



REPUBLIC OF KENYA



**Julo v Republic (Criminal Appeal E035 of 2022)
[2023] KEHC 19366 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E035 OF 2022**

**A. ONG'INJO, J
JUNE 15, 2023**

BETWEEN

MDUNE JULO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the judgment delivered by Hon. Sandra Ogot,
Senior Resident Magistrate on 17th December 2021 in Msambweni
Magistrates Court S. O. No. 14 of 2020, Republic v Mdune Julo)*

JUDGMENT

Background

1. Mdune Julo was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars are that Mdune Julo on the diverse dates between 16th day of April 2019 and 30th day of April 2019 in Dzombo Location of Lunga Lunga Sub-County within Kwale County, intentionally and unlawfully caused his penis to penetrate the vagina of AWM a child aged 16 years.
2. In the alternative count, the appellant was also charged with the offence of indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.
3. The trial magistrate considered the evidence of the six prosecution witnesses and the sworn statement of the appellant and his witness and convicted the appellant who was sentenced to serve 15 - years imprisonment.
4. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds: -



1. That the learned trial magistrate failed in law and fact by not seeing that voire dire examination was not conducted in this matter.
2. That the learned trial magistrate erred in both law and fact when it failed to observe that medical evidence tabled was insufficient and inconsistent with the allegations made against me.
3. That the learned trial magistrate erred in fact by failing to see that crucial evidence was not called by the prosecution.
4. That the sentence meted upon me by the trial court was excessive in light of the current jurisprudence in regard to sentencing.
5. The appellant prayed for the court to set aside the conviction and sentence and to direct that the Appellant be at liberty.

Prosecution's Case

6. PW1, AWM., the complainant stated that she was 17 years old having been born on 1.6.2003. She testified that in April 2019, a date she could not remember, at 11.00 am, she was sent to the shamba by her mum to harvest green maize and when she got near the shamba, she met the accused herding near the shamba. She testified that she knew the accused who was their neighbour and that she had known him since he was a baby. That when she got to the shamba and upon harvesting the 3rd maize cob, she felt someone grab her from behind and when she turned she saw the accused and before she could scream, he held her by the throat and removed her skirt and also removed her panty. That he then pushed her to the ground and inserted his penis in her vagina and when he was finished he told her not to say anything otherwise he would kill her.
7. The complainant testified that the accused got dressed and left, and that she got dressed and was bleeding from her vagina and continued to harvest maize and later went back home. That she removed her clothes together with the blood stained ones and laundered them herself. She stated that she did not know what to tell her mother because people had been slashed and killed with pangas around their home and the accused said he would kill her. PW1 testified that she did not know that she would fall pregnant and that she told her parents of the pregnancy on 24.10.2019 when her mother asked why her stomach was becoming big. That the next day her father took her to school to ask the head teacher who told then to go to hospital for examination where it was confirmed that she was three months pregnant. That they also went to Lunga Lunga Hospital and Msambweni Hospital where it was confirmed she was 5 months and 2 weeks pregnant. That the father returned to Mamba Police Station and Mdune Julo was arrested. That she was called to identify him when he was arrested and that she gave birth on 24.2.2020 to a baby boy who was in court.
8. PW2, HMN stated that the complainant is her daughter born on 1.6.2003. That on 24.10.2019, her father asked why the complainant had changed and PW2 said that she had not looked at her as she rarely leaves the compound. That her breasts had become big and her breasts were swollen. That when she was asked, the complainant said she was pregnant. That the father took her to see the headmaster and that they went to the police and to Lunga Lunga where the doctor confirmed she was pregnant. That when PW2 asked her what happened, the complainant said that in April 2019 when schools were closed and she had been sent to the shamba, the accused defiled her and said he would kill her if she told anyone. PW2 identified the accused in court and that he is related to PW2's husband and that they lived peacefully as neighbours.
9. PW3, PMD, a pastor at [Particulars Withheld] stated that the complainant is his daughter and that she was born on 1.6.2003. A copy of the birth certificate was marked as MFI-1. PW3 testified that on



