exist.
58. I have considered the facts in this matter. The victim was 17 years old and confirmed that indeed the appellant was his boyfriend. The appellant was warned by PW1 aunty that she was still a child but seemed not to have taken this warning seriously. This court considers the offence to be quiet egregious and calls for a deterrent sentence. But be that as it may it was also important to for the trial court to consider the age of the appellant and the fact that he pleaded for leniency. In my view, in this case as much as deterrence was important, so also is rehabilitation of this young person so that he maybe reintegrated back into the society with the aim of making him a productive citizen.
59. Further this is a matter where the trial magistrate ought to have also considered the provisions of the Judiciary sentencing policy Guidelines. It would have been important for the trial magistrate to call for a pre-sentence report and get objective and reliable information about the offender and the community to assist court in reaching the most appropriate sentence (see policy 22. 12).
60. The sentencing policy at paragraph 22.12 states that
- ' To pass a just sentence, it is pertinent to receive and consider relevant information. The court should, as a matter of course, request for pre sentencing report where a person is convicted of a felony as well as in cases where the court is considering a non-custodial sentence. In respect to children in conflict with the law, social inquiry reports should be requested for as a matter of course. Whilst the recommendation of pre-sentence reports are not binding, the court should give reasons for departing from the recommendations.'
61. At paragraph 22.19 and 22.20 The policy notes that;
- ' some offenders are not represented by advocates, many of them fail to understand what is required of them in terms of mitigation. In many cases, they fail to provide information that impact on the sentence, opting to remain silent or giving irrelevant information. The policy further proceeds and states the court should guide the offender on what is required of him or her at this stage'



62. Finally at 23.1 the sentencing policy provides that;

' The court should schedule a hearing in which it receives submission's that would impact on the sentence. Whilst pertinent information is typically contained in the reports, the hearing provides the court with the opportunity to examine the information and seek clarity on all the issues.'

63. The trial court after convicting the appellant summarily proceeded to sentence hearing and melted out the sentence of 15 years. It is clear from the above that, while he was within law to do so, he did not fully consider the impact of the above sentencing policies which would have guided him to seek pre-sentence report and also allow the appellant to mitigate in a better manner. This was a clear misdirection which justifies the interference of the sentence melted out

64. In the case *R Vs Scott (2005) NSWCCA 152* Howle J Grove & Baar JJ then stated –

' There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and then must be a reasonable proportionately between the sentence passed in the circumstance of the crime committed...one of the purpose of punishment is to ensure that the offender is adequately punished a further purpose of punishment is to denounce the conduct of the offender.'

65. In this instant appeal the appellant was sentenced to serve 15 years imprisonment after the decision of muruatetu case. The learned magistrate seem to have considered the appellants mitigation, but as seen from the proceedings, the appellant was not guided on the same nor was a pre-sentence report prepared to his detriment and in violation to his right to fair hearing as provided for under Article 50(2) of the *Constitution* of Kenya 2010. The trial magistrate was aware of the recent jurisprudential development brought by the decision of In Maingi & 5 others Vs Director of Public Prosecution & Another (Petition No E117 of 2021) (2022) KEHC 13118 (KLR) and more particularly in In Maingi & 5 others Vs Director of Public Prosecution & Another (Petition No E117 of 2021) (2022) KEHC 13118 (KLR)

66. In the premises, this instant appeal as against conviction fails for lack of merit. It is hereby dismissed. The conviction is hereby confirmed. However the appeal as against sentence succeeds and the sentence of 15 years handed down to the appellant in GICHUGU SRM SOA CASE NO 13 OF 2019 is hereby set aside. I do order that this matter be remitted back to the Hon Magistrate Court for fresh sentencing. The court should consider the sentencing policy guideline's as mentioned above and the procedure laid out therein.

67. To this end the deputy Registrar – Kerugoya will remit the original file and a copy of this judgment and extracted order to the Gichugu court for compliance.

68. It is so ordered.

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 16TH DAY OF FEBRUARY 2023

RAYOLA FRANCIS

JUDGE

In the presence of:-

Appellant



.....For O.D.P.P

.....Court Assistant

