JM v Republic (Criminal Appeal E092 of 2023)
[2025] KECA 694 (KLR) (11 April 2025) (Judgment)

Neutral citation: [2025] KECA 694 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E092 OF 2023

KI LAIBUTA, FA OCHIENG & GWN MACHARIA, JJA

APRIL 11, 2025

BETWEEN

JM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Voi (E. M. Muriithi, J.) delivered on 9th July 2015 in HCCRA No. 19 of 2014)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Voi (E. M. Muriithi, J.) dated 9th July 2015 in Voi HC Criminal Appeal No. 19 of 2014 rendered in determination of the 1st appeal against the judgment of the lower court in Voi SRMC Criminal Case No. 450 of 2008 in which the appellant was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act*, 2006 (the Act.) whereupon he was convicted of the offence of incest and sentenced to life imprisonment.

2. The particulars of the offence were that, on 1st June 2008 in Taita Taveta District within Coast Province, the appellant had carnal knowledge of EW, a child aged 7 years and who, to his knowledge, was his niece.

3. The appellant denied the charges whereupon the trial proceeded with the prosecution calling four (4) witnesses, including the complainant. However, the appellant did not call any witness in his defence.

4. The complainant was the first prosecution witness. She testified as PW1 and told the trial court that she was 7 years old; that the appellant was her mother's brother and that, therefore, she was his niece; that, on the material day, the appellant called PW1 to his house and requested her to sit on his bed; that the appellant "removed his thing for urinating and put it in" her; that, during this particular ordeal, the complainant cried in pain, prompting the appellant to stop momentarily; that she felt pain in her

private parts; that she saw some blood; that, after the appellant was done, he told her to go back home and threatened to beat her if she disclosed to anyone what had taken place; and that he had "put the thing in" her on four previous occasions.

5. PW1 further testified that, the very next morning while her mother, S K (PW2) bathed her, she probed her about her private parts and demanded to know who had done that to her; that she disclosed that it was her uncle – the appellant; and that she was later taken to hospital for examination after the appellant was arrested.

6. PW2 testified that PW1 was born on 10th August 2001; that the appellant is her elder brother; that they both resided in the same compound; that, on 2nd June 2008 while bathing PW1, she noticed that her private parts were swollen and open; that she demanded to know what had happened to her; that PW1 initially refused to respond after which she pressured her to tell her what had happened; that PW1 eventually disclosed that she had been defiled by the appellant four times at home and in the shamba; that PW2 immediately called her other brother and informed him of the incident; that, on 7th June 2008, she escorted PW1 to Moi District Hospital in Voi for examination; and that the appellant had been arrested the night before.

7. PW3, PC Emily Munialo of Voi Police Station Children's Office testified that, on 8th June 2008, PW1, PW2 and the appellant were presented to her office by the Assistant Chief of Ghazi Location and her colleague, one Cpl Kileleni; that PW1 and PW2 recounted to PW3 what had transpired between PW1 and the appellant; and that, thereafter, PW3 escorted PW1 to Moi District Hospital in Voi for examination.

8. Dr. Odep (PW4), a medical officer stationed at Moi District Hospital in Voi, also testified and produced PW1's P3 form prepared by his colleague, one Dr. Charo. PW4 testified that, upon examination, it was found that PW1's external genetalia was normal, her hymen was not intact, which was a sign of sexual penetration, her vagina had no presence of spermatozoa, but had some discharge, and that she had no venereal infection. PW4 concluded his testimony by producing PW1's P3 form and Age Assessment Report dated 9th June 2008, confirming the complainant's age as 7 years.

9. In his defence, the appellant gave an unsworn statement and stated that the complainant is her niece; that, on the material day, he proceeded to his place of work at 7:00 am; that, on 6th June 2008, PW2 informed him that her children were unwell, and that she had taken them to hospital; and that, later that evening, he was arrested and whisked to Voi Police Station without being informed of the reasons for his arrest.

10. In its judgment, the trial court found that the complainant gave a very detailed account of what happened after the appellant called her to his house; that the details given by the complainant were sufficient proof that the appellant had engaged in sexual intercourse with her; that, based on her mien and demeanor, the complainant's evidence was direct, consistent and credible; that the complainant's testimony was corroborated by PW2's evidence and the medical evidence of penetration; and that the appellant's alibi defence did not discredit or create any doubt in the prosecution's case. The court therefore convicted the appellant with the offence of incest and sentenced him to life imprisonment in accordance with section 20(1) of the Act.