- 24.4.2019 when he got back home from visiting his other churches and saw the complainant, the signs on her face were very prominent of pregnancy. That the complainant left for school and during the day PW3 told her mother to ask if the complainant was pregnant when she returns from school. That her mother called her inside that evening and that the mother came out crying and that she had pressure. That the mother said “mtoto wako Winnie” then she fell. That the mother became better at 2.00 am and that is when she told PW3 that the complainant was pregnant and by the accused, the one with a wife and two children.
10. PW3 testified that the following day at 25.10.2019, he took the complainant to school and told the headmaster who equally got surprised. That she was sent to the hospital to be examined and that at Mambo Dispensary she was found to be three months pregnant. That PW3 took the complainant back to the headmaster who referred them to the police at Mamba Police Station who also referred them to Lunga Lunga Hospital where the doctor found that she was five months and two weeks. That they were given a letter to be referred to Msambweni Hospital for scanning which confirmed she was five months and two weeks. That the P3 was filled and returned to Mamba Police. The treatment book for all the visits was marked MFI-2, the scan of 26.10.2019 marked as MFI-3 and P3 Form of 26.10.2019 marked MFI-4.
 11. PW3 testified that after reporting, they started to look for the accused who went missing from October 2019 to January 2020 and in February 2020, the accused made an appearance and PW3 went and informed the police and that he was arrested on 4.2.2020. That the accused is his neighbour, they share a fence and that he saw him as a baby. That they have never had issues with him and his family and he never thought he would do something like that.
 12. PW4, Suleiman Jemmani Mwamzazi, a Clinical Officer working at Lunga Lunga sub-county Hospital testified that he filled the P3 Form for W. A. aged 16 years sent to their facility on 25.10.2019 with a defilement report by someone known to her. That PW4 took her history first and that she was a class seven pupil with a defilement history and was pregnant. That her last period was 26.7.2019 and she had already started antenatal clinic at Mambo Dispensary. PW4 stated that he looked at the report from Mambo Dispensary where she was seen on 25.10.2019 where tests were done and the pregnancy confirmed. That HIV and STI were negative and there was no abnormality in stool or urine.
 13. PW4 testified that as per first examiners at Mambo Dispensary, she was 12 weeks pregnant and the examination showed 20 weeks pregnant and not 12 weeks. That PW4 requested for ultrasound which was done at Msambweni County Hospital and the pregnancy was confirmed to be 21 weeks and one day. PW4 filled the P3 Form on 26.10.2020 as per the results from the lab and also filled details of ultrasound dated 26.10. The treatment notes scan, P3 Form marked as MFI-2, 3 and 4 were produced as PExh- 2, 3 and 4 respectively.
 14. PW5, No. 113048, P.C. Kevin Njore Mwatia the investigating officer herein stated that on 25.10.2019, he went to the report office and found he had been assigned a case by the OCS. That the case had been reported by PM who alleged that his daughter had been defiled. That PW5 called them and told them to return to the station and the minor went with her parents. That PW5 interrogated them and found out that in mid-April 2019, during school holidays and during maize harvest season during that time, the mother of the complainant sent her to the farm to harvest maize.
 15. PW5 informed court that when she got there, Mdune Julo was nearby herding and that he saw the complainant entering the shamba. That after a short time, the complainant felt someone grabbing her from behind her neck, her mouth blocked and a voice telling her not to make noise. That the accused turned her around so that they were face to face then pushed her down, removed his clothes and her too while she was on the ground. That he laid on her and inserted his penis into her vagina and ejaculated



in her. That after he finished, he got up and dressed and so did she. That he then told her not to tell anyone what happened and if she tried to tell, he would kill her.

