DK v Republic (Criminal Appeal E021 of 2023) [2024] KEHC 15652 (KLR) (9 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15652 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E021 OF 2023

MW MUIGAI, J

DECEMBER 9, 2024

BETWEEN

DK .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal against the judgment by Hon. R W Gitau (SRM) in Mavoko Chief Magistrate's Court in Cr. S.O No.56 of 2020 Delivered on 20th July, 2022)

JUDGMENT

Background

1. The Appellant herein Dennis Kyalo was charged with an offence of Defilement contrary to Section 8(1)(B) of the *Sexual offences Act* No.3 of 2006.
2. The particulars of the offence being that on 15th October 2020 at [Particulars Withheld] Machakos County intentionally and unlawfully caused his penis to penetrate the anus of J.M, a child aged 5 years.
3. In the Alternative Charge the Appellant herein was charged with the offence of committing an indecent Act with a child contrary to Section 11(1) of the *Sexual offences Act* No.3 of 2006.
4. The particulars of the offence being that 15th October 2020 at [Particulars Withheld] Machakos County intentionally touched the vagina of J.Ma child aged 5 years with his fingers.
5. Plea was taken on 26/10/2020 and the Appellant denied the charges and Plea of Not Guilty entered on his behalf.
6. The Prosecution called a total of four (4) witnesses in support of its case while the Defence gave sworn testimony and called no witness.

Prosecution Case

7. PW1 JM stated that she goes to [Particulars withheld]Academy in PP1. She went to see her dad the appellant. They used to live with him before. She went to the Police Station. Her dad had broken the phone. He used his thing for urinating and placed it on her anus. He also inserted one finger on his vagina. He did this when she was on the seat. When he called her, she did not know what he was going to do. He covered her with a blanket that was white and black in colour. He is the one who undressed her. She pointed to her private parts as to where the penis is located. He also dressed her up after the incident and told her not to tell her mum. He did this 3 times . when her mum came back from work she told her that the dad had removed his clothes. She was made to lie on one side as her dad was on the seat. Her dad told her not to say anything

8. On cross – examination she stated that her dad lay behind her. She had worn a trouser. When he placed his penis on her anus she did not feel pain. She saw discharge that looked like mucus. Her mum told her not to say what her dad had done to her.

9. PW.2 VM mother to the PW1 told the Court on 15/10/20 she came from work at 6pm. Her husband DK would spend the day in the house and go to work in the night shift. When she went back home whilst bathing pw1 she said she was feeling pain. The next day she woke up crying and when asked what the issue was she refused to say. She took a slippers and when she was about to beat her she started talking. She said that whilst sleeping on the sofa on the sitting room the dad put his penis on her anus and touched her vagina and told her not to tell anyone. That this was not the first time as there was a different day the father made her touch his penis but did not defile her. She saw something like mucus come out on the day she was defiled and her father's penis also discharged something like mucus. They would work on day shift and the next week the father would work on night shift and when they were both on day shift they would live PW1 in the care of a neighbor in the plot they lived. They have lived in 2 plots. In the 1st plot is where she was told to touch the accused penis. She confronted the accused who denied and stated that he only removed the panty for PW1 because it was too tight. He continued to deny and she decided to report. He broke her phone as he did not want her to report. He blocked her from the door and wanted to beat her. She would also leave having changed PW1's clothes and on this day she found that PW1's pantie had been changed. The child was taken to hospital when she reported the matter. She checked the child's anus did not see anything though the child complained on pain for a period of 2 days. When the doctor examined the child he confirmed that indeed something had been inserted. Her urine had bloody spots. She recognized the accused in court and stated that they had not agreed prior.

10. On cross – examination PW.2 told the court that the minor complained of pain in her private part. The first time she said dad but was scared of saying. She told her about it the next day. She continued to live the accused in the care of the minor for a week despite having suspected him of defiling the minor.

11. Pw3 Philip Kioko stated that he was a clinical officer at Athi River Level 4 Hospital. The incident occurred on 15/10/2020 at around Noon. The complainant was in pain in passing urine for 2 days. The mother who brought the child reported that she left the child with the father and upon her return at night she noted that the child had difficulty in passing urine. The child reported that the father used to insert his finger in her vagina and anus. On examination the labia majora and manora were normal. The vagina had inflammation and was bruised. The hymen was not visualized. The anus was normal. They ordered for lab test, did outer vagina swab which showed moderate pus. On a microscope leucocytes were noted at positive of some blood. They also did pyritic test and it was no reactive. He produced the PRC form and the P3 form. The child's age was assessed at 5 years. The child was stable

and there was no evidence of violence on the head, neck, thorax. Upper and lower limbs were normal. Probable object that caused the injury was a blunt object. A bruise was noted in the vagina

12. Upon cross examination Pw3 stated that the allegation was penetration through the vagina and anus. The anus was normal meaning no evidence of penetration through the anus. The vagina had moderate pus cells meaning there was an ongoing infection that required treatment. The child started feeling pain 2 days prior to the date of examination. At the time of the examination, the child was not limping. The bruise may have been caused from scratching because there was itching due to the infection. In this case, she could not tell when the hymen was broken. Medications were antibiotics and painkiller.

13. Pw.4 No 93400 Corporal Catherine Mutisya stated that on 25/10/20 she perused through the occurrence book and found a case of defilement for investigations. The complainant and the mother were at the station. The accused was also at the station having been arrested by the duty officer, the minor was taken to hospital and the OC crime handed her the p3 form and the PRC. She recorded the minor's statement where she told her that on 15/10/20 she was resting with her father in the sitting room when he removed her trouser and panty and put his penis in the minor's anus and inserted his fingers on her vagina. He then dressed her up and told her not to tell anyone of what had happened that day. Later on 25/10/20 the mother realized the minor was complaining of pain while urinating and when she asked her what was wrong, the child told her that her father had slept with her. The mother reported the matter to the station and they went to the house in the company of duty officer and arrested the accused. She recorded the mother's statement and escorted the minor to Athi River health centre for an age assessment which indicated the minor was approximately 5 years old. She produced the age assessment report as exhibit

14. On cross examination PW4 told the court that she went to the crime scene on 25/10/20. She did not take the child's trouser because the incident happened a while back and the clothes had already been washed. The accused and the wife were living together and there was no dispute. She did not interrogate the neighbors. The mother said she reported the incident on 25/10/20 because that's when she got time. The PRC form indicated that the hymen was broken. The minor did not have a birth certificate or birth notification at the time. She did not find out if there was another place the minor used to be left if the accused was not around to babysit her. According to the minor and the mother the defilement happened once.

Defence Hearing

15. Dw1 DK gave sworn testimony. He told the court that he has known the complainant for 1 year 8 months as he was married to the mother. On 15/10/20 he came home from work. The girl would be left in the house during the day when the mother went to work and whenever he left in the morning he would take her to another lady who would care for her until the mother is back at 6pm.

16. On that day PW2 called him and told him that the minor was itching in her private parts and he told her that he had left some money in the house which she should use to take her to hospital or buy her medication. When she returned home on 16/10/20 she took the child to clinic in mlolongo where she was told the child had infection and was advised that the child uses a potty instead of sharing toilet with adults.

17. On 24/10/20 he left work at 1pm and found the child at the usual place he leaves her. He picked the child and together with his friend went to the house cooked and ate. They then went with the friend to buy alcohol and left the minor with the usual lady. PW2 came and found them and they all drunk the entire night. PW2 started complaining because there was a time she had found him cheating , a misunderstanding arose. She told him that he had become such a bad person that she was scared he

could defile her child. He suggested that they call their parents and have the complaints raised before them. He took PW2's phone which accidentally fell and broke the screen. He told her he would replace it the following week. While he was at the bedroom PW2 had left and after 15 minutes the police came to the house and arrested him. He was not told of the reason for arrest.

18. One officer told him that the wife had accused him of defiling the minor 0n 15/10/20. He was later charged in court in which he denied the charges. They had lived in peace and he did not know the child was in pain. PW2 told him that the doctors said that the child had infection which they suspected was as a result of sharing toilets with adults. He was present when the child testified. The minor lied to the court. PW2 framed him because he had an affair with another woman.

19. On cross examination he stated that he started living with the complainant when he married PW2. They would leave the child under the care of a school girl for about 2 months. The child had infection and the mother bought her medication. This was the 2nd time the child got infection. At the police station he did not write any statement and did not say about the phone because the lawyer did not represent him well. He had the best relationship with the minor for the past one year 8 months. She was coached by the mother to lie to the court because he had an affair. PW2 said in his friend's presence that she did not trust him and suspected he would defile their daughter. When she told him about the problem with the child he told her to take the child to hospital and she did not mention any defilement. They were to discuss the issue of where to leave the child going forward over the weekend.

Judgment Of The Trial Court

20. The Trial Court delivered its Judgment dated 20/07/2022 and found the appellant guilty of the offence of committing an indecent act with a child and sentenced him to serve Ten (10) years imprisonment.

Appeal:

21. Aggrieved by the Judgment the appellant filed his amended Petition of appeal based on the following grounds;

    1. That the trial court erred in law and in fact by convicting and sentencing the appellant when there was no evidence to support the charge.

    2. That the Learned Magistrate erred in law and in fact by convicting and sentencing the appellant on inconsistent, doubtful and contradictory evidence.

    3. The Trial Court erred in law and in fact by convicting and sentencing the appellant by relying on the evidence of PW2 whom the appellant was denied an opportunity to cross examine despite requesting for the witness to be recalled.

    4. That the trial court erred in law and in fact by holding the prosecution had proved its case against the appellant beyond reasonable doubt

    5. The trial court erred in law and in fact by convicting and sentencing the appellant disregarding the defence alibi and submissions of the appellant

    6. That the Trial Court erred in law and in fact by convicting and sentencing the appellant by disregarding the doctor's evidence that clearly showed that there was no evidence of penetration in the child's genital organs.

    7. That the Trial Court erred in law and in fact by considering extraneous factors and evidence which was not tendered during trial in convicting and sentencing the appellant

8. That the trial Court erred in law and in fact by convicting and sentencing the appellant to serve a 10 year sentence in the circumstances

22. The Appeal was canvassed by way of written submissions.

Written Submissions

Appellant Submissions

23. The Appellant submitted that the testimony of PW1 was beyond a shadow of doubt that the appellant inserted fingers in her vagina which evidence was corroborated by testimony of PW2, PW3 and PW4. The age of the minor was proved by the age assessment report which indicated that the victim was 5 years old.

24. On contradictions and inconsistencies reliance was placed in the case of Richard Munene v Republic [2018]

25. It was also submitted that the appellant the appellant through his legal counsel was able to cross examine PW2 appropriately and the right to recall a witness was at the discretion of the court. He relied in the case of Kulukana Otim v R [1963] and Section 150 of the Criminal Procedure Code as reemphasized in the case of Joseph Ndungu Kagiri v R [2016]

26. The prosecution submitted that it had proved its case beyond reasonable doubt and relied on Section 124 of the *Evidence Act*

27. it was submitted that the appellant despite offering a defence of alibi did not avail any witness to corroborate his alibi hence the prosecution evidence remained unchallenged. He relied on the case of Victor Mwendwa Mulinge vs R [2014]

28. On sentence it was submitted that 10 years imprisonment was not excessive since it was within the law.

29. On identification the appellant was properly identified by the victim as the perpetrator and the appellant in his defence also confirmed living with PW1 and 2

30. Reliance was placed in the case of Peter Musau Mwanzia vs Republic and the case of Wamunga V Republic (1989)

31. It was finally submitted the conviction and sentence against the appellant was sufficient and appropriate

Respondent's Submissions

32. On behalf of the Respondent, reliance was placed on the case of Sawe vs Republic to buttress the point that it is wrong to find fault on someone whom there is no evidence or sufficient evidence. He also relied on the case of Eliud Waweru v Republic [2019]

33. He relied on the case of Oloo v Rep [2009] on corroboration of the testimony of a child of tender age and submitted that the evidence by PW1 on the when she started to feel pain was not accurate and disapproves the facts raised by the prosecution and that the trial court erred in not taking into account the relevant factors that disapprove the allegations of PW1 and PW2

34. Reliance was placed in the case of Queen vs Quintanilla 1999 AQBD 768 to buttress the point that hymen can be broken by factors other than sexual intercourse. He also relied on the case of Maragwa vs Rep EACA [1965]

35. it was submitted that the evidence of PW2 raises suspicion as to the credibility and reliability of the prosecution case especially in matters relating to the alleged offence taking into account the age of the complainant versus the pain and the body organ in issue.

36. It was his final issue that the prosecution case is wanting and unsafe to secure a conviction. He prayed that the appeal succeeds in its entirety, conviction be quashed, sentence be set aside and the appellant be set to liberty

Determination

37. The Court considered the Appeal, the Trial Court record and the submissions of parties on record.

38. This is a first Appeal and in the case of Okeno v Republic [1972] EA 32 the court stated:

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

39. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

40. The Appellant herein was found guilty and convicted of the offence of defilement contrary to Section 8(1) as read together with section 8(3) of the *Sexual Offences Act*.

41. Section 8 (1) and (3) of the Act provide as follows;

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 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.

42. The elements of defilement are thus age of the victim (must be a minor), penetration and the proper identification of the perpetrator. This was stated in the case of George Opondo Olunga vs. Republic [2016] eKLR.

43. The first element of age was elucidated by the Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

44. Further, in the case of Fappyton Mutuku Ngui vs. Republic [2012] eKLR it was held that:

> ... That "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

45. In this case, PW1 stated that she was 5 years when she was testifying. The victim was taken through age assessment and age assessment report was produced as exhibit indicating that the victim was a child of 5 years. The appellant also stated that the victim was 5 years old. The issue of age is therefore not in doubt. A child is defined as a person under the age of 18 years old by the Children's Act. No 29 of 2002 under section 2.

46. Section 2 of the *Sexual offences Act* defines a child as "has the meaning assigned thereto in the *Children Act*"

47. The second ingredient is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

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

48. Section 124 of the *Evidence Act*, Cap 80 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."

49. In the case of DS v Republic [2022] eKLR, the court stated that;

> "Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration."

50. In this case, the victim said that her dad used his thing for urinating and placed it on her anus. He also inserted one finger on his vagina. He did this when she was on the seat. When he called her, she did not know what he was going to do. He covered her with a blanket that was white and black in colour. He is the one who undressed her. She pointed to her private parts as to where the penis is located. He also dressed her up after the incident and told her not to tell her mum. .

51. Medical evidence was produced by PW3 who was the clinical officer stated that on examination the labia majora and manora were normal. The vagina had inflammation and was bruised. The hymen was not visualized. The anus was normal. They ordered for lab test, did outer vagina swab which showed moderate pus. On a microscope leucocytes were noted at positive of some blood. They also did pyritic test and it was no reactive. He produced the PRC form and the P3 form. The child's age was assessed at 5 years. The child was stable and there was no evidence of violence on the head, neck, thorax. Upper and lower limbs were normal. Probable object that caused the injury was a blunt object. A bruise was noted in the vagina.

52. The medical evidence herein does not clearly demonstrate whether there was penetration on not. It however establishes that there was bruises in the vagina which PW1 testified that her father had inserted his finger in her vagina.

53. The definition of genital organ by Section 2 of *Sexual Offences Act*, provides "genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;

> The testimony of the Complainant in an unsworn statement was that the Appellant placed his thing for urinating and placed it in her anus and he inserted his finger in her vagina. She was made to lie on her side. He covered her with a blanket on the seat and undressed her and dressed her after the incident. In cross examination she stated when the Appellant placed his penis in her anus she saw the discharge that looked like mucus.
>
> This is the same version PW1 gave to her mother PW2 & PW4 Investigation Officer she was consistent in her testimony.
>
> The Charge sheet indicates date of offence was 15/10/2020 and Pw2 took the child to the Police Station and hospital on 25/26/10/2020 and by then the clothes PW1 had on the fateful day were changed and in 10 days the evidence of defilement had diminished.
>
> The medical evidence by PW3 on examination found the labia majora and labia minora normal. The vagina had inflammation and bruises and hymen was not visualized. The vaginal swab taken was tested and found to have pus cells and PW1 was treated with antibiotic and pain killers.
>
> Section 2 of the *Sexual Offences Act* provides that:
>
> "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;"
>
> Although, the medical records P3 Form & PRC Form indicate the anus was normal and vagina had inflammation, the medical evidence did not disclose offence of defilement, Of course, time of the incident and of examination made a difference in detection and Child's clothes were not availed for examination.
>
> Be that as it may , the evidence by PW1 is so graphic and detailed that one would not conjure such facts if the incident did not take place. The witness child did not have any grudge quarrel with her step father and had lived with him for 8 months prior and could only be

telling the truth. The offence of defilement was not proved but by evidence of PW1 whose evidence is deemed truthful, the offence of indecent assault was/is proved.

The alleged misunderstanding between PW2 mother of the child & Appellant could not be basis for framing him through the child, she could have left him and if any violence occurred reported to the Police.

The Appellant's claim that he asked for PW2 to be recalled as per letter of 28/6/2021, the Trial Court record shows that the Appellant was represented through out proceedings by various /different lawyers, Mr Mutavi during plea taking, Mr Olieti during PW1 & PW2 evidence and he cross examined them and Mr Muoki during Bond variation Application and Ms Mwau during evidence of PW3 & PW4 and cross -examined them. They were allowed to obtain proceedings Witness Statements & Documents and the record confirms the Appellant had legal representation and ample opportunity to prepare for Trial.

54. The last ingredient is identification. The victim in this case recognized her father as the one who undressed her as she pointed to her private parts. The appellant also admitted that he had known the victim for one year 8 months by virtue of having married her mother. There is no doubt that identification in this case was by way of recognition.

55. As regards the issue of contradictions that have been raised by the Appellant, the way to treat contradictions in a case was stated by the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017) eKLR where the court cited with approval the Ugandan case of Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6 where it was held that:

> "with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

56. Also, in the case of *Joseph Maina Mwangi vs. Republic CA No. 73 of 1992* (Nairobi) the Court of Appeal held that: -

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working 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."

57. The discrepancies highlighted by the Appellant have been noted but they do not go to the core of the offence before the court.This court has subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the decision. The decision of the Trial court therefore stands undisturbed.

Sentence

58. As regards the sentence, 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 as follows:

> "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, 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 some wrong material, or acted on a 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."

59. The Court of appeal also rendered itself as follows on sentences in sexual offences in the case of Athanus Lijodi Vs. Republic [2021] Eklr

> " On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu's case (supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for instance Evans Wanjala Wanyonyi v Republic [2019] eKLR). Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited."

60. The same court in the case of Dismas Wafula Kilwake Vs. Republic [2019] Eklr stated as follows;

> "Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

61. 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 G.V Odunga vide his considered judgment dated 17th May, 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."

62. The provision of section 8(1) as read together with provisions of section 8(2) 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 vs Republic Kisumu CA Criminal Appeal No 202 of 2011* and Jared Koita Injiri Vrs Republic Kisumu CA Criminal Appeal No 92 0f 2104.

63. Sentencing is a discretion of the court of law but the court should look at the facts and the circumstances in the entirety so as to arrive at an appropriate sentence. The Court of Appeal in Thomas Mwamba Wanyi Vs Republic (2017)eKLR cited the decision of the Supreme Court of India in Alister Antony Pereira Vs The state of Maharastra at paragraph 70 – 71 where the court held;

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

64. In Francis Karioki Muruatetu & another Vs Republic the Supreme Court did provide guidelines and mitigating factors in re-hearing of sentence. The Judiciary sentencing policy guidelines list the objective of Sentencing At. Paragraph 4.1 they include the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the applicants to inflict harm.

65. Having considered the sentence meted out and circumstances of this case and also having considered that the said Section 8(2) of the *Sexual offences Act* No 3 of 2006 fettered the courts discretion in sentencing, I do find that the sentence was reasonable given proportionality between the sentence passed and the crime committed. In Republic vs Scott (2005) NSWCCA 152 Howie J Grove & Barn J J it was stated;

> " There is a fundamental and immutable principle of sentencing, that is, 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... one of the purposes of punishment is to ensure that an offender is adequately punished... a further purpose is to denounce the conduct of the offender.

66. Disposition

    1. The Upshot is that the appeal lacks merit and is hereby dismissed.

    2. The judgement of the Trial Court on Conviction and Sentence is thus upheld.

    It is so ordered.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT ON 9/12/2024 AT MACHAKOS HIGH COURT. (VIRTUAL/ PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

In The Presence Of:

No Appearance For The Parties

Geoffrey – Court Assistant