11. Aggrieved by the conviction and sentence meted by the trial court, the appellant lodged an appeal to the High Court on the amended grounds that the conviction was not supported by any evidence adduced by the prosecution. According to the appellant: there were no dates or treatment notes to show when PW1 was medically examined; that PW1 went to hospital seven

(7) days after the alleged defilement; that no explanation was given for the delay in reporting the matter to the police; that no certificate of birth was produced to verify PW1's age; that there was a variance on the date of the offence as indicated in the particulars of the offence and PW2's evidence; and that the trial court failed to consider his alibi defence.

12. In its judgment dated 9th July 2015, the High Court (E. M. Muriithi, J.) concluded thus: that the trial court was not at fault in finding that, on account of PW1's forthrightness, coherence and consistency in her testimony, the appellant had sexually assaulted her; that the complainant's evidence was corroborated by the evidence of PW2 and the medical evidence adduced by PW4; and that the trial court rightly dismissed the appellant's alibi defence. Consequently, the learned Judge dismissed the appeal.

13. Dissatisfied by the learned Judge's decision, the appellant moved to this Court on eight (8) grounds set out in his undated "Grounds of Appeal," namely that the learned Judge erred in law by: relying on poor identification evidence and mistaken identity; failing to find that the investigation was shoddy; failing to observe that some witnesses were not cross examined nor recalled; failing to find that the sentence was harsh and excessive; relying on circumstantial evidence; failing to appreciate that crucial witnesses were not availed by the prosecution; and by failing to appreciate the appellant's defence.

14. In addition to the grounds aforesaid, the appellant filed an undated "Amended Grounds of Appeal" containing nine (9) grounds, namely that the learned Judge erred in law by: failing to find that the appellant was charged with a defective charge sheet; failing to find that the appellant was not served with the first initial report, OB, PRC and P3 forms; failing to find that the evidence of PW1 to PW4 were fabrications aimed at casting suspicion upon and incriminating the appellant; failing to evaluate the evidence of PW2, and to find that PW2 threatened to beat the minor; failing to find that no birth certificate was produced; relying on contradictory and uncorroborated evidence upon which no safe conviction could be based; failing to evaluate the medical documents and find that there was no medical reference number recorded; failing to consider the appellant's alibi evidence; failing to analyse the medical examination of PW1 and observe that nothing proved that the hymen was broken by penetration or that the appellant was the one who defiled the minor as he was not taken for medical examination; and in failing to find that the appellant's rights under Articles 35(1) (a) and (b), and 50(1) (2) (g) and (h) of *the Constitution* were violated.

15. In support of his 2nd appeal, the appellant filed undated written submissions citing a multitude of 17 judicial authorities, namely: Republic v Silas Magongo Onzere alias Fredrick Nanema [2017] eKLR; Borris Ken Solomon v Republic [2013] eKLR; and Woolmington v DPP (1935) AC 482, for the proposition that the onus is always on the prosecution to prove its case beyond reasonable doubt; Jason Okumu Yongo v Republic [1983] eKLR, arguing that his charge sheet was defective since it did not have the court file number, OB number, and that his arraignment date was erroneously indicated as 10th June 2008 instead of 24th June 2008.

16. The appellant further relied on the cases of Daitany v Republic (1950) EACA 493 in support of the proposition that if a crucial witness is not called, the court can presume that his or her evidence would have been averse to the prosecution's case; Richard Munene v Republic [2018] eKLR; Dickson Elia Nsamba Shapwata & Another v Republic [2008] TZCA 17; and Erick Onyango Odeng v Republic [2014] eKLR, submitting on the effects of contradictions and inconsistencies in the prosecution's evidence; R v Taylor Weaver and Donovan (1928) 21 Cr App R. 20; Joan Chebichii Sawe v Republic [2003] eKLR; and James Mwangi v Republic [1983] eKLR on the probative value of circumstantial evidence.