16. PW5 testified that the accused left the complainant confused at the scene and that the complainant continued to harvest maize as initially sent to do and then she left. That after a few days, the mother saw the daughter acting funny and on asking her, she said everything that had happened and that is when they reported to Mamba Police Station. That PW5 recorded their statement and the father of the complainant said Mdune was at the shops in Mamba. That PW5 and his colleague went to the shops but they could not find him. That the accused returned after a while and they managed to arrest him based on the description given. That they called the parents and the minor who went to the station and identified the accused. That the accused also admitted to knowing the minor.
17. PW5 further stated that she filled the P3 Form and sent her to hospital. That the P3 said she was pregnant at 21 weeks and one day and that PW5 charged the accused with defilement. That the minor gave birth and PW5 took her, the born child and the accused for DNA sampling on 28.9.2020. That PW5 filled the exhibit memo marked and presented as Exh-5 and that they got results on 2.10.2020 which stated that 99.99% chance that the accused was the father. The said report was marked MFI-6.
18. PW6, Irene Furaha Mwaringa, the Government Analyst, Government Chemist Msambweni branch testified that she had a report and a police Exhibit Memo Form taken to the government chemist on 28.9.2020 by PC Njore escorting the following for DNA sampling: -
 - i. Buccal swab marked A from W. A. the mother
 - ii. Buccal swab marked B from Mdune Julo the alleged father
 - iii. Buccal swab marked C from A. A. the minor
19. PW6 testified that she acted under the orders of the court and that the order was to determine paternity of the minor. She stated that the results were 99.99+% more chances that Mdune Julo was the biological father of the minor. That PW6 signed the report on 2.10.2020 marked as MFI-6 and produced as PExh-6.

Defence Case

20. DW1, the accused gave sworn statement that on 27.10.2019 at 8.00 am, his boss called him and told him that the police were looking for him. That the boss decided to let him go and that he returned to work in March 2020 when he got arrested. That he denied all the charges preferred against him when he was taken to court. He informed court that the complainant said that from 16.4.2019 to 10.5.2021 he had sex with her and that he denied the allegations. He testified that one doctor said she was 21 weeks pregnant and the 2nd doctor who was never called to testify had a different report.
21. DW2, Douglas Chimako Tsuma gave sworn statement that he knew the accused who used to be his employee and that he employed him in 2016 and in 2019, he ran into problems and on 27.10.2019, he let him go because he had a rape case. That from 2016 to 2019, Monday to Saturday, he would go to work. DW2 further stated that he had nothing to say regarding the charges before court.
22. This appeal was canvassed by way of written submissions.

Appellant's Submissions

23. The appellant submitted that the law on evidence requires that before the evidence of a minor witness can be taken for consideration, the court must satisfy itself that the minor is possessed with knowledge of the importance of an oath and the need to tell the truth. The appellant stated that the complainant



was 17 years old and the trial court directed that the minor should give sworn testimony and proceeded to her testimony. The appellant cited the cases of John Muiruri v Republic (1983) KLR 445, DWM v Republic (2016) eKLR, and Patrick Kathurima v Republic, Cr. App. No. 137 of 2014 in support of the importance of conducting voire dire examination. The appellant pointed out that there was nothing on record to demonstrate that the learned trial magistrate administered voire dire examination.

