REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NUMBER 82 OF 2015

(From original conviction and sentence in Mombasa Chief Magistrate's Court Criminal Case No. 1096 of 2014, **R. Odenyo** SPM)

YAWA NYALE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

1. The appellant herein, **Yawa Nyale**, was charged in the Mombasa Chief Magistrate's Court Criminal Case No. 1096 of 2014 with the offence of defilement contrary to section 8(1) as read with section 8(4) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars of this charge were that on diverse dates between 23rd May, 2014 and 4th June, 2014 at [particulars withheld] area Changamwe within Mombasa County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of MWN, a girl aged 15 years. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the ***Sexual Offences Act. No. 3 of 2006*** in that on diverse dates between 23rd May, 2014 and 4th June, 2014 at [particulars withheld] area Changamwe within Mombasa County, the appellant unlawfully caused his penis to rub the vagina of MMN, a girl aged 15 years.

2. After hearing, the Learned Trial Magistrate found the appellant guilty of the offence of defilement, convicted him accordingly and sentenced him to 20 years imprisonment.

3. Being dissatisfied with the conviction and sentence the appellant appeals based on the following grounds that:

> **1. That the Learned Trial Magistrate erred in law and in fact in basing his conviction and sentence in reliance on a defective charge sheet.**
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> **2. That the Learned Trial Magistrate erred in law and in fact in convicting and sentencing him to serve 20 years imprisonment without proper finding that the appellant was a minor when the offence was committed contrary to section 8(7) of the *Sexual Offences Act* and section 181 and 191 of the *Children Act*.**
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> **3. That the Learned Trial Magistrate erred in law and in fact in convicting the appellant by failing to find that no doctor was called to testify in court when given that a police officer cannot answer any medical questions if raised.**
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> **4. That the Learned Trial Magistrate erred in law and in fact in basing his conviction and sentence in reliance on a P3 Form produced in court by PW3 without proper finding that the complainant's evidence and the P3 for was at variance.**
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> **5. That the Learned Trial Magistrate erred in law and in fact in connecting his arrest with the matter in question without proper finding that the same had no connection when given that none of his arrester came to testify in court and tell the reasons for his arrest.**

4. At the hearing of the case the prosecution called three witnesses.

5. PW1 was the complainant. According to her, she was aged 16 years and was born on 14th April, 1999 based on her birth certificate and was in class 7. It was her evidence that she met the appellant in November, 2013 but before that he had been seeing the appellant who used to visit her mother and they used to talk. According to the complainant, the appellant's brother gave her the appellant's telephone number and she called the appellant who went to pick her the following night by a motor cycle. The appellant then told her to board the motor cycle which she did at 8.00pm though the appellant did not disclose to her where they were going.

6. According to the complainant, the appellant took her to their home at Duruma where they arrived at 11.00pm and she stayed for two weeks. Although that day they did not have sex, the following day, the appellant removed both his clothes and her clothes and they engaged in sex and thereafter for the said two weeks. When the complainant told the appellant that she wanted to go back home, the appellant informed her that he would arrange for someone to take her home. Instead of doing so, the appellant took her to a witchdoctor who gave her some things resembling charcoal which she ate and became confused. Three days later, her brother went with police officers to the appellant's home but upon seeing them, the appellant told the complainant to run away and took her into a forest and left her there. The complainant however escaped from the forest, got a refuge from the appellant's friend who took her to his house. However the appellant traced her and took her back to where they were staying but his mother told them to surrender to the police which they did and she was then taken to Coast General Hospital for treatment and she recorded her statement with the police though she denied the correctness of what she told the police on the ground that she was confused.

7. In cross-examination, she admitted that she did not resist when the appellant told her to engage in sex. She also denied that she told the appellant to go and get her from home or that she wanted the appellant to marry her. She denied the appellant's suggestion that they slept in Mombasa on 21st November, 2013. She disclosed that they were remanded in custody for three days.

8. PW2, **UC**, was the complainant's father. According to him, the complainant was 15 years at the time of his testimony and was in class 7 On 23rd May, 2014 at around the complainant was at home with him till 7.00pm when the complainant left to go and sleep in another house where she used to sleep with her younger brother. However in the morning at around 6.00am the said brother woke him up inquiring where the complainant was as she had left the house at night. She was then advised by her brother to report the matter at Jomvu Police Station.

