



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 65 OF 2019

ROBERT KIMUTAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment, conviction and sentence of Hon. Caroline R.T. Ateya,

Senior Resident Magistrate, delivered on the 15th day of February 2019

in Iten Senior Principal Magistrate's Criminal Case No.17 of 2018)

JUDGMENT

[1] The appellant herein, **Robert Kimutai**, was the accused person in **Iten Senior Principal Magistrate's Criminal Case No. 17 of 2018: Republic vs. Robert Kimutai**. He was therein charged with the offence of attempted rape contrary to **Section 4 of the Sexual Offences Act, No. 3 of 2006**. The particulars thereof were that on the **6th day of April 2018** at about 1900 hours at Maron Village in Embobut Location within Elgeyo Marakwet County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of **PJY** without her consent.

[2] The proceedings of **12 June 2018** indicate that an amended Charge Sheet was admitted by the lower court, which included a second count as well as an alternative count. However, that amended Charge Sheet does not appear to be on the file or in the Record of Appeal. It is manifest, however, that the appellant denied the allegations against him and in proof thereof, the Prosecution called four witnesses. At the conclusion of the trial; and having heard the appellant in his defence, the lower court found him guilty and convicted him of the substantive charge of attempted rape. He was consequently sentenced to serve 7 years' imprisonment for the offence.

[3] Being aggrieved by his conviction and sentence, the appellant opted to file the instant appeal on the following grounds:

[a] That the learned trial magistrate erred in law and fact in failing to hold that the evidence tendered by the Prosecution was not sufficient to warrant a conviction;

[b] That the learned trial magistrate misapplied the evidence and the law and hence arrived at an erroneous conclusion;

[c] That the trial magistrate erred in fact and in law in failing to find that the appellant was not properly connected to the offence;

[d] That the learned trial magistrate erred in fact and in law in finding that the appellant was of known bad character, a conclusion outside the evidence adduced by the Prosecution;

[e] That the learned magistrate erred in fact and in law in failing to record all proceedings as they transpired before the court;

[f] That the learned magistrate erred in fact and in law in failing to find that the evidence adduced did not meet the elements of the charge;

[g] That the learned magistrate erred in admitting into evidence the testimony of a witness who admitted to court the existence of bad blood between him and the witness; and placing heavy reliance on such testimony;

[h] That the learned magistrate erred in law and in fact in failing to analyse the evidence of the Prosecution as well as of the Defence and dismissed the evidence off-hand when it had merit.

[i] That the learned magistrate erred in law and in fact in relying on contradictory witness, documents and a witness who had been paid to arrest the appellant in arriving at a conviction;

[j] That the learned magistrate erred in law and in fact in passing an aggravated sentence in the absence of aggravating circumstances and ignoring mitigating and/or absolving evidence that ought to go to the benefit of the appellant.

[4] It was, accordingly, the prayer of the appellant that his appeal be allowed; that the conviction and sentence of the lower court be quashed and set aside; and that he be set at liberty or the case be referred to the lower court for retrial. He also prayed for any other orders that the Court may deem fit to grant.

[5] The appeal was canvassed by way of written submissions. Thus, **Ms. Kosgei** reminded the Court of its duty as the first appellate court. In this regard, she relied on **Odhiambo vs. Republic** [2005] 1 KLR, for the holding that:

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour.”

[6] Counsel accordingly proposed the following issues for determination and tailored her written submissions along those lines:

[a] Whether the prosecution discharged their mandate to prove their case beyond reasonable doubt;

[b] Whether the trial magistrate properly appreciated the facts and applied the same to the law;

[c] Whether the failure by the learned trial magistrate to record all the proceedings amounts to gross injustice;

[d] Whether this matter meets the threshold for a re-trial order.

[7] According to **Ms. Kosgei**, the prosecution failed to discharge the burden of proof beyond reasonable doubt for purposes of **Section 107(1)** of the **Evidence Act, Chapter 80** of the **Laws of Kenya**. She also relied on **Woolmington vs. DPP** [1935] AC 462 and **United States vs. Smith**, 267, F 3d 1154,1161 (D.C. Cir. 2001). According to her, the learned trial magistrate failed to properly appreciate the facts and the applicable law; and thereby failed to put into consideration the contradictory nature of the prosecution evidence. The cases of **Maitanyi vs. Republic** [1986] KLR 198 and **Republic vs. Turnbull** [1976] 3 ALLER 549 at page 552 were cited to support the argument that the Prosecution evidence was weak, and that the complainant’s evidence ought to have been treated with caution by the trial court. Counsel further posited that, since **PW2** admitted to having bad blood with the appellant, his evidence was of little probative value, if any.