24. On faulty medical evidence, the appellant submitted that if the pregnancy was 20 weeks old according to PW4, that was inconsistent with the evidence given by other witnesses who stated that the pregnancy upon examination was three months old, five months and two weeks old and the third version that alluded to 12 weeks. He stated that the diverse pieces of evidence on the pregnancy went against the principle of beyond reasonable doubt and that the trial court was at fault for allowing such questionable and doubtful medical evidence to form the basis upon which to infer guilt upon him.
25. The appellant stated that the law requires that crucial witnesses should be summoned to help the court arrive at a just conclusion. The appellant cited Section 140 of the *Evidence Act* which states that a trial court may summon or call anybody whose evidence may be necessary for it to arrive at a just conclusion. The appellant cited the case of Bukenya v Uganda (1972) EA 549 where it was held that the prosecution is duty bound to make available all witnesses necessary to establish the truth even if the evidence may be inconsistent to its case otherwise failure to do so may in an appropriate case lead to an inference that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution.
26. On sentencing, the appellant averred that he was sentenced to 15 years imprisonment despite his mitigation before sentencing. The appellant cited Section 329 of the Criminal Procedure Code which provides that the court may before sentencing receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The appellant further submitted that courts are bestowed with discretion in sentencing of offenders. He relied on the holding in the case of Philip Mueke Maingi & 5 Others v Republic, Constitutional Petition No. E017 of 2021 and Swabir Bukhet Labhed v Republic, C.A. Cr. App No. 52 of 2018 where the courts are in agreement that the words shall be liable to do not connote anything mandatory in the imposition of sentences. The appellant therefore prayed that the appeal succeeds, conviction is quashed and sentence set aside.

Respondent's Submissions

27. On the issue of voire dire examination, the Respondent submitted that the birth certificate was produced as exhibit 1 which indicates that the minor's date of birth was 1.6.2003. The Respondent stated that the incident took place on diverse dates between 16.4.2019 and 30.4.2019 and at the time the complainant was 16 years old.
28. The Respondent cited the case of John Muturia v Republic, Criminal Appeal E127 of 2021 where the court considered the matter of evidence of tender years and quoted the leading case of Kibangeny Arap Korir v Republic (1959) EA 92 whereby the Court of Appeal for Eastern Africa while dealing with a determination of the issue, held that "tender years means a child under the age of 14 years. The court further addressed what age would be appropriate for trial court to conduct a voire dire examination by considering the holding in the case of Maripett Loonkomok v Republic (2016) eKLR where the Court of Appeal Reiterated that children under the age of fourteen (14) ought to be taken through voire dire examination" The Respondent averred that the minor was 16 years old at the time of the incident and therefore not a child of tender years.
29. On the second issue of whether the medical evidence tabled was insufficient and inconsistent with the allegations made against the appellant, the Respondent submitted that they are entirely in agreement with the trial court when it stated thus "the DNA report presented as exhibit 6 firmly corroborated



the minor’s testimony that he defiled her and as a result impregnated her too. The accused may very well deny that he did not do it, but the DNA result is irrefutable proof that he in fact defiled her.”

30. On the third issue that crucial evidence was not called by the prosecution, the Respondent cited the case of *Kenneth Mwenda Mutugi v Republic* (2019) eKLR, Criminal Appeal 10 of 2017 where the court observed that in sexual offences cases, going by the provisions of Section 124 of the *Evidence Act*, there was still sufficient evidence to return a verdict of guilt against the appellant simply because the evidence against him was credible and overwhelming.
31. On the last issue of sentencing, the Respondent submitted that the supreme court clarified the position in cases where the law prescribed mandatory sentences such as the present one in directions issued on 6th July 2021 in the second Muruatetu case that the decision in the first Muruatetu case applied only to the mandatory death sentences for the offence of murder. The Respondent cited the case of *John Mwita Kerario v Republic* (2011) eKLR, Criminal Revision No. E017 of 2022. The Respondent urged the court to find that the conviction was sound, the sentence under the charge was lawful and not excessive and thus prayed that the appeal be dismissed for lack of merit.

Analysis and Determination

32. This being the first appellate court, this court is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”
33. After considering the grounds of appeal, records of trial court and submissions, issues for determination are: -
 - i. Whether failure to conduct *voire dire* examination was fatal to the prosecution case.
 - ii. Whether medical evidence was insufficient and inconsistent
 - iii. Whether crucial evidence was left out of the prosecution’s case
 - iv. Whether the sentence meted against the appellant was excessive in light of the current jurisprudence.

Whether failure to conduct *voire dire* examination was fatal to the prosecution case.

34. Section 125 (1) of the *Evidence Act* states: -

“All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause”.



