



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 102 OF 2019

JAMES MOSABITI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence delivered on the 4th June 2019 in Iten Senior Principal Magistrate's Criminal Case No. 16 of 2018 by Hon. H.M. Nyaberi, SPM)

JUDGMENT

[1] This appeal arises from the conviction and sentence passed by the Senior Principal Magistrate's Court at Iten in **Criminal Case No. 16 of 2018: Republic vs. James Mosabiti**. The appellant was therein charged with the offence of defilement, contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars of the charge were that on **11 April 2018** at around 1.00 p.m. at [Particulars Withheld] area in Chebiemit Location within Elgeyo Marakwet County, he intentionally and unlawfully committed an act which caused penetration with his genital organ, namely penis, into the genital organ, namely vagina, of **WJJ** a girl child aged 9 years.

[2] In the alternative, the appellant was charged with indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act**. It was alleged that on the **11 April 2018** at around 1.00 p.m. at [Particulars Withheld] area in Chebiemit Location within Elgeyo Marakwet County, he committed an indecent act with a child, namely **WJJ**, a girl 9 years, by unlawfully touching her private parts, namely vagina with his penis.

[3] The appellant denied those allegations and after trial, he was found guilty of the substantive count of defilement. He was consequently convicted thereof and sentenced to life imprisonment on **4 June 2019**. Being dissatisfied with that decision, the appellant filed this appeal on **12 June 2019** on the following grounds:

[a] That the trial magistrate erred in law and fact by failing to evaluate the whole evidence on record;

[b] That the learned magistrate erred in law and fact by convicting the appellant without taking into account that the complainant's evidence was not supported by medical proof of defilement;

[c] That the trial magistrate erred in law by not seeing that there was no age assessment report presented by the Prosecution;

[d] That the learned magistrate erred in law and fact by failing to evaluate the material contradictions in the Prosecution evidence;

[e] That the learned magistrate erred in law and fact by failing to evaluate his *alibi* defence in compliance with **Section 309** of the **Criminal Procedure Code**, but instead shifted the burden of proof to him;

[f] That generally the Prosecution case was not proved beyond reasonable doubt, hence the grudge was relevant.

[4] The appellant filed Amended Grounds of Appeal on **19 February 2021** and prayed that his appeal be heard and determined on the basis of the following grounds:

[a] That the learned trial magistrate erred in law and fact by failing to find that penetration was not proved;

[b] That the learned trial magistrate erred in law and fact by failing to consider the appellant's defence;

[c] That the learned trial magistrate erred in law and fact by failing to find that the appellant's right to a fair trial as provided for by **Article 50(2)(g) and (h)** of the **Constitution** was violated.

[d] That the learned trial magistrate erred in law and fact by sentencing the appellant to a mandatory minimum sentence which has since been declared unconstitutional by the Supreme Court.

[5] It was, accordingly, the appellant's prayer that his appeal be allowed, his conviction quashed and the sentence imposed on him be set aside. The appellant urged his appeal by way of written submissions, filed herein on **19 February 2021**. It was his submission that penetration was not proved to the requisite standard. He relied on **Julius Kioko Kivuva vs. Republic** [2015] eKLR to support his contention that the evidence of the complainant was not specific enough to prove the element of penetration. According to him the victim did not explain what actually happened during the act of having sex; and therefore that his conviction was erroneous.

[6] The appellant further complained that his defence of *alibi* did not count for anything as it was totally ignored by the learned trial magistrate. He also alleged the existence of a grudge between him and the mother of the victim; which the trial magistrate did not give any consideration.

[7] In his third ground of appeal, the appellant complained that his right to fair trial for purposes of **Article 50(2)(j), (g) and (h)** of the **Constitution** was impinged on by the trial court, in that he was neither provided with copies of witness statements and documentary exhibits that the Prosecution intended to rely on; nor was he accorded legal representation at the expense of the State. He relied on **Advocats Sans Frontiers (on behalf of Bwampanye) vs. Burundi, African Commission on Human Rights**, Comm. No. 213/99 (2000); **Pett vs. Greyhound Racing Association** (1968) 2 All ER 545 and **Macharia vs. Republic** for the proposition that legal assistance is a fundamental element of the right to fair trial, considering the gravity of the allegations that had been levelled against him and the penalty entailed thereby.

[8] Lastly, the appellant took issue with the sentence of life imprisonment that was meted on him by the trial court. His argument was that the learned magistrate purported to pass the mandatory sentence provided for in **Section 8(2)** of the **Sexual Offences Act**, yet such penalties have been declared unconstitutional by the Supreme Court, the Court of Appeal and the High Court. He then made reference to about 11 authorities, including **Francis Karioko Muruatetu & Another vs. Republic** [2017] eKLR and **Evans Wanjala Wanyonyi vs. Republic** [2019] eKLR to support his arguments. The majority of those cases were cited to demonstrate situations in which mandatory terms of life imprisonment, imposed pursuant to **Section 8(2)** of the **Sexual Offences Act**, were substituted with imprisonment terms ranging between 1 year to 12 years.

[9] The appellant concluded his submissions by urging the Court to find that the lower court gravely misdirected itself on several aspects of his trial and therefore that he is entitled to success on his appeal.

[10] The appeal was resisted on behalf of the State by **Mr. Mugun**. He posited that, in respect of the substantive count of defilement, the Prosecution needed to prove three ingredients for purposes of **Section 8(1) and 8(2)** of the **Sexual Offences Act**; namely, age of the complainant, penetration and identification of the offender. In his submission all these three ingredients were proved before the lower court. He urged the Court to find that the Prosecution established that the complainant was born on **1 January 2008**; and that when the incident took place, she was 10 years old. According to him, credible proof was given that the appellant had unlawful carnal knowledge of the complainant while knowing very well that she was a minor.

[11] On identification, counsel urged the position that the complainant was defiled by a person known to her; and that the offender was a neighbour. He further pointed out that the appellant was found in the act by the complainant's brother, who testified before the lower court as **PW2**. **PW2** in turn called a neighbour **PW4** with whose help the appellant was arrested at the scene of crime by a mob as he tried to put on his pair of long trousers. Counsel accordingly urged the Court to find that this was a case of recognition in broad daylight; and therefore that there was no possibility of mistaken identity.

[12] **Mr. Mugun** urged the Court to take into account that medical examination on the complainant revealed that her hymen was lacerated with bruises on her *labia minora* and *labia majora*; and that there was fresh blood in her vagina at the time of examination. In his view this was proof enough of the fact that there was forceful penetration of the victim's vagina. He further urged the Court to note that the complainant was examined by **PW6** only a few hours after the incident; and therefore that there was credible evidence in proof of penetration beyond reasonable doubt.

[13] As regards the assertion by the appellant that his fair trial rights were violated, **Mr. Mugun** refuted those allegations and referred the Court to the proceedings of **17 May 2018** as proof that the appellant was not only furnished with copies of witness statement and documentary exhibits, but was also given sufficient time to prepare for the trial. Counsel relied on **Jackson Muendo Mutie vs. Republic** [2020] eKLR in urging the Court to find that the appellant was indeed accorded the facilities, time and space to adequately prepare for his trial.

[14] **Mr. Mugun** concluded his submissions by urging the Court to find that the sentence of life imprisonment that was meted on the appellant was well justified. He pointed out that when the appellant committed the crime he was an adult; and that by so acting, he abused the trust bestowed upon him by society to protect minors such as the complainant herein. He accordingly urged the Court to uphold his conviction and sentence.

[15] I have given careful consideration to the appeal. I have also taken into account the written submissions filed herein by the appellant as well as by the learned counsel for the State. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions on the basis of that evidence. (see **Okeno vs. Republic** [1972] EA 32)

[16] The brief summary of the Prosecution case is that the complainant, **WJJ (PW4)** a 9-year-old girl who was then in Class 4 at [Particulars Withheld] Primary School in Elgeyo Marakwet, was at home alone at about 1.00 p.m. when the appellant went there on

Wednesday **11 April 2018** to borrow a bottle from her. She declined the request and told the appellant she had no authority to give out such items. It was her evidence that as she continued washing the dishes, the appellant got hold of her and placed her on her mother's bed and proceeded to defile her. She further stated that she was only rescued when her brother, **JKJ (PW2)**, entered the house by chance and found the appellant in the act of defilement. **JKJ** in turn notified one of their neighbours who raised alarm and drew attention of others to the incident. The appellant was then beaten and arrested by members of the public and was handed over to a policeman, namely, **Cpl. Suleiman Julius Mengich (PW5)** who was attracted to the scene by the commotion.

[17] The appellant was re-arrested by **PW5** and escorted to Kapsowar Police Station. He similarly caused the victim to be taken to Kapsowar AIC Mission Hospital for examination and treatment. **Dr. Wilfred Kimosop (PW6)** confirmed that he attended to the complainant and filled a P3 Form, confirming that she had been defiled a few hours earlier. The last prosecution witness, **PC Richard Ondiba (PW7)** testified on **12 February 2019** and confirmed that he was on duty at Kapsowar Police Station on **11 April 2018** when **Cpl. Suleiman Mengich** of Kaptubula AP Camp brought in the appellant on allegations of having defiled a minor. He interviewed and recorded statements from the witnesses, issued the complainant with the P3 Form and accompanied her to hospital for examination and treatment. He thereafter obtained the complainant's Child Health Card from the complainant's mother for the purpose of proving the age of the complainant. He accordingly produced the Child Health Card as **the Prosecution's Exhibit 2** before the lower court. **PW7** also pointed out that, since the appellant had been beaten by a mob, he escorted him to hospital for treatment in respect of the injuries he had sustained.

[18] In his defence, the appellant stated that he returned to [Particulars Withheld] Trading Centre from Kilima on **11 April 2018** at about 2.00 p.m. and was confronted on arrival by two young men who wanted to know where he had been. He further told the lower court that the two men started assaulting him for no reason; and that the incident attracted the attention of several people, one of whom was a police officer. According to his version the police officer then handcuffed him and escorted him to Kapsowar Police Station on his motor cycle. He was thereafter taken for treatment before being placed in custody. The appellant told the lower court that he was shocked to learn the following day when he was taken to court that he had been arrested for having defiled a 9-year-old girl.

[19] The appellant further asserted that the mother of the complainant was his mistress; and that they were next door neighbours at [Particulars Withheld] Trading Centre. He alleged that the complainant's mother used to keep his money for him; and that when he asked her for his money she declined to give him and instead threatened him with dire consequences for which he would regret for the rest of his life. He consequently blamed the complainant's mother for his arrest and prosecution. He vehemently denied having defiled the complainant.

[20] The Main Count, which the appellant was convicted of, was laid pursuant to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**, which provision stipulates that:

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

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to life imprisonment.

[21] In the premises, having given due consideration to the appellants Amended Grounds of Appeal and the submissions made herein in respect thereof by the appellant and counsel for the state, the issues for my reconsideration and determination are:

[a] Whether the complainant was, at the material time, a child for purposes of **Section 8(2)** of the **Sexual Offences Act**;

[b] Whether there was penetration of the complainant's genital organ;

[c] Whether the penetration was perpetrated by the appellant.

[d] Whether the appellant's constitutional right under **Article 50(2)** of the **Constitution** was violated; and if so, whether that violation vitiates the lower court proceedings.

[a] **On the age of the Complainant:**

[22] There is no gainsaying that the age of a minor is a critical component of a defilement charge which must be proved by the Prosecution beyond reasonable doubt. This point was aptly made by the Court of Appeal in **Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010** thus:

"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".

[23] In terms of acceptable proof, **Rule 4** of the **Sexual Offences Rules of Court Rules** it is recognized that:

"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

[24] It is also now settled that the age of a victim of a sexual offence can also be determined by observation and common sense. Moreover, in **PMM vs. Republic** [2018] eKLR, it was held thus:

"...whilst the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the

complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant..."

[25] Hence, the complainant testified before the lower court and stated that she was 10 years old as of **20 August 2018** when she gave her evidence. The complainant's mother testified as **PW1** and told the lower court that the complainant was born on **1 January 2008**. She availed the complainant's Child Health Card in proof thereof. It was produced herein by **PW7** and marked **the Prosecution's Exhibit 2**. The document does give the complainant's date of birth as **1 January 2008**. Hence, the Prosecution adduced credible and uncontroverted evidence that proved beyond reasonable doubt that the complainant was aged 10 years and 4 months as at **11 April 2018** when the offence of defilement is said to have taken place. Accordingly, the complainant herein was within the age bracket envisaged by **Section 8(2)** of the **Sexual Offences Act**. It is consequently immaterial that the Charge particulars furnished the complainant's age as 9 years.