17. The appellant went on to cite the cases of S v Sithole & Others 1999 (1) SACR 585; and Miller v Minister of Pensions [1947] 2 ALL ER 372, submitting on the standard of proof in criminal cases – beyond reasonable doubt; Paul Kanja Gitari v Republic [2016] KECA 741 (KLR), arguing that PW1 was of "reasonable age" and would have come forward on her own volition to claim that she had been sexually assaulted, but only did so after being pestered by PW2; Samuel Warui Karimi v Republic [2016] eKLR, submitting that the issues for consideration by this Court on a second appeal are on matters of law only; Jacob Odhiambo Omumbo v Republic [2019] eKLR, submitting that there was no credible evidence of PW1's penetration; and Mary Wanjiku Gichira v Republic [1998] eKLR, submitting that suspicion, however strong, cannot provide a basis for inferring guilt, which must be proved by evidence. On the basis of his submissions, the appellant urged us to allow his appeal.

18. Opposing the appeal, the Principal Prosecution Counsel, Ms. Vallerie Ongeti, filed written submissions and a list of authorities dated 1st October 2024 citing four (4) judicial authorities, namely: Moses Nato Raphael v R. [2015] eKLR, requesting this Court to only consider matters of law in this second appeal; Mwalango Chichoro Mwajembe v Republic [2016] eKLR for the proposition that there isn't one particular preferred means of proving age; SKM v R. [2021] eKLR, arguing that the appellant was positively identified by PW1 bearing in mind that the incident happened repeatedly; and Wanjema v R. (1971) EA 493, submitting that the trial magistrate correctly applied her mind in sentencing the appellant, and that nothing has been shown to warrant appellate interference with the sentence. Counsel urged us to dismiss the appeal in its entirety and uphold both conviction and sentence.

19. Our mandate on a second appeal as the one before us is confined to consideration of matters of law by dint of section 361 of the *Criminal Procedure Code*. In Karingo vs. Republic [1982] KLR 213, the Court stated:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."

20. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on only 4 main issues of law raised in his Grounds of Appeal and the Amended Grounds of Appeal, namely: (i) whether the prosecution proved the complainant's age; (ii) whether the charge sheet was incurably defective; (iii) whether the appellant's alibi evidence was considered; and (iv) whether the sentence meted on him was manifestly harsh and unjust in the circumstances.

21. We need not address ourselves to the remaining grounds of appeal most of which raise issues of factual evidence, and which we cannot re-open on 2nd appeal. Others relate to points of law raised for the first time on 2nd appeal, and on which we cannot pronounce ourselves.

22. Addressing himself to the prejudicial effect of new points of law raised for the first time on appeal, Forbes VP had this to say in Alwi A Saggaf v Abed A Algeredi (1961) EA 767 CA 610:

> " ... these are assumptions which were never tested at the trial. The minds of the parties simply were not directed to this issue which, apparently, was raised by counsel for the respondent for the first time in his reply at the end of the hearing of the first appeal. In the circumstances, it appears to me that the appellant had no fair notice of this issue, and that the court cannot be satisfied that the facts, if fully investigated, would have supported the new plea.

In my view, accordingly, the learned judge ought not to have allowed this issue to be raised, or to have decided the appeal on it."

23. In the same vein, this Court in Alfayo Gombe Okello v Republic [2010] eKLR underscored the importance of raising all issues in contention at the earliest opportunity at the trial and had this to say:

> "... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

24. In Sudi Mnalo Mweke v Republic [2023] KECA 1527 (KLR), this Court identified itself with the holding by the predecessor to this Court in Alwi Abdulrehman Saggaf vs. Abed Ali Algeredi (supra) where, in its holding, the Court laid down the guiding principle that the course of taking on appeal a point of law which has not been argued in the court below ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea. The justification for that holding was that:

> "The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.
>
> It (has) been clear for nearly a century and perhaps more, that the litigant could not take a completely new point of law for the first time on appeal and the Court of Appeal had no jurisdiction to decide a point which had not been subject of argument and decision in the county court."