[8] Counsel for the appellant also faulted the learned trial magistrate for what she considered a failure to record all the proceedings that took place before her. An example was given of an application that the appellant made to be supplied with the initial report. According to counsel, the proceedings in respect of the application were neither recorded nor was a ruling delivered on the same. Another example given by counsel to support her allegations was in connection with the proceedings of **12 June 2018** in connection with the appellant’s readiness to proceed with the hearing. According to counsel no record was made thereof. As to whether a retrial ought to be ordered, counsel referred the Court to **Ahmedi Ali Dharamsi Sumar vs. Republic** [1964] E.A. 343 and the case of **Jackson Mutunga Matheka vs. Republic** [2015] eKLR and submitted that substantial injustice would occur to the appellant if the appeal is not allowed.

[9] On behalf of the Respondent, **Mr. Kwame Chacha** relied on his written submissions dated **27 October 2020**. He made reference to **Section 4** of the **Sexual Offences Act** as well as **Section 388** of the **Penal Code** for the definition of the offence of attempted rape; and urged the Court to find that all the ingredients of that offence were proved before the lower court vide the evidence of the complainant; and an eye witness, **PW2**. His view was that the offence of attempted rape was manifestly proved beyond reasonable doubt; and that the testimony of all the witnesses was cogent and unshaken on cross-examination. He added that the trial court was well guided by **Section 143** of the **Evidence Act**, which provides that no particular number of witnesses is required for the proof of any fact. He prayed that the appeal be dismissed as the conviction was based on sound evidence. He was also of the view that the sentence meted by the trial court was appropriate in the circumstances.

[10] I have given careful consideration to the appeal and taken into account the written submissions filed herein by learned counsel for the parties. I am mindful that, in a first appeal such as this, the Court is under obligation to re-evaluate the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno vs. Republic** [1972] EA 32, the Court of Appeal for East Africa expressed this principle thus:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 conclusion; 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 also **Odhiambo vs. Republic** (supra))

[11] The complainant testified on **12 June 2018** as **PW1**. She told the lower court that, at about 7.00 p.m. on **6 April 2018**, she was on her

way home from the forest where she had gone to tether her cows for grazing purposes when she met the appellant at the stream. That the appellant got hold of her by her leg and hand and threw her into the stream. He then lifted her and carried her to the nearby bushes where he attempted to rape her. Her screams attracted the attention of **GK (PW2)** to the scene; and on realizing that **PW2** had seen and recognized him, for **PW2** had a torch which he shone on them, the appellant arose and ran away.

[12] **PW1** further testified that she went and reported the incident to the area chief, who thereafter caused the arrest of the appellant on **8 April 2018**. She also mentioned that she was issued with a P3 Form which was completed on her behalf at Kapsowar Hospital. **PW1** pointed out that the appellant is a neighbour and therefore a person well known to her. She also told the lower court that she was using her mobile phone torch at the time of the incident; and was therefore in a position to see and recognize the appellant.

[13] **GK**, then a student at K Secondary School, testified before the lower court as **PW2** and stated that he had gone to check on his father's cattle at Embobut forest on **6 April 2018** at about **8.00 p.m.** when his attention was attracted by the screams of a woman who was asking for help. He ran to the scene; and with the aid of his mobile phone torch, he saw the appellant, a person he well knew as a neighbour, lying on top of the complainant. He added that the complainant then rebuked and insulted him; and that out of fright, he put off his torch and ran away.

[14] **PC Zakayo Mwenda (PW3)** was then attached to Embobut Police Post. His evidence was that he was on duty at the police post on **7 April 2018** when the complainant went there at about 11.00 a.m. and filed a report of attempted rape. **PW3** told the lower court that he noted that the complainant had a visible injury on her neck; and that he issued her with a P3 Form which was later filled by a medical practitioner. It was also his testimony that the appellant was arrested by members of the public and taken to the Police Post on **8 April 2018** at about 5.40 p.m. He then conducted his investigations and caused the appellant to be charged and arraigned before court.

[15] The last Prosecution witness was **Dr. Wilfred Kimosop (PW4)**. He confirmed that he examined the complainant at Kapsowar Hospital on **10 April 2018** and filled a P3 Form that she had been issued with in connection with allegations of attempted rape. He noted that the complainant had tenderness on the neck; and that her voice was slightly hoarse. There were no other injuries noted on the other parts of her body, including her genitalia; and therefore he took the view that there was no evidence of penetration. He also mentioned that he took samples for further analysis and that nothing abnormal was detected by the analyst. He produced the P3 Form as **the Prosecution's Exhibit 1** in the matter.