[b] On Penetration of the Complainant:

[26] The complainant testified as to how the defilement occurred; namely that she was at home alone when the appellant, who was their next door neighbour went to their house; got hold of her and placed her on her mother's bed and proceeded to defile her. She explained that the accused blocked her mouth with his hand; then he removed his pair of long trousers and inserted his genital organ in hers. She told the lower court that in spite of the pain she was unable to scream as the appellant had blocked her mouth. She then heard the door open and saw her brother **JKJ (PW2)** who opened the curtain and asked the appellant what he was doing. **PW4** explained that her brother went outside and **Carol**, a neighbour came in and found the appellant still lying on top of her. **Carol** then screamed loudly to attract other neighbours who found the appellant at the scene in the process of wearing his trousers.

[27] The evidence of **PW4** in respect of the intervention of her brother were corroborated by her brother, **PW2**, whose evidence was that, at about 1.00 p.m. on **11 April 2018** he left a neighbour's home and returned home. He opened the door and heard the sound of a creaking bed; he opened the curtain and saw the appellant on top of her sister and that he was pressing her neck by his hand. **PW2** also mentioned that the appellant had removed his long trousers completely and his pant was on the bed. In his own words, the appellant was raping his sister; and so he asked him what he was doing before going out to call **Carol** who was behind the house chopping cabbage.

[28] The evidence of **PW2** and **PW4** was lent credence by the evidence of **Dr. Kimosop (PW6)**. He testified that he examined the complainant only a few hours after the alleged defilement incident; and that he noted that she had tenderness on the neck and abdomen; and that her hymen was lacerated with bruises on her *labia minora* and *labia majora*. **PW6** also noted the presence of fresh minimal blood in the complainant's vagina. He consequently formed the opinion that the girl's vagina had been forcefully penetrated. He produced the P3 Form that he filled and signed on **11 April 2018** as **the Prosecution's Exhibit 1**.

[29] Thus Prosecution evidence in proof of penetration and the injuries suffered by the complainant remained uncontroverted. This is because, in his defence, the appellant focused on the events surrounding his arrest, which in his estimation happened at about 2.00 p.m. It is therefore manifest that penetration of the complainant's genital organ was proved beyond reasonable doubt; and I so find.

[c] On whether the penetration of the complainant was perpetrated by the appellant:

[30] In this case, the incident took place in broad daylight at about 1.00 p.m. The complainant told the lower court that the appellant was a person well known to her as their next door neighbour. She stated that he occupied House No. 1 while theirs was House No. 2. She also mentioned that the appellant engaged her in conversation before committing the offence. Her evidence connecting the appellant with the crime is therefore credible and worthy of belief. Although no corroboration of that evidence was necessary, granted the proviso to **Section 124** of the **Evidence Act**, the evidence of **PW4** was well corroborated by the evidence of her brother **PW2**, who found the appellant in the act of defiling his sister and immediately brought the matter to the attention of a neighbour by the name **Carol**.

[31] Although **Carol** was not called as a witness, it is manifest that it was her screams that attracted the attention of other neighbours and the crowd that ultimately arrested the appellant at the scene of crime. In particular, **PW3** testified that at about 1.00 p.m. on **11 April 2018**, he heard screams from the plot where **PW1** was then residing; and that the scream was being made by a woman to the effect that a child was being raped. He then went to the plot along with other members of the public. He saw the appellant inside the house with the victim and because members of the public wanted to lynch him, a police officer intervened and arrested him. **PW3** mentioned that the appellant's long trousers were loose; and that over 70 people were at the scene; the day having been a market day. In the circumstances, the Prosecution adduced credible evidence that effectively connected the appellant with the crime charged in the substantive count.

[32] The appellant's allegation that he was framed on account of a grudge between him and **PW1** was taken into account by the learned trial magistrate and found to be untenable. This is manifest at pages 32 and 33 of the Record of Appeal. In the premises, the appellant's contention, per his 2nd ground of appeal, that his defence was not considered by the trial court is baseless. Indeed, the evidence adduced by the prosecution completely displaced the appellant's alibi and placed him right at the scene of crime.

[d] Whether the appellant's constitutional right under Article 50(2) was violated; and if so, whether that violation vitiates the lower court proceedings

[33] Regarding the appellant's contention that his right to fair trial for purposes of **Article 50(2)(j)**, of the **Constitution** were violated by the trial court, in that he was not provided with copies of witness statements and documentary exhibits that the Prosecution intended to rely on, the record shows otherwise. At page 10 of the Record of Appeal, the appellant is recorded to have addressed the trial court as follows in connection with the proceedings of **17 May 2018**:

"I am not ready to proceed. I was given witness statements on 15/5/2018. I have not managed to get sufficient time to go through them and prepare fully my case."

[34] On that account, hearing of the case was adjourned to **26 June 2018**. The Record of Appeal further shows that hearing did not proceed on **26 June 2018** either, for the reason that the trial magistrate was away attending the annual magistrates' colloquium. Indeed, hearing did not take off in earnest until **20 August 2018**. Clearly then, the appellant has no reason to complain that his constitutional right under **Article 50(2)(j)** of the Constitution was violated. I note that in his submissions he pitched for the general need for the contents of witness statements and documentary exhibits to be translated for the benefit of accused persons in Kenya. I did not understand him to be saying that he required translation of the said documents. Here is what he had to say:

“...as regards the issue of witness statements, the law under article 50(2) requires that an accused person be furnished with all the relevant information being used by the prosecution against him in order to enable him prepare properly. It is important to note that most if not all the statements which are furnished with the defence in Kenya are written in English and no follow up is done to ensure that the accused understands those statement to the extent that he is able to frame his defence and that in my view works to the detriment of the accused person. I submit that the record of the trial court must be able to show not only that the accused was furnished with all the material evidence that the prosecution relied on but also that he understood that evidence sufficiently well to enable him to challenge it. In the event that he doesn't understand the language used in framing the evidence, an interpreter or mediator has to be appointed to ensure that the accused is not prejudiced by language barriers...”

[35] Clearly, there is no indication that the appellant was here complaining that he needed the services of a translator but was not provided with one. He is, here, making a general proposal either for law reform or for implementation by the key actors in the administration of justice; which in itself is plausible. It is however no proof that, for the purposes of this appeal, his constitutional right under **Article 50(2)(j)** was impinged on. Indeed, going by the quality of his submissions, in terms of his command of English language as well as appreciation of the legal issues canvassed therein, the appellant has no cause for complaint for purposes of the rights provided for in **Article 50(2)(j)** of the **Constitution**.

[36] The second aspect of the appellant's complaint is in connection with **Article 50(2)(g) and (h)** of the **Constitution**. He submitted that, given the seriousness of the charges he was facing and the penalty envisaged thereby, he ought to have been accorded legal representation at state expense. He relied on **Advocats Sans Frontiers (on behalf of Bwampanye) vs. Burundi, African Commission on Human Rights**, Comm. No. 213/99 (2000); **Pett vs. Greyhound Racing Association** (1968) 2 All ER 545 and **Macharia vs. Republic** for the proposition that legal assistance is a fundamental element of the right to fair trial, considering the gravity of the allegations that had been levelled against him and the penalty entailed thereby.

[37] **Article 50(2)(g) and (h)** of the Constitution stipulates that:

"Every accused person has the right to a fair trial, which includes the right:-

...

(g) o choose and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

[38] The Supreme Court had occasion to consider the above Article in **Republic vs. Karisa Chengo & 2 Others** [2017] eKLR; had the following to say at paragraph [87] of its Judgment:

“[87] Article 50(2)(h) of the Constitution provides that “[e]very accused person has the right to a fair trial, which includes the right...to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.” It does not define what “substantial injustice” means. However, in David Macharia Njoroge v. Republic, (supra), the Court of Appeal held that “substantial injustice” results to “persons accused of capital offences” with “loss of life” as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are “if substantial injustice would otherwise result...” While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa v. Republic; C.A No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.”

[39] Accordingly, there can be no doubt that the appellant had the right, not only to be represented by an advocate before the lower court, but to also be informed promptly of that right. There is no indication in the record of the lower court that the appellant was informed of this right, yet there is no gainsaying that the appellant herein was faced with a fairly serious charge (per the substantive count); a charge that entailed life imprisonment in the proviso thereto; and therefore met the “substantial injustice” test.

[40] Nevertheless, as was pointed out by the Supreme Court in **Republic vs. Karisa Chengo & 2 Others** (supra), there is a clear distinction between the right to legal representation in general and the right to legal representation at state expense. The Supreme Court made this vital distinction thus:

“...it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation *per se* and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings.

Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:

- i. the seriousness of the offence;
- ii. the severity of the sentence;
- iii. the ability of the accused person to pay for his own legal representation;
- iv. whether the accused is a minor;
- v. the literacy of the accused;
- vi. the complexity of the charge against the accused;

[41] It is also instructive that there is an elaborate framework to operationalize **Article 50(2)(h)** in the form of the **Legal Aid Act, No. 6 of 2016**. That framework puts an applicant, in this case the appellant, at the centre of the process; for **Section 40** provides that:

(1) A person who wishes to receive legal aid, shall apply to the Service in writing.

(2) Where a person wishes to apply for legal aid the person shall apply before the final determination of the matter by a court.

(3) An application under subsection (1) shall be assessed, with respect to the applicant's eligibility for legal aid services in accordance with this Act."

[42] **Section 42** of the Act further recognizes that, for persons in lawful custody, the application for legal aid need not be made to the Court. It states that:

The officer-in-charge of a prison, police station, remand home for children or other place of lawful custody shall—

- a. ensure that every person held in custody, is informed in language that the person understands, of the availability of legal aid on being admitted to custody and is asked whether he or she desires to seek legal aid;**
- b. maintain a register in which shall be entered the name of every person held there and the response of each such person when asked if he or she desires to seek legal aid; and**
- c. ensure that a legal aid application form is made by a person in their custody wishing to apply for legal aid and shall inform the Service of the application within twenty-four hours of the making of the application.**

[43] In the absence of an application as indicated herein above, I am far from persuaded that the appellant's right to legal representation at state expense was infringed.

[44] Turning now to the last ground of appeal, touching on the propriety of the sentence imposed on the appellant, **Section 8(2)** of the **Sexual Offences Act**, does provide for life imprisonment. Looked at from the prism of the decision of the Supreme Court in **Francis Karioko Muruatetu vs. Republic [2017] eKLR**, the appellant would appear justified in faulting the learned trial magistrate for his conclusion that:

"...the offence the accused has been convicted attracts a minimum mandatory sentence which this court has no discretion but rather to hand it to the convict as it is provided in our statute of Sexual Offences Act. The accused is hereby sentenced to imprisonment for life..."

[45] I say so because the sentence was passed on **4 June 2019** after the decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic** (supra). Following that decision, the Court of Appeal, in **Jared Koita Injiri vs. Republic [2019] eKLR**, pronounced itself thus in a Judgment delivered on **7 December 2018**:

Arising from the decision in *Francis Karioko Muruatetu & Another vs Republic*, SC Pet. No. 16 of 2015 where the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional. The Court took the view that;

"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."

In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."

[46] The Court of Appeal proceeded to set aside the sentence of life imprisonment in favour of imprisonment for 30 years in the matter, in which the complainant was a 9-year-old minor. However, the Supreme Court has since clarified matters regarding the applicability of Muruatetu to the mandatory minimum sentences provided for in the **Sexual Offences Act** in its Directions dated **6 July 2021**, at paragraphs 11, 12 and 14 that:

[11] **The ratio decidendi in the decision was summarized as follows;**

“69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment”.

[12] **We therefore reiterate that, this Court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.**

...

[14] **It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.”**

[47] Granted that clarification, the learned trial magistrate cannot be faulted for sentencing the appellant to life imprisonment. The sentence is perfectly lawful and accords with our constitutional architecture. Moreover, granted the circumstances in which the offence was committed, it cannot be said that the sentence is unwarranted.

[48] In the result, it is my finding that this appeal lacks merit and is hereby dismissed in its entirety. The appellant’s conviction and sentence are accordingly upheld.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF SEPTEMBER, 2021

OLGA SEWE

JUDGE