25. Be that as it may, we take to mind the fact that, whereas section 361 of the *Criminal Procedure Code* bars the re-opening of findings of fact reached by the two courts below for reconsideration on second appeal, this Court may nonetheless pronounce itself thereon, but only in the exceptional circumstances highlighted in the case of Adan Muraguri Mungara vs. Republic [2010] eKLR where the Court set out the exceptional circumstances under which it will disturb concurrent findings of fact by the trial court and the first appellate court in the following words:

> "As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere." [Emphasis added]

26. Our well-founded mandate to pay homage to the findings of fact made by the two courts below holds in the absence of any exceptional circumstances to justify departure therefrom. The uncontroverted evidence of PW1 and PW2 indisputably established the appellant's identity by recognition as the perpetrator of the sexual offence repeatedly committed against PW1, the complainant's age, the fact

that PW1 (the complainant) was his niece, and the evidence of penetration as confirmed by the P3 and medical evidence adduced by PW4. We find nothing on the record to fault the two courts below for finding that the evidence led by the prosecution proved the charge of incest beyond reasonable doubt. Indeed, we find nothing, as did the High Court, to justify interference with the trial court's decision to convict the appellant as charged.

27. That said, and for the avoidance of doubt, it would be remiss of us not to pronounce ourselves on the ingredients of incest for which the appellant was convicted. In this regard, section 20(1) of the Act reads:

> 20.
>
> (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:
>
> Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

28. Addressing itself to the ingredients of the offence of incest, this Court at Nakuru in MGK v Republic [2020] eKLR pronounced itself thus:

> " 11. .... the ingredients that must be established for the offence of incest by a male person is, first, that the victim and the offender are related within the categories stated under section 20(1) of the *Sexual Offences Act*. Secondly, that the offender committed an act which caused penetration with the victim, and thirdly, the age of the victim must also be established for the proviso to apply." [Emphasis ours]

29. On the 1st issue as to whether the prosecution proved the complainant's age, which the appellant purports to challenge, the record as put to us shows that her age assessment report was produced in evidence by PW4 to establish her age as 7 years at the time of the repeated sexual offences committed by the appellant against her. The assessment confirms PW1's and PW2's testimonies in that regard. On the issue as to proof of age, this Court in Mwalango Chichoro Mwanjembe v Republic [2016] eKLR held as follows:

> "The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa v R,Cr. Appeal No.19 of 2014 and Omar Uche v R,Cr.App.No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni v Uganda, Crim. Appeal No.2 of 2000.

> We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

30. Turning to the 2nd issue as to whether the charge sheet was incurably defective as contended by the appellant, the appellant cited the case of Jason Okumu Yongo v Republic [1983] eKLR, arguing that his charge sheet was defective since it did not have the court file number, OB number, and that his arraignment date was erroneously indicated as 10th June 2008 instead of 24th June 2008.

31. Be that as it may, the pertinent issue at hand is whether the charge sheet was "incurably defective" and whether the proceedings thereon occasioned a failure of justice. In Peter Ngure Mwangi v Republic [2014] eKLR, this Court identified two limbs to the defect of a charge sheet, namely: whether the charge sheet is indeed defective; and, if defective, whether the defect is curable. The issue before us is whether the charge sheet on the basis of which the appellant was convicted and sentenced was incurably defective. The answer to this question depends on the nature and effect of the defect complained of.

32. Section 382 of the *Criminal Procedure Code* provides a remedy for defects in a charge sheets and provides:

> 382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
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> > Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

33. This Court provided guidance on determining whether a defect in a charge is fatal in Benard Ombuna v Republic [2019] eKLR in the following words:

> "In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

34. The question is whether the alleged defects on account of the omission of the criminal case file number, the police occurrence book (OB) number, and the alleged incorrect date of arraignment, were so fundamental as to be the source of confusion to the extent that the appellant was not aware of the nature of the charges preferred against him so as to put an appropriate defence. We think not. To our mind, the formal cum procedural infractions or irregularity complained of can hardly be termed as fatal or incurable. The minor defects highlighted by the appellant did not prejudice him or occasion any miscarriage of justice or a violation of his fundamental right to a fair trial. Indeed, he was fully aware that he faced the charge of incest. The particulars of the offence set out in the charge sheet clearly disclosed the nature of the offence, the identity of the complainant, the date and place where the offence was committed. The offence and the particulars thereof were read to the appellant whereupon he pleaded and, thereafter, presented his defence (see Peter Ngure Mwangi V Republic [2014] eKLR; and R v Norton [1979] Crim LR 282 (CA).