35. Section 19 (1) of the [Oaths and Statutory Declarations Act](#) provides: -

“Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth”.

36. In the case of *Samuel Warui Karimi v Republic* [2016] eKLR it was held: -

“...voire dire is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus under the [Evidence Act](#), the test is one of competency as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. It, therefore, follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence.”

...

“This explains why the Courts have held on the age at 14 years and sometimes even a higher age as the age below which a child is of tender years for purposes of criminal trials and insisted the competency be tested through questions that must be put to the child and answers given by the child be recorded verbatim. The definition of a child of tender years provided under the Children’s Act has remained a guide in regard to criminal responsibility.”

37. The Appellant submitted that the court did not satisfy itself that the complainant possessed the knowledge of the importance of an oath and the critical need to tell the truth. He relied on the authorities below to support his position that voire dire examination was a prerequisite of taking the evidence of the key witness herein.

38. In *John Muiruri v Republic* (1983) KLR 445, Criminal Appeal No. 44 of 1982 Court of Appeal at Nairobi, Madan, Porter JJA and Chesoni Ag JA held: -

“Where in any proceedings before any court a child of tender years is called as a witness, the court is required to form an opinion on a voire dire examination whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

...

When dealing with the taking of an oath by a child of tender years, the inquiry as to the child’s ability to understand the solemnity of the oath and the nature of it must be recorded, so that the course the court took is clearly understood”

39. In *DWM v Republic* (2016) eKLR, Justice Maureen Odero quashed conviction where the appellant was found guilty for the offence of defilement contrary to Section 8 (1) and (2) of the [Sexual Offences](#)



Act for the reason that the age of the complainant and identity of the perpetrator was not proved beyond all reasonable doubt. This authority is therefore not relevant in so far as *voire dire* examination is concerned.

40. In *Patrick Kathurima v Republic*, Criminal Appeal No. 137 of 2014, the Court of Appeal held: -

“We take the view that this approach resonates with the need to preserve the integrity of the *viva voce* evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children’s Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes”.

41. From the charge sheet, the complainant W. A. was aged 16 years at the time she was defiled having been born on 1st June 2003 as per Exh-1 certificate of birth produced by the father PW3. By 21st September 2020 when she was testifying, it was noted that she was 17 years old and it was on that account that the trial magistrate ordered that she give a sworn testimony. By all standards, she was not a child of tender years and was therefore competent to testify without *voire dire* examination. There was nothing to prevent her from understanding the questions put to her or from giving rational answers to those questions. This ground cannot be sustained.

Whether medical evidence was insufficient and inconsistent

42. The Appellant claimed that there was inconsistency in the medical evidence in that the complainant was told she was 3 months pregnant when she went to Mamba Hospital in October 2019 and upon the ultrasound being done, it was found she was 5 months and 2 weeks pregnant. The complainant said that at Mamba Hospital, she was merely told that she was 3 months pregnant but PW4 requested for an ultrasound to be done and established the exact age of the fetus at 21 weeks and 1 day. The complainant said she could not remember the date that she was defiled but it was in April 2019. The time that she gave birth and the period she alleges to have been defiled are irreconcilable but she also explained that the appellant who was a herder to their neighbor threatened to kill her if she disclosed that he had defiled her. The complainant therefore kept to herself the traumatic incident until her parents noticed changes in her body and on inquiring, established that she was pregnant for the appellant. When the child was born, DNA tests were conducted and Government Analyst report revealed that there are 99.99% chances that the appellant was the father of the subject child. This scientific finding rules out possibility of any other person having defiled the complainant. The offence was committed in broad daylight at 11.00 am and the appellant’s employer DW2 Douglas Chimako Tsuma said that he let the appellant go on 27.10.2019 because he had a rape case.