9. Later, she got information from the appellant's brother that the complainant was staying with the appellant at Kukanyeni house belonging to the appellant. PW2 then reported this to the said police station but when they went there they neither found the complainant nor the appellant but were informed by the appellant's mother that they had gone to the appellant's sister's house. They however did not find them there either as they were informed that the two had hurriedly left the place and they returned to the police station.

10. On 4th June, 2014, PW2 was called by the police who informed her that the two had been arrested together with a relative of the appellant. At the police station, the appellant alleged that he had already married the complainant and the matter was referred to Kinango Police Station and then to Changamwe where the incident had occurred. The complainant was thereafter referred to Coast General Hospital where she was given a P3 form which was duly filled in.

11. In cross-examination, PW2 stated that the complainant went with her clothes to the appellant's home.

12. PW3 was **PC Charles Wamusi** who received a report from PW2 that her daughter, the complainant was lost. He accordingly booked a report of a missing child. On 4th June, 2014, the complainant and the appellant were arrested at Kinango by police officers and take to Changamwe Police Station. He recorded witness statements a referred them to Coast General Hospital after issuing the complainant with a P3 form which was filled in on 18th June, 2014 which was produced as exhibit 3 while PCR was produced as exhibit 2. The complainant's birth certificate was produced as exhibit 1 while her treatment notes were produced as exhibit 4.

13. In cross-examination, PW3 stated that the appellant had married the complainant and was charged with the offence of defilement.

14. At the close of the prosecution case, the appellant chose to keep quite.

15. In his judgement the Learned Trial Magistrate found that the appellant decided to elope with the complainant after which they got married and engaged in sexual intercourse. From the birth certificate, the court found that the complainant was 15 years old and was as such a child.

16. I have considered the material placed before the Court. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.**

17. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

18. However, it must be stated that there is no set format to a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, thus:

> **"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:**
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> **'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"**

19. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC** (as he then was) said:

> **"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."**

20. The appellant has taken issue with the failure to call the doctor who prepared the P3 form. In **Emmanuel Mwadime vs. Republic [2016] eKLR,** the Court (**Kamau, J**) expressed herself as hereunder:

> **"Against the backdrop of the aforesaid powers, this court nonetheless came to the firm conclusion that it could still not convict the Appellant on the charge of grievous harm. Appreciably, as was rightly pointed out by the Appellant, PW 5 had no power or authority to tender in evidence the P3 Form on behalf of Patterson Mwapula, who the Learned Trial Magistrate indicated to have been PW 5. 61. This was in contravention of Section 77 of the *Evidence Act* Cap 80 (Laws of Kenya) that provides as follows:-**
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> > ***"In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence."***
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> **However, a P3 Form, being an expert report can only be tendered in evidence by a skilled expert as provided in Section 48 of the *Evidence Act*. The same provides as follows:-**
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> > ***"When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions."***
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> **Evidently, PW 5 was not skilled in medical matters. It was irrespective that the Appellant did not object to him producing the P3 Form because he did not lead evidence to demonstrate that he knew the signature of Patterson Mwapulu, attest that the said Patterson Mwapulu was the one who signed the said P3 Form or that he was well versed in medical matters. The situation would have been different had the said P3 Form been produced by a medical person and the Appellant failed to object to the production of the same. In the case of *Julius Karisa Charo vs Republic* (Supra), Ouko J also expressed similar reservations about police officers tendering in evidence P 3 Forms because they should only restrain themselves to tendering documents that would fall in their docket. He stated as follows:-**
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> > **"To my mind police officers role in the production of documentary evidence ought to be restricted police abstracts and other non-technical documents. For the reasons stated I find and direct that PC Sang cannot produce the post-mortem report on behalf of Dr. Olumbe who has relocated at Australia and the efforts made in trying to procure his attendance, from what I have stated above, there must be pathologists who are conversant with his writing and signature."**
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> **There is no doubt in the mind of this court that PW 1 sustained injuries as was evident from the photographs that were adduced in evidence. However, the P3 Form was critical to corroborate the injuries that he sustained because it is normal for it to be inconsistent with oral evidence that is tendered by witnesses. Failure to call Patterson Mwapulu thus dealt a fatal blow to the Prosecution's case as this court not therefore consider as the possible charge of the Appellant having caused grievous harm to PW 1 herein. In the circumstances foregoing, Amended Grounds of Appeal Nos 2, 5, 6, 7, 8 and 9 had merit and the same are hereby allowed."**

21. **Ouko, J** (as he then was) in **David Jefwa Kalu vs. R Cr. Appl No. 133/03** held that:

> **"Medical evidence if sought to be adduced ought to be so done with propriety and not in such slipshod manner"**

22. In very clear warning was issued by the Court of Appeal in **Sibo Makovo vs. R Criminal Appeal NKR No. 39/1996** in the following words

> **"it appears to us that production of P3 forms in courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called".**

23. In this case the P3 form was similarly produced by a police officer without any reason being afforded for not calling the maker or even another medical officer to do so. If the only evidence of penetration was that P3 form the Court would not have hesitated in upsetting the conviction on that ground alone.

24. It was the appellant's case that the charge sheet was defective for stating the place where the crime was committed which was different from the evidence. Section 134 of the ***Criminal Procedure Code*** requires in mandatory terms that every charge should be precise and abundantly clear to the appellant. It provides that:

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information***

as to the nature of the offence charged."

25. Interpreting this provision in the case of **Isaac Omambia vs. R, [1995] eKLR** the Court held that:

> **"the particulars of a charge [form] an integral part of the charge."**

26. However in **Cherere s/o Gakuli vs. R [1955] EACA 622,** it was held that.

> **"The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity".**

27. This was the view taken in **Amos -v- DPP [1988] RTR 198 DC** where it was held that:

> **[Uncertainty in the mind of the accused person is the] "vice at which the rule against duplicity is aimed and to counter a true risk that there may be confusion in the presenting and meeting of charges which are mixed up and uncertain".**

28. In **Paul Katana Njuguna v Republic [2016] eKLR**, the Court held that:

> **"In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective. In this appeal, the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice. We must, therefore, reject the appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect if any, was in any event, curable under Section 382 of the Criminal Procedure Code."**

29. In this case it is my view that the discrepancy in the place where the offence occurred as stated in the charge sheet and the evidence adduced did not occasion any prejudice to the appellant.

30. It was the appellant's case that the arresting officers were not called to testify. While that is true, it is not in contention that the appellant was arrested. In fact according to the evidence of the complainant, the appellant and the complainant presented themselves to the police station. In **Kiriungi vs. Rep (2009) KLR 638**, the court said:-

> **"...the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that he evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged."**

31. In my view nothing turns on the failure to call the arresting officer and that ground fails.

32. The appellant contends that he was a minor at the time the offence was committed. This was in his mitigation which was on 29th April, 2015. However the offence was allegedly committed, according to the complainant, within two weeks of their elopement which was in November, 2013. If the appellant was 19 years at the time of the sentence in 2014 then it would be true that he was less than 18 years at the time of the commission of the offence. Section 8(7) of the ***Sexual Offences Act*** states that:

> ***Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.***

33. In my view, the Learned Trial Magistrate ought to have investigated the appellant's contention that he was 19 years before passing the sentence. The sentiments of the Court of Appeal with respect to heavy minimum sentences in the case of **Hamisi Bakari & Another vs. Republic [1987] eKLR** are worth taking note of. In that case the Court held that:

> **"We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear."**

34. It is similarly my view that where a heavy minimum sentence is involved such as in this case where the sentence prescribed is 20 years, the Court ought to be satisfied that such a sentence is being imposed on a person who the law provides such a sentence ought to be imposed on and where it is brought to the attention of the trial Court before the passing of the sentence that there is a lesser sentence to be imposed on the class of persons the accused purports to belong the Court ought to investigate such an issue before imposing the sentence.

35. Before I pen off, I wish to comment on the minimum mandatory sentences in general and those prescribe under the ***Sexual Offences Act*** in particular. It is now clear that certain provisions of the ***Sexual Offences Act***, are a cause of concern in this country. The effect of the harsh minimum sentences imposed under the said Act on young people in this country is a serious cause of concern. Our jails are overflowing with young people convicted courtesy of the provisions of the said Act. While I appreciate that sexual offences do demean the victims of such crimes and ought not to be taken lightly, the general society in which we operate ought to be taken into account in order to achieve the objectives of punishment. Penal provisions ought to take into account the objectives intended to be achieved and should not just be an end in themselves otherwise they may end up being unjust especially where the penalties imposed do not deter the commission of crimes where both the victim and the offender do not appreciate the wrongdoing in question.

36. In my view those sentences ought to be looked at in light of Article 27 of the Constitution as read with clause 7 of the ***Transitional and Consequential Provisions*** which provide as follows:

> ***All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with conformity with this Constitution.***

37. I have my doubts as regards the constitutionality of the minimum sentences since in my view such sentences do not permit the Court to consider the peculiar circumstances of the case in in order to arrive at an appropriate sentence informed by hose circumstances. Whereas the Court is given the leeway to impose any sentence over and above the minimum sentence, the section like any other sections prescribing for minimum sentences does not permit the Court the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. In those circumstances, it is my view that such provisions do not meet the constitutional dictates. This is my understanding of the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic**, **Petition No. 15 of 2015,** where it expressed itself as hereunder:

> **"47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.**
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> **[48] 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 appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.**
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> **[49] With regard to murder convicts, mitigation is an important facet of fair trial. In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.**
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> **[50] We consider *Reyes* and *Woodson* persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.**
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> **[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.**
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> **[52] We are in agreement and affirm the Court of Appeal decision in *Mutiso* that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in *Joseph Kaberia Kahinga* that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.**
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> **[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict."**

38. Similarly in **S vs. Mchunu and Another (AR24/11) [2012] ZAKZPHC 6** Kwa Zulu Natal High Court held that:

"It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35:

'Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.'

The judgment continues:

'. . . [i]t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.'

39. The Courts have always frowned on mandatory sentences that place a limitation judicial discretion. In **S vs. Toms 1990 (2) SA 802 (A) at 806(h)-807(b),** the South African Court of Appeal (**Corbett, CJ)** held that:

"the infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant."

40. In **S vs. Mofokeng 1999(1) SACR 502 (W) at 506 (d)**, **Stegmann, J** opined that:

"For the Legislature to have imposed minimum sentences severely curtailing the discretion of the Courts, offends against the fundamental constitutional principles of separation of powers of the Legislature and the Judiciary. It tends to undermine the independence of the courts and to make them mere cat's paws for the implementation by the legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases."

41. Also in **S vs. Jansen 1999 (2) SACR 368 (C) at 373 (g)-(h), Davis J** held that:

"mandatory minimum sentences disregard all individual characteristics and each case is treated in a factual vacuum, leaving no room for an examination of the prospect of rehabilitation and of the incarceration method to be adopted. Such a system can result in a gross disregard of the right to dignity of the prospect of rehabilitation and of the incarceration method to be adopted. Such a system can result in a gross disregard of the right to dignity of the accused."

42. In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences. My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:

Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.

43. The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in **S vs. Malgas 2001 (2) SA 1222 SCA 1235** paragraph 25 as follows:

"What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."

44. Therefore the provisions of a legislation that was in force before the Constitution of Kenya, 2010 such as the ***Sexual Offences Act. No. 3 of 2006*** must be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences to not take into account the dignity of the individuals as mandated under Article 27 of the Constitution as appreciated in the ***Muruatetu Case***.

45. In this case there is a possibility that the appellant may have been subjected to a sentence which ought not to have been imposed had the trial court taken the trouble to investigate the matter. The appellant was sentenced on 29th April, 2015 and has served more than 3 years.

46. In this case I find that the appellant's conviction, based on the evidence presented was proper as the complainant was proved to be a minor; that indeed there was penetration as the complainant and the appellant had sex believing that they were married; and the identity of the appellant was not in doubt. However, there is a possibility of a miscarriage of justice having occurred with respect to the sentence. In the premises I hereby set aside the sentence imposed on the appellant and in light of the period served, I direct that he be set free forthwith unless otherwise lawfully held.

Judgement read, signed and delivered in open court at Mombasa this 5th day of September, 2018.

G V ODUNGA

JUDGE

In the presence of:

Mr Obura for the appellant

Ms Ogweno for the Respondent

CA GladysDW