35. This Court explained what constitutes a defective charge in Jason Akumu Yongo v Republic [1983] eKLR thus:

> " ... a charge is defective under section 214(1) of the *Criminal Procedure Code* where:
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> a. it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or
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> b. it does not, for such reasons, accord with the evidence given at the trial; or
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> c. it gives a misdescription of the alleged offence in its particulars."

36. Faced with a similar lamentation, the Supreme Court of India in Willie (William) Slaney v State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391], held that:

> " Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

37. In view of the foregoing, the learned Judge was not at fault by finding, as we hereby do, that the charge sheet in accord with which the appellant was tried and convicted was not defective.

38. On the 3rd issue as to whether the two courts below considered the appellant's alibi defence, we hasten to observe that they did. Notably, the trial court considered his averment that he had gone to work that morning and was arrested on return later in the day for reasons he did not know. On considering the prosecution evidence, the trial court found that the alibi defence raised by the appellant did not dislodge or cast doubt on the prosecution evidence in proof of the offence as charged.

39. It is not lost to us, though, that the alleged alibi was raised too late in the day in the appellant's defence, which denied the prosecution the opportunity to test its veracity. This Court set out the principles that guide the trial Court when considering an alibi defence in Erick Otieno Meda vs. Republic [2019] eKLR in the following words:

> " (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
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> b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
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> c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
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> d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.
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> (See Mhlungu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)."

40. In the same vein, in R v Sukha Singh s/o Wazir Singh & Others [1939] 6 EACA 145, the predecessor to this Court held that:

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and, if they are satisfied as to its genuineness, proceedings will be stopped." [Emphasis added]

41. In addition to the fact that the appellant's alibi defence was introduced at the defence hearing, the appellant did not give any evidence to contradict the complainant's testimony to the effect that he (the appellant) had defiled her on four previous occasions. Accordingly, the two courts below were not at fault in concluding, as we hereby do, that the alibi defence did not hold. To our mind, it amounted to nothing more than a baseless afterthought.

42. On the 4th and last issue as to whether the sentence meted on the appellant was harsh and excessive, it is noteworthy that the learned Judge declined to vary the same, holding that the sentence imposed was appropriate and by no means excessive. The appellant's appeal was found to be devoid of merit and dismissed and, consequently, the conviction and sentence upheld.

43. Section 361(1) (a) of the *Criminal Procedure Code* provides that:

> " A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High court in its appellate jurisdiction on a matter of law and the Court of Appeal shall not hear an appeal under this section-
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> i. on a matter of fact, and severity of sentence is a matter of fact; or
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> ii. against sentence, except where a sentence has been enhanced by the High court, unless the subordinate court had no power under section 7 to pass the sentence."

44. From the foregoing provision, it is clear that severity of a sentence is a matter of fact and that, therefore, this Court on second appeal will only interfere with a sentence if the same is unlawful. It is also trite that sentencing is purely the exercise of discretion of the trial court. This Court has also pronounced itself on its limited power to interfere with the discretion of the trial court in sentencing. For instance, in the case of Francis Nkunja Tharamba vs. Republic (2012) KECA 29 (KLR), the Court stated:

> " ...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that

the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere." [Emphasis added]

45. The Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) (12 July 2024) whilst restating the powers of the Court of Appeal in sentencing stated:

> " 48. Before further delving into the question of the constitutionality or otherwise of the sentence, we must take cognizance of provisions of section 361(1) of the *Criminal Procedure Code* which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and that Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court."

46. With regard to the legality of the mandatory minimum sentences provided for under the *Sexual Offences Act*, the Supreme Court delivered itself in the same decision thus:

> "49. The Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction.
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> .....
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> 66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute must be based not only on evidence and sound legal principles, but on an in- depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed." (See MGK vs. Republic [2020] eKLR).

47. Having carefully considered the record of appeal, the impugned judgment of the two courts below, the rival submissions of the appellant and of the State Counsel, the cited authorities and the law, we can only conclude that the statutory sentence meted on the appellant was lawful and by no means harsh or unjust. Consequently, we hereby order and direct that:

    a. The appellant's appeal be and is hereby dismissed in its entirety; and

    b. The judgment of the High Court of Kenya at Voi (E. M Muriithi J.) dated 9th July 2015 in Criminal Appeal No. 19 of 2014 be and is hereby upheld.

Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL, 2025

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR