VKK v Republic (Criminal Appeal E007 of 2023)
[2024] KEHC 14161 (KLR) (15 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14161 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E007 OF 2023

JRA WANANDA, J

NOVEMBER 15, 2024

BETWEEN

VKK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Iten Senior Principal Magistrate's Court Sexual Offence Case No. E006 of 2022 with the offence of defilement contrary to the provision of law described as "Section 8(1)(3) of the *Sexual Offences Act*, No. 3 of 2006". It was alleged that the Appellant, on diverse dates between the months of November 2021 and the 28th day of January 2022 at around 2230 hrs at [particulars withheld] in Keiyo North sub-county within Elgeyo Marakwet Count, intentionally and unlawfully caused his penis to penetrate the anus of IKK, a child aged 15 years. He was also charged with the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the same Act.

2. The Appellant pleaded not guilty and the case proceeded to full trial in which the prosecution called 6 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. The Appellant then gave an unsworn statement and did not call any witness. By the Judgment delivered on 28/2/2023, he was convicted on the main charge and sentenced to serve 20 years' imprisonment.

3. Dissatisfied with the decision of the trial Court, the Appellant filed this appeal on 10/3/2023, against both the conviction and sentence, on 9 grounds reproduced verbatim as follows:

    i. That the learned magistrate erred in law and fact by failing to note that the appellant was underage during the time of the crime.

    ii. That the learned magistrate erred in law and fact in holding that the prosecution had proved its case beyond reasonable doubt while the evidence stated otherwise.

iii. That the learned magistrate erred in law and fact by holding that there was indecent act with an adult by the appellant while in fact there was no offence established as committed by the appellant.

iv. That the trial court misdirected itself on facts by finding that the alternative offence of committing an indecent act with a child was proved based on the assumption that there was penetration.

v. That the learned magistrate erred in law and facts by failing to record reasons for believing the minor victim contrary to section 124 of the *Evidence Act*.

vi. That the learned magistrate erred in law and fact by shifting the burden of proof to the appellant;

vii. That the learned Magistrate erred in law and fact in sentencing the Appellant to 20 years imprisonment, which sentence was excessive in the circumstances;

viii. That the learned magistrate erred in relying on uncorroborated and unsubstantiated evidence.

ix. That the learned magistrate erred in law and fact by failing to consider the appellants' cogent defence was rich in truth.

Prosecution evidence before the trial court

4. PW1 was the complainant-minor. The Court conducted a voire dire examination during which he stated that he was 15 years old and a Form 1 student. The trial Court, upon satisfying itself that the minor understood the nature of the oath, allowed him to give sworn evidence. He then testified that he knew the Appellant as they were in the same school, and that the Appellant was in Form 2. He stated that in November 2022, on a Friday after evening preps, he met the Appellant in the dormitory, that the Appellant came and took off PW1's school uniform, removed PW1's shorts and sweater, and raped PW1. He stated that they were behind the dormitory, that there was no one else and that the Appellant threatened PW1 not to tell anyone. He stated that on the following day, he told his friend, RK, who told him to keep quiet because the other students would beat him up if he told them.

5. He testified that in the year 2023 when they were sent home for fees, the Appellant tried to rape him again but he managed to escape, that on the next day, they were in the field and the Appellant asked him why he had run away, that they then fought and RK assisted him. He stated that he was then sent home for school fees and that he told his aunt, VC, about the incident when he was about to return to school. He stated that his aunt told his grandmother, that they then went to school and informed the Principal, Mr. JK who told them to report it to the police, which they did at the Iten Police Station. He testified that he was then taken to Moi Teaching and Referral Hospital where he was examined and a P3 form issued and that a few days later, the Appellant was arrested. In cross-examination, he stated that the incident took place behind the dormitory, that there was no witness, that the Appellant threatened him so he did not tell people, that he did not scream and that the security lights had been turned off.

6. PW2 was VSM. She testified that she was 19 years old, that on 7/02/2022, she was in her salon when the complainant (PW1) who was her nephew came to see her before he went back to school, that he seemed hesitant and when she went to talk to him, he started crying but did not reveal what was disturbing him even when PW2 asked him if he was having any challenges in school. She testified that she then told the complainant to go to school, that he crossed the road to board a vehicle and was almost knocked down by a car, that she then called the complainant back and instructed him not to go to school but to go home instead. She stated that her workmate then alluded that the complainant may have been

sodomized, that when she went home after work and asked the complainant whether he had been sodomized, the complainnat confirmed that indeed that was the case. It was her further testimony that she then called her mother and informed her about the matter.

7. PW3 was PCL, the complainant's grandmother. She stated that on 05/02/2022, the complainant was sent home for school fees and she told him to go back to school the next day, that the complainant told her that he would go on Monday, that on the said Monday, while PW3 was at work, at 11 am, PW2 called her and told her that the complainant was crying and appeared to have had a problem. She stated that when she (PW3) came back home in the evening, and enquired, the complainant informed her that he had been raped at school, that on the following day, they went to the school with the complainant and PW2 but that the Principal did not want to talk to them. She stated that they then went to Moi Teaching Referral Hospital where the complainant was examined and they reported the matter to the Iten Police Station from where they were sent back to the school and the Principal told them that the Appellant had also been sent home for school fees. She stated that a P3 Form was filled and that they recorded statements at the police station.

8. PW4 was Dr. Irene Simiyu, a medical doctor working at Moi Teaching Referral Hospital. She testified that she examined the complainant on 8/02/2022 who came with a history of defilement, that the examination revealed a healing laceration on the anal region at 12 O' Clock with a normal anal tone, that there was no discharge and that she made a conclusion that the injuries were consistent with sodomy. She then produced the P3 Form.

9. PW5 was Police Constable Mary Goret who was attached at the Iten Police Station. She stated that she was the investigating officer in the case. She testified that on 9/02/2022 the complainant reported that he was being sexually assaulted by a fellow student, that she issued him with a P3 Form and visited the scene where they arrested the Appellant and charged him with the offence. She then produced the complainant's birth certificate which indicated that the complainant was born on 22/09/2006. In cross-examination, she stated that the incident occurred in November but was reported in February

10. PW6 was Meshack Kandie Chemjor, a Clinical Officer at Iten County Hospital. He testified that the complainant came with a history of defilement on 15/02/2022 and that he examined the Appellant but found nothing abnormal in the Appellant's genitalia or anus. He then produced the Appellant's P3 Form.

Defence evidence

11. The Appellant gave unsworn testimony as DW1. He testified that he was a Form 4 student and aged 18 years old. He testified that the complainant wanted a transfer from the school and he assaulted him which the complainant went and reported. He stated that he was sent home for school fees and when he came back to school, the Principal called him and asked him if he had brought the fees, and that when he went back to class, two police officers came and took him to the police station. He stated that a female officer assaulted him forcing him to confess but that he only mentioned that he had assaulted the complainant and that he was then brought to Court and charged.

Hearing of the Appeal

12. The parties were then given liberty to file written Submissions. While the State, through Prosecution Counsel Calvin Kirui filed its Submissions on 4/06/2024, up to the time of concluding this Judgment, I had not come across any Submissions filed by the Appellant.

Respondents' Submissions

13. Prosecution Counsel cited Sections 8(1) and (3) of the *Sexual Offences Act* and also the case of George Opondo Olunga v Republic [2016] eKLR, and submitted that the same restate the ingredients of the offence of defilement as being "identification" or "recognition" of the offender, "penetration" and the "age" of the victim. He submitted that the prosecution is under a duty to establish or prove all the above elements beyond reasonable doubt, and that this duty, or burden of proof, does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the prosecution.

14. He submitted that in this case, the issue of "identification" of the perpetrator is clear, that the complainant was 15 years old and had the capacity to vividly remember the events of the incident and the perpetrator, that the two were schoolmates hence not strangers to each other and that the "identification" was therefore by way of "recognition". Regarding "penetration" he cited the definition set out under Section 2 of the Act to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person". He submitted that the complainant testified that the Appellant took off his uniform and defiled him behind the dormitory, that the Appellant threatened him and directed him not to tell anyone but that the complainant told his friend RK. He also pointed out the complainant's testimony that the Appellant again tried to defile the complainant when they were sent home for fees but that the complainant managed to escape, that on the following day, the Appellant asked the complainant why he had run away, that a fight ensued and that the complainant later told his aunt about the ordeal.

15. Regarding "corroboration", Counsel cited Section 124 of the *Evidence Act*, and submitted that the doctor testified that he examined the complainant and found that he had a healing laceration on the anal region. According to him, this evidence shows that the Appellant caused penetration of his penis into the complainant's anus, that these findings were noted in the P3 Form and that this evidence proved that there was defilement. He also submitted that the investigating officer produced the complainant's birth certificate which indicated that the complainant was born on 22/09/2006, that the incident happened between the month of November 2021 and 28th January, 2022 and that this means that the complaint was 15 years old at the time thereof. He also pointed out that the Appellant did not challenge this evidence that no contrary evidence was produced and that as such, the age of the complainant was proved. Counsel also contended that the Appellant elected to give unsworn evidence which was a mere denial which denial was untrustworthy and that the trial Court rightfully held that the prosecution had discharged its burden of proof.

16. Regarding the Appellant's contention that the trial Court failed to consider that he was a minor at the time of the incident, Counsel submitted that the trial Court sentenced the Appellant to the minimum sentence and that the trial Court was therefore lenient. He submitted that prosecution witnesses and evidence were all consistent, that there was no doubt or contradiction and the evidence was credible and reliable. In conclusion, he submitted that the trial Court, after careful consideration of the evidence, and the Appellant's mitigation rightfully exercised its discretion and sentenced the Appellant accordingly.

Determination

17. As a first appellate forum, 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. Before I proceed further in determining this Appeal, I note that as one of his Grounds of Appeal, the Appellant has alleged that he was below the age of 18 years as at the date that he is alleged to have committed the offence. I will revert to this issue later.

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

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

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

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

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

22. In the circumstances, it is evident that the two broad issues that arise for determination in this matter are the following:

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

    b. Whether the sentence of 20 years imprisonment imposed against the Appellant was justified.

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

a. Whether the charge of defilement was proved case beyond reasonable doubt

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

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

25. From the foregoing, it is agreed that for the charge of defilement to stand, the Prosecution must prove 3 ingredients, namely, the "age" of the victim (must be a minor), "penetration" and proper "identification" of the perpetrator (see George Opondo Olunga vs. Republic [2016] eKLR

26. Although proof of the "age" of the victim has not been expressly challenged in this Appeal, there is no harm in analyzing the same nevertheless.

27. The importance of proving "age" was reiterated in the Court of Appeal case of Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010, in which the following was stated:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

28. The Court of Appeal further stated in the case of Hadson Ali Mwachongo v Republic [2016] eKLR, that:

> " 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: -
>
> > " 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)".

29. In respect to the manner of proving "age", in the case of Francis Omuroni v Uganda Court of Appeal; Criminal Appeal No. 2 of 2000, the following was stated:

> " 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 ....."

30. In this case, the age of the victim was proved by production of the certificate of birth. The same indicated that the victim was born on 22/09/2006 and the incident having been alleged to have happened between 2021 and 2022, it means that indeed, the victim was about 15 years old at the time thereof. Age was therefore sufficiently proved.

31. Regarding "penetration". Section 2(1) of the *Sexual Offences Act* defines it as follows:

> " the partial or complete insertion of the genital organs of a person into the genital organ of another person."

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

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

33. In this case, a doctor produced the medical evidence. She testified that she examined the complainant and found him to have had a healing laceration on the anal region at 12 O'clock position with normal anal tone. She testified that as a result of these findings, she made the conclusion that the injuries were consistent with sodomy. I however note that although the charge sheet states that the defilement took place between November 2021 and 28/01/2022, in his evidence-in-chief, the complainant only referred to one incident that happened in November 2021. There is therefore some inconsistency insofar as the doctor, in her testimony and in the P3 Report, stated that she examined the complainant on 10/02/2022, that the injuries she found were about 11 days old and that the date of the defilement was about 28/01/2022. I however do not find this inconsistency to be material or capable of weakening the rest of the evidence on record since the healing process could as well have been still ongoing.

34. In the circumstances, I find no material to fault the trial Magistrate for reaching the finding that "penetration" was proved.

35. 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".

36. It is therefore clear that "identification" of an accused person in these kinds of cases is crucial. The Court of Appeal in the case of Kariuki Njiru & 7 others vs Republic, [2001] eKLR further restated the same in the following terms:

> "Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

37. Further, in the case of Anjononi & Others vs Republic [1981] KLR 594, it was stated that:

> "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."

38. It is therefore true that "recognition" is regarded as more reliable than identification of a stranger. However, caution must still be taken where witnesses is purporting to recognise someone that they know since even in such cases, mistakes may sometimes be made. (see R vs. Turnbull & Others [1976] 3 ALL ER 549).

39. In this case, the Appellant's "identification" by the complainant was by way of "recognition" since they were both students at the same school. The factors to be considered with respect to "identification" were set out in the case of R vs Turnbull & Others (1976) 3 ALL ER 549 in the following terms:

> "... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

40. As the complainant and the Appellant were both students at the same school, they were not strangers to each other. This, the Appellant also confirmed in his defence. In view thereof, it is my considered view that "identification" of the appellant was proper and indisputable.

41. Since this case, being a sexual offence, is one where conviction may be based on the evidence of a single witness, I need to also mention the provisions of Section 124 of the *Evidence Act* which provides as follows:

> "Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

42. In this case, the complainant's evidence was not shaken during cross-examination, was consistent and was not controverted. Though a single eye-witness therefore, I find no reason to fault the trial Magistrate for convicting the Appellant. In any event, the evidence was, in any event, also corroborated by the medical evidence.

43. The upshot of the foregoing is that I am satisfied that the trial Court did not fall into any error when it reached the finding that the prosecution proved its case beyond reasonable doubt.

b. Whether the sentence of 20 years imprisonment was justified

44. 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".

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

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

46. In view of the above, it is clear that the sentence imposed by the trial Court, although the minimum prescribed, was within the law. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory or minimum sentences should now be discouraged and that Courts should retain the discretion to depart from such sentences. In connection to this, the Supreme Court in the case of Francis Karioko Muruatetu and Another vs Republic [2017] eKLR, while dealing with a case of murder, stated as follows:

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

due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."

47. The Supreme Court then directed the Attorney General, the Director of Public Prosecutions and other relevant agencies to prepare a detailed 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 on the same.

48. On the strength of the 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).

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

50. Recently, just about 2 months ago, the Supreme Court reiterated and restated the above directions when dealing with an Appeal emanating under the Sexual Offence Act. This was in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023*) [2024] KESC 34 (KLR) (12 July 2024) (Judgment). In setting aside the decision of the Court of Appeal which had applied the Muruatetu reasoning in setting aside the mandatory minimum sentence of 20 years imprisonment imposed on an Appellant, the Supreme Court stated, inter alia, as follows:

> " 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.
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> ....."

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

52. My above observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh. In view thereof, I cite Majanja J, quoting the case of Francis Karioko

Muruatetu & Another v Republic [2017] eKLR) in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, where stated as follows:

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

53. The Court in the Muruatetu Case also guided that, in re-sentencing, 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; and (h) any other factor that the Court considers relevant.

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

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

55. In this case, applying the above principles to the facts and circumstances of this case, I have considered that offence of defilement is a serious one and I agree that the Appellant merited a stiff punishment. The Appellant was also given the opportunity to mitigate, which he did by pleading for a lenient sentence.

56. I however also consider the mitigating circumstances that the Appellant was himself a youth when he committed the act and a 1st offender. He was a Form 2 student in the same school as the complainant who was in Form 1. At the time when he testified on 7/02/2023, he alleged to be 18 years old. If true, then it means that since the defilement is alleged to have taken place between November 2021 and 28/01/2022, the Appellant was, like the complainant, also still a minor. In dealing with an issue of this nature, the Court of Appeal, in the case of JKK v Republic (Criminal Appeal 118 of 2011) [2013] KECA 241 (KLR) (3 October 2013) (Judgment) while dealing with a case in which an Appellant had been sentenced to death for the offence of murder, pronounced itself as follows:

> "18. The dilemma we face in this appeal was the ascertainment of the age of the appellant. Going by the remarks by the Judge, he was about 17 years when he was first arraigned in court in March, 2009, it is now four years later, which means he is now over the age of 18 years, therefore, he is not suitable to be subjected to any of the sentences provided for under the *Children Act*. The purposes of the sentences provided for under the *Children Act* are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the

preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence.

19. For the aforesaid reasons we are inclined to interfere with the death sentence imposed by the trial court and substitute it with imprisonment for a period of 12 years. We allow the appeal to the extent that the death sentence is substituted with twelve years. To that extent the appeal partially succeeds on sentence but the appeal on conviction is dismissed.

57. Faced with a similar situation, Tuiyott J (as he then was), in the case of *PNO v Republic (Criminal Appeal 74 of 2013)* [2014] KEHC 960 (KLR) (9 December 2014) (Judgment), stated as follows:

> " 6. In the course of hearing, the first trial Magistrate ordered for the age assessment of the accused person after noticing that he may be a minor. On 27/2/2012, the Magistrate observed;-
>
> > " "Age assessment report showing suspect age was assessed on 25/10/09 shows he is underage"
>
> This court has looked at the age assessment report which though not on the record of appeal is in the original file. ..... what is decisive is the content of that report which reads;-
>
> > " This is to confirm I have today the February 24, 2012 examined PNO and found him to be below the age of Eighteen (18) years" (my emphasis)
>
> As of February 24, 2012, the appellant was a minor. That seems to find support in a P3 form prepared after the examination of the suspect on October 18, 2011. The examining Doctor put the age of the suspect at seventeen (17) years.
>
> 7. It would be apparent that as at time of the alleged commission of the offence, being October 18, 2011, the appellant was a minor. As earlier stated, the trial court, after convicting the appellant, sentenced him to a prison term of 15 years. This sentence may very well be unlawful. In considering the sentence to impose on a child offender who has turned the age of majority at the time of conviction what is critical is the age of the offender at the time of the offence and not on the date of conviction. section 8(7) of The *Sexual Offences Act* provides:-
>
> > " Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence

the accused person in accordance with the provisions of the *Borstal Institutions Act* and the *Children Act*."

Commenting on the effect of those provisions vis-à-vis imprisonment of minors, The Court of Appeal in Dennis Abuya v Republic [2010] eKLR held,

> " Neither the trial magistrate, nor the learned Judge on first appeal dealt with the issue of the appellant's age at the time he allegedly committed the offence. It may be that he was eighteen years at the relevant time; but it may equally be that he was below eighteen years at the time. We do not understand the provisions of the *Sexual Offences Act* to authorize the imprisonment of minors and we are unable, on the material record, to rule out the possibility that the appellant was under eighteen years on June 19, 2007 when the offence was alleged to have been committed. Section 8(7) of the *Sexual Offences Act* specifically provides that:-Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* and the *Children Act*.
>
> The question of imprisoning a minor does not, therefore, arise under the provision of the *Sexual Offences Act*." (my emphasis)
>
> Section 190(1) of The *Children Act* is explicit
>
> 190 (1) No child shall be ordered to imprisonment or to be placed in a detention camp."

8. No doubt the appellant is alleged to have committed a serious crime. It would seem that he may have suffered an unlawful jail term from December 10, 2012 (24 months now). This may be sufficient atonement for any wrong he may have done. It would be an unjust to put him through a re-trial. For those reasons I hereby set the appellant free unless detained for some other lawful cause."

58. In this case, I observe that after the Appellant took plea on 4/08/2021, the trial Magistrate ordered that he be taken for age assessment. The record then indicates that on 22/03/2022 when the matter came up for hearing, the Prosecution informed the Court that such age assessment had been conducted and had placed the Appellant's age at over 18 years. A copy of the Report was also filed. I note that in the P3 Form relating to the Appellant, his age was also stated to be 18 years. However, the age assessment Report dated 24/02/2022, placed the Appellant's age at about 19 years. Since the defilement is alleged to have taken place between November 2021 and 28/01/2022, it means that the Appellant was just about 18 years of age at the time that he committed the offence. In view thereof, I have no material before me to declare that the Appellant was a minor at the time that he committed the offence. I therefore have no basis for treating him under the provisions of Section 8(7) of the *Sexual Offences Act* or Section 90(1) of the *Children Act* or the *Borstal Institutions Act*.

59. Nevertheless, I still consider that the Appellant is of a young age, perhaps about 20-21 years now. While committing the offence, he also used minimal violence, and was not armed with any weapon and did not act in any depraved manner. Although the Appellant, while in custody, will have to lose a portion of his productive age as a result of his actions, I believe he still has a role to play in the society. I trust

that he has had ample opportunity to reform while in prison and will be ready to be released back to the society to achieve social re-adaptation and rehabilitation. I believe that he has suffered substantial retribution for his "sins"

60. It was of course upon the trial Court to impose a sentence that is proportionate to the offence committed. However, taking into consideration all the extenuating and aggravating factors in this case, while acutely aware of the intrinsic seriousness and gravity of the offence the Appellant committed, I am of the view that, considering the peculiar circumstances of the case, and particularly the young age of the Appellant, that he was a 1st offender, and that the act of sodomy occurred in a boarding secondary school setting, the sentence imposed was manifestly excessive and harsh. Needless to state, I, in no way, downplay the lifetime psychological trauma and effects that the complainant will undergo as a result of the ordeal that he underwent in the hands of the Appellant. However, weighing all factors, I am convinced that reducing the sentence to a proportionate period would be the right thing to do in the circumstances of this case.

Final Order

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

    i. The Appeal against conviction fails.

    ii. The sentence of 20 years imprisonment imposed by the trial Court against the Appellant is however set aside and substituted with a sentence of 5 years imprisonment to be computed from the date of sentence, namely, 28/02/2023.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF NOVEMBER 2024.

.....

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Appellant present physically in open Court

N/A for the State

Court Assistant: Brian Kimathi