43. The ground that the medical evidence was faulty, insufficient and inconsistent cannot stand.

Whether crucial evidence was left out of the prosecution’s case

44. The prosecution produced a P3 Form and an ultrasound report as medical evidence to support its case that the appellant defiled and impregnated the complainant. He is relying on Section 71 of the Evidence Act which was not complied with in that the treatment book was not produced and the medical officer who filled it did not attend. The trial court noted that the appellant had been calling for the doctor who filled the book to be called but the prosecution closed its case before the said doctor was called. The appellant said that the said witness if called would have enabled the court to arrive at a just conclusion



over the subject matter. He urged the court to infer that had the doctors who filled the treatment books been called, the evidence would have been adverse to the prosecution.

45. The appellant has not shown that the treatment notes he claims were not produced are different from the P3 Form, the ultrasound report which established that the complainant was defiled, she got pregnant and gave birth to a child who is established by DNA to have been sired by the appellant. The evidence adduced against the appellant was credible and overwhelming. I similarly find that this ground cannot stand and the same is dismissed.

Whether the sentence meted against the appellant was excessive in light of the current jurisprudence

46. The Appellant argued that the trial court took into account the aggravating factors to the absolute exclusion of the mitigating factors which is contrary to the provisions of the Sentencing Policy Guidelines. He also said that the courts construed the relevant Penal Law Section 8 (4) to be a minimum term provision in disregard to the current jurisprudence of the proper and acceptable construction of such laws. He submitted that it is currently a common jurisprudence in case law that courts are bestowed with discretion in the sentencing of offenders and that those laws are worded in mandatory terms can and ought to be construed to be discretionary. He relied in the case of Philip Mueke Maingi & 5 Others v Republic, Petition No. E017 OF 2021 where Odunga, J. (as he then was) held as follows: -

116. Having said that the ultimate decision as to what ought to be done must remain that of the legislature. Ours is simply to align the legislation that were in existence before the promulgation of *the Constitution* of Kenya, 2010 with the letter and spirit of *the Constitution*.

117. In the case R vs. Scott (2005) NSWCCA 152 Howie J Grove and Barr JJ stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...”

118. Having considered the issues raised in this petition, the orders that commend themselves to me and which I hereby grant are as follows:

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

2) Taking cue from the decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR (Muruatetu 1) those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases.

47. The appellant also argued that the words shall be liable in the penalty sections of the *Sexual Offences Act* do not connote anything mandatory in the imposition of those sentences and relied in the decision of the Court of Appeal in Swabir Bukhet Labhed v Republic, C.A. Cr. App No. 52 of 2018 and Fred Michael Bwayo v Republic (2009) eKLR to submit that the trial court ought to have considered his mitigation and imposed a more lenient sentence on him. He urged the court to look into the plight of his children and adjust his sentence to one that would allow him to join his loved one soon.
48. Upon conviction of the appellant the trial magistrate called for a presentence report after the appellant gave his mitigation but the report turned out not to be favourable for the appellant's sentence to non-



custodial sentence for reason that he did not seem to be remorseful and the victim's family needed justice to be served. The trial magistrate considered the aggravating factors and said that the appellant did not deserve any mercy from the court as he changed the complainant's life forever and he cannot get to walk away from that. When sentencing him to 15 years, the trial magistrate did not indicate whether she was passing the sentence because of the mandatory nature of the sentence or the aggravating factors. It is important that the trial court indicates whether they have exercised the discretion in sentencing pursuant to both the principle in Muruatetu Petition as well as the Philip Mueke Petition in which it was held that minimum mandatory sentences in the Sexual Offences Act fall foul of Article 28 of the Constitution.

49. In consideration of similar cases, this court finds that 10 years would have been appropriate sentence in the circumstances. The sentence of 15 years is therefore substituted with 10 years less 4 months which the appellant spent in remand custody with effect from 5th February 2020 to 8th June 2020.
50. In conclusion, this court finds that the appeal on conviction has no merit and the same is dismissed. On sentence, it is successful to the extent that the same is substituted with 10 years imprisonment less 4 months remand period. The appellant has 14 days right of appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,

THIS 15TH DAY OF JUNE 2023

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