[16] Upon being placed on his defence, the appellant took the posturing that he had been framed by the complainant. He stated how on **28 March 2018** the complainant had gone to his home and asked for medicine to treat her cow and that he had told her he did not have any. He then narrated his movements between **2 April 2018** and **8 April 2018** when he was arrested by Kenya Police Reservists. He therefore was convinced that the complainant begrudged her for not giving her medicine when she was in need, given that her cow ultimately died.

[17] In the light of the foregoing summary of the evidence adduced before the lower court, the pertinent questions to pose in this appeal, granted the appellant's Grounds of Appeal, are:

[a] Whether sufficient evidence was adduced before the lower court to prove the ingredients of the offence of attempted rape to the requisite standard;

[b] Whether the evidence adduced before the lower court proved beyond reasonable doubt that the appellant was the perpetrator of the offence;

[c] Whether there were any misapprehensions or misdirection on the part of the Learned Trial Magistrate that would vitiate the conviction that was recorded against the Appellant.

[a] **On whether the ingredients of the offence of attempted rape were proved:**

[18] **Section 4** of the **Sexual Offences Act** pursuant to which the charge was laid, provides that:

“Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organ is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.”

[19] On the other hand, the word “attempt” is defined in **Section 388(1)** of the **Penal Code** thus:

“where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfillment, and manifests his intention by some overt act but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) it is immaterial except so far as regards punishment whether the offender does all that is necessary on his part for completing the commission of the offence or whether the complete is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention.”

[20] Hence, in **Abdi Ali Bere – vs – Republic** [2015] eKLR, in which the Court of Appeal had occasion to discuss the above provision, it held that:

“Although a casual reading of section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of

attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence. In the work quoted above by Smith & Hogan, the authors give the following scenario at page 291 to illustrate the distinction:

“D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D takes up his position, loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now certainly committed attempted murder...”

[21] In the premises, in order to prove the offence of attempted rape against the appellant, the Prosecution needed to prove both the *mens rea* and as much of the *actus reus* that would show that he had put in motion his intention to rape the complainant, beyond mere preparation. In Kisii HCCRA No. 53 of 2009: Abraham Otieno vs. Republic, Hon. Asike-Makhandia, J. (as he then was) held that:

“For an offence of attempted rape to be deemed to have been committed under the section, the prosecution must prove that the culprit acted in such a manner that there was no doubt at all as to what his intention was. The intention must be to rape the victim but was stopped in tracks and or in the nick of time. The intention to rape must be manifest. Such intention can be manifested by word of mouth or conduct of the culprit. If the culprit proclaims his intention of rape and directs his efforts towards that goal... but for one reason or another something happens which compels him to stop, again that would be good evidence of attempted rape...”

[22] Moreover, as was observed by Spry J. (as he then was) in Mussa s/o Saidi v Republic [1962] E.A. 454:

“The principles of law involved are very simple but it is their application that is difficult. If the appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny. The burden on the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence. The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that an act must be of such a character as to be incompatible with another reasonable explanation. Secondly, if the intention is established, the act itself must not be too remote from the alleged intended offence.” (emphasis supplied)

[23] From the evidence presented before the lower court, there is clear proof that the complainant was accosted at about 7.00 p.m. while on her way home from the forest; and that she was roughed up and in the process, sustained injuries on the neck. She explained that the person who accosted her first tripped her as she was crossing a stream and caused her to fall in the water; and that she then forcefully carried her on his shoulders to the bushes nearby where a struggle ensued as he tore her clothes in a bid to have sexual intercourse with her by force. The torn underwear was produced before the lower court as an exhibit.

[24] The complainant further stated that when she started screaming for help, the assailant held her by the neck in a stranglehold to stop her screams. And, the evidence of **Dr. Kimosop** confirmed that the complainant not only had tenderness on her neck but also a hoarse voice. There is also credible evidence adduced by the Prosecution that the complainant's screams for help attracted **PW2**; and that **PW2** rushed to the scene and found the assailant, who he identified to be the appellant, lying on top of the complainant. **PW2** added that when he shone his spotlight on the appellant, he was riled thereby and that the appellant abused him in a menacing way; thereby frightening him away from the scene. In the premises, there was credible proof of several overt acts *sufficiently proximate to the intended offence of rape that proved beyond reasonable doubt that an attempt was made to rape the complainant.*

[25] I note that counsel took issue with the fact that, in her evidence, the complainant suggested that there was penetration; and cited this as one of the contradictions in the Prosecution case that the trial magistrate ought to have weighed against a conviction. The record shows that what the complainant said, as translated from Marakwet language was that the appellant took his private part and put in her private parts. The Sexual Offences Act recognizes instances of indecent contact which do not necessarily amount to penetration. This must explain why the Charge Sheet was amended to include an alternative count of indecent act with an adult. Hence, taking into account the medical evidence adduced by **PW4**, the learned magistrate cannot be faulted for coming to the conclusion that this was a case, not of rape, but of attempted rape.

[b] On whether the appellant was the perpetrator of the offence:

[26] The evidence presented by the Prosecution before the lower court shows that the incident occurred between 7.00 p.m. and 8.00 p.m.; and therefore that it was already dark. In such circumstances, it is the duty of the trial court to test with greatest care the evidence presented before it and satisfy itself that it is free from possible mistake or error with particular regard to the identification of the accused person. Thus, in R. vs. Turnbull & Others [1973] 3 ALLER 549, it was held that:

“...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 who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

[27] Likewise, in Wamunga vs. Republic [1989] KLR 426, the same cautionary approach was recommended thus:

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

[28] I have thus given careful consideration to the evidence presented before the lower court. The complainant stated clearly that she was illuminating her way by means of a mobile phone torch; and that she was thus able to see and recognize the appellant; a person she well knew as a neighbour. She also mentioned that the appellant spoke a greeting but she did not respond thereto; and that it was thereupon that he tripped her and carried her across the stream and took her to the scene of crime. She was in no doubt at all as to the identity of her assailant. It is also instructive that she immediately made a report of the occurrence to the area chief and gave the particulars of the appellant for arrest purposes.

[29] In addition to the complainant's evidence, **PW2** testified that he was attracted to the scene by the complainant's screams; and that on arrival he found the appellant lying on top of the complainant. He explained that he had his mobile phone torch on and that he used it to light up his way to the scene; and which enabled him to see and recognize the appellant as well as the complainant. He further told the lower court that the appellant was a neighbour and a person well known to him by the name **Kipnyormoi**. He added that he had known the appellant for 11 years prior to the date in question. It is manifest therefore that this was not a case of identification of a stranger by a single witness in difficult circumstances, as counsel urged the Court to find, but a case of recognition of a well-known neighbour.

[30] That kind of identification cannot be said to be unreliable. In fact, it is now settled that there is some measure of assurance when dealing with the evidence of recognition. In the case of **Anjononi & Another vs. Republic (1980) KLR 59** it was held that:

"...This was however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other. "

[31] The appellant raised the issue of grudges between him and the complainant on the one hand, and between him and **PW2**. His contention was that the complainant had asked him for some medicine to treat her sick cow but that he did not assist and the cow ended up dying. I have given his defence my own independent evaluation and find it to be a hollow afterthought; for, if indeed he did not have the medicine that the complainant needed at the time she needed it, it would be unreasonable for any neighbour to take offence; especially in this case where, according to the appellant's version, he went out of his way and provided her with a needle and a drinking trough for the purpose of treating the sick animal.

[32] It is noteworthy too that whereas the appellant cross-examined the complainant in connection with her sick cow, he never suggested the existence of the grudge to her. Similarly, while **PW2** made mention that the appellant was feared in the village for his unsavoury disposition, nowhere did he allude to the existence of a grudge between him and the appellant. In the same vein, the appellant did not make any indication, during the trial, of there being a grudge between him and **PW2**. Hence, the mere response by **PW1** in cross-examination that "... **You know what you did to me once...**" to explain why he ran away from the scene, cannot, in my considered view be sufficient ground for impugning the entire evidence of **PW1** as to what he saw and heard on the night in question.

[33] Counsel for the appellant also faulted the learned trial magistrate for finding that the appellant was of known bad character; and that this was a conclusion outside the evidence adduced by the Prosecution. Ordinarily evidence of bad character is inadmissible in evidence in criminal proceedings. Nevertheless, **Section 57(1)(b)** of the **Evidence Act, Chapter 80** of the Laws of Kenya, recognizes that such evidence is admissible if the accused has personally or by his advocate asked questions of a witness for the prosecution with a view of establishing his own character, or has given evidence of his own good character. Accordingly, I have carefully perused and considered the Judgment of the lower court but find no such finding therein.

[34] As has been pointed out hereinabove, reference to the appellant's bad character was made by **PW2** only for the purpose of explaining why he ran away from the scene when the appellant rebuked him. In one instance, it was in cross-examination. It was in that light, and while supplying a summary of the evidence, that the trial magistrate alluded to the character of the accused in paragraphs 8 and 17 of her Judgment. There is no specific finding to indicate that the appellant's conviction was premised on the evidence of his bad character. In fact, no details were supplied by **PW2** of what he had in mind. It is therefore instructive that in **Section 58** of the **Evidence Act**, it is stipulated that:

"In sections 55, 56 and 57 of this Act the word "character" includes both reputation and disposition; but, except as provided in section 57, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown."

[35] Thus, I am satisfied, as was the trial magistrate, that the Prosecution evidence placed the appellant at the scene of crime and offered proof beyond reasonable doubt that the appellant was the perpetrator of the offence of attempted rape with which he was charged.

[36] Counsel for the appellant drew the Court's attention to what she perceived to be misapprehensions on the part of the trial magistrate of the evidence adduced. For instance, she pointed out that, whereas **PW2** testified that he shone his light on the appellant and that he immediately ran away after the appellant sternly rebuked and frightened him; the trial magistrate's appreciation was that it was the appellant who ran away. She was of the view that this wrong finding of fact led the trial magistrate towards an unwarranted conviction. Counsel also posited that the learned trial magistrate failed to record all the proceedings; notably, pre-trial applications held on **12 June 2018** to ascertain the appellant's readiness.

[37] I have given consideration to the submissions and find them utterly unfounded. Unfounded because the record of the proceedings of **12 June 2018** shows that, after the Prosecutor gave indication that he was ready to proceed with one witness, the appellant is recorded as having told the lower court that he was also ready to proceed. Also, there is nothing in the Judgment of the lower court to show that she misdirected herself on the facts. The truth of the matter, as reflected on page 8 of the Record of Appeal is that it was the evidence of **PW1** that the

appellant ran away from the scene. Here is an excerpt of what she had to say:

“As I tried to scream/croak, a school student passed by and he had a spotlight. He spotted it where we were and the accused rose and ran away. The name of that school pupil was G K. I ran to the Chief’s house. He is called C. I told him about the ordeal and he told me to go home till the next day...”

[38] In one of the Grounds of Appeal, it was contended that the learned magistrate erred in law and in fact in relying on the evidence of a witness who had been paid to arrest the appellant in arriving at a conviction. It is true that the complainant told the lower court that after she made her report to the chief, she was asked to pay **Kshs. 6,000/=** to the Kenya Police Reservists who were to effect the arrest. It is however not true that the learned trial magistrate relied on the evidence of the reservists to convict the appellant; for the reservists’ role was confined to arrest; which arrest was not in dispute before the lower court. Moreover, none of the reservists testified before the lower court. It was, therefore, baseless for counsel to assert that the trial magistrate relied on the evidence of compromised witnesses.

[39] In the result therefore, I am satisfied that the appellant’s conviction was premised on sound evidence. With regard to the sentence imposed on the appellant, it bears repeating that the penalty for the offence of attempted rape is 5 years’ imprisonment, with the possibility of enhancement to life imprisonment. The appellant was sentenced to 7 years’ imprisonment; and, needless to say that life imprisonment as a penalty has been declared unconstitutional along with the mandatory minimum sentence regime hitherto recognized under the Sexual Offences Act. Thus, in **Evans Wanjala Wanyonyi vs. Republic [2019] eKLR**, the Court of Appeal held that:

“On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – -Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – -Vs- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution.

[40] In the light of the foregoing, what would be the appropriate sentence? The suggestion given in **Paragraph 23.9** of the **Judiciary Sentencing Policy Guidelines** is thus:

“The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances.”

[41] The appellant had an opportunity to address the lower court in mitigation; and he mentioned that he was the bread winner for his family. He accordingly asked for a non-custodial sentence to enable him fend for his family. The trial court called for a pre-sentence report which was largely favourable to the appellant. Having perused the pre-sentence report filed before the lower court and having taken into account all the relevant factors, including the nature of the offence, I would reduce the sentence imposed on the appellant to a period of 3 years’ imprisonment, to be reckoned from **15 February 2019** when he was sentenced by the lower court.

[42] Thus, while the appellant’s appeal against conviction is devoid of merit and is dismissed, his appeal against sentence is hereby allowed and the sentence imposed by the lower court is hereby reduced to 3 years’ imprisonment as aforesated.

It is so ordered

DATED, SIGNED AND DELIVERED AT ELDORET THIS 1st DAY OF MARCH, 2021

OLGA SEWE

JUDGE