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Mwanyengela v Republic (Criminal Appeal E005 of 2023) [2024] KECA 561 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 561 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E005 OF 2023

JW LESSIT, PM GACHOKA & GV ODUNGA, JJA

MAY 24, 2024

BETWEEN

BENSON MWAMELA MWANYENGELA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Voi (Farah S. M Amin, J.) delivered on 9th October 2018 from the original Wundanyi Criminal Case No. 11 of 2017 in Voi HCCRA No. 89 of 2017)

JUDGMENT

1. Benson Mwamela Mwanyengela, the appellant, was charged in Count I, with the offence of rape contrary to Section 3(1)(a)(b) and (3) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 22nd March, 2017 at around 3.00 am at Wumingu Location within Taita Taveta County, he intentionally and unlawfully caused his penis to penetrate the vagina of DNK, the complainant, without her consent. The appellant also faced an alternative charge of committing indecent act with an adult contrary to Section 2(1) as read with Section 11(A) of the *Sexual Offences Act*. In Count II, the appellant faced the charge of unnatural offence contrary to section 162(a) (i) of the Penal Code, the particulars being that on 22nd March, 2017 at around 3.00 am at Wumingu Location within Taita Taveta County the appellant had anal knowledge of DNK against the order of nature. Just like in the first count, there was an alternative count of committing indecent act with an adult Contrary to section 2(1) as read with section 11(A) of the *Sexual Offences Act*.

2. The prosecution's case was that on 22nd March 2017 at 3.00 am, PW2 AWM, a daughter to the complainant was in her room with her boyfriend, PW3, when she heard a person enter the appellant's room. The appellant who was their landlord was staying in a room next to hers. The man called her but she did not respond. She then heard the man threatening that "today you will know me". Upon checking, she saw that the man was the appellant and shortly thereafter, the appellant switched off

the security lights, before entering the complainant's room, about 1 metre away from hers. It was her evidence that the appellant was there for 3 minutes and shortly after the appellant entered the complainant's room, she heard the complainant scream. She was able to see the appellant through the window since there was moonlight. Although she searched for a weapon, she was unable to get one. After the appellant left the complainant's room, she went there and found the complainant touching her buttocks with her hand and the complainant informed her that the appellant had raped her in her vagina and in her anus. Although the complainant was wearing a skirt and T-shirt, she had no underpants since she had a catheter for urinating.

3. On examining the complainant, PW1 saw colourless fluid oozing from her vagina and from her anus. On the floor she saw a condom and wrappers and the complainant was bleeding from the stool. After that she took the complainant to the hospital and reported the matter to the police. It was her evidence that her boyfriend, PW3 stood outside when she entered the complainant's room. According to PW2, she was scared and did not scream. In her evidence, she had never seen the appellant enter the complainant's room before and she had no grudge with the appellant.

4. PW3, AKS , confirmed that on that night, he was in the bedroom with PW2 sleeping when at 3. 00 am, the appellant returned, put off the lights and called PW2, but receiving no response warned that they would know him. He then saw the appellant enter the complainant's bedroom where he stayed for 3 minutes. While the appellant was inside, he heard screams. It was his evidence that when the appellant arrived, though he was asleep, the lights were on.

5. Dr. Mohamed Machi, who testified as PW1 examined the complainant, a 54 year old lady who had suffered a stroke and had developed an abnormality in her speech arising from the damage to her central nervous system hence could not express herself well. She also had a catheter in situ. On examination, he found that the complainant had no tear or stains on the clothes and was in fair general condition; that there were visible bruises on the vaginal wall and labia and hymen was missing; that there were bruises on the anal region and watery discharge in the vagina with presence of bloody faecal matter in the anal region; though there were no spermatozoa, he found urinary tract infection, and was of the view that the watery discharge was alarming. He stated that a condom was collected at the scene as well as pubic hair from the appellant for the purposes of carrying out a DNA test. In his opinion, there was forced penetration of the complainant.

6. PW4, PC Simon Ndoloi, took over the investigations from PC Mugendi. It was his evidence that the complainant's statement was not taken because she was unwell and could not talk. However, condoms were found at the scene and the investigations revealed that the appellant penetrated the complainant's anus and vagina with his penis.

7. In his sworn defence, the appellant stated that he returned home at 1.00 am drunk and slept till 8.00 am the following morning when he was woken up by police officers who told him that he had gone into the room of the complainant who screamed. He however denied entering the complainant's room. According to his evidence, he had given parties a notice to leave his premises for non-payment of rent but the complainant and her daughter ignored though he was unable to tell for how long they had defaulted. In cross- examination, he confirmed that on 22nd March, 2017 he was in his house at 3.00 am and that the complainant and PW2 had been his tenants for 4 years and that they were living in the same compound. He confirmed that PW2 could see him from her house as there were lights in and out. In his evidence, PW2 was in the next room with another man.

8. At the conclusion of the case, the learned trial magistrate found that the appellant was properly identified by PW2 and PW3 as the man who was seen entering the complainant's room at night; that he was also heard threatening the complainant and PW2; that the complainant informed PW2 that

the appellant had raped and sodomised her; that the medical report corroborated the fact of rape and sodomy; that the appellant's defence of the existing grudge arising from non-payment of rent was not established; that the appellant's defence was a mere denial of the prosecution case and evidence; that there was overwhelming evidence against the appellant; that the case was proved beyond reasonable doubt and that the appellant was guilty as charged in both counts I and II. The appellant was thus convicted in the two counts and sentenced to ten (10) years imprisonment in count I and twenty one (21) years imprisonment in count II, both sentences running consecutively.

9. Aggrieved, the Appellant lodged an appeal before the Voi High Court in Criminal Appeal No. 89 of 2017 based on the grounds that the whole case was a total fabrication; that the prosecution did not prove its case beyond reasonable doubt to warrant a conviction; that the sentence ought to run concurrently and not consecutively; that no investigation was conducted in the case; and failure to consider his sworn defence.

10. On 9th October, 2018, Farah Amin, J dismissed the appeal and upheld the learned trial Magistrate conviction and sentence. According to the Learned Judge, the appellant failed to demonstrate the error in both law and principle.

11. The appellant has appealed to this Court contending the plea taking exercise was defective; that the respondent failed to discharge the burden of proof beyond reasonable doubt contrary to sections 109 and 110 of the *Evidence Act*; that the respondent's evidence was inconsistent and contradictory contrary to section 163(1)(c) of *Evidence Act*; for relying on the evidence of a single witness which was incredible and insufficient to sustain a safe conviction; and that the conviction was against the weight of the evidence. The appellant urged us to allow his appeal, quash the conviction and set aside the sentence.

12. We heard the appeal on the Court's GoTo virtual platform on 18th December 2023 when the appellant appeared in person from Manyani Prison while learned Senior Principal Prosecution Counsel, Mr Alex Gituma, appeared for the respondent. Both the appellant and Mr Gituma relied entirely on their written submissions which we have considered.

13. This being a second appeal, this Court's mandate is limited by section 361(1)(a) of the Criminal Procedure Code. In that regard, in the case of Peter Osanya v Republic [2016] eKLR this Court stated:

> " Section 361(1)(a) of the Criminal Procedure Code limits our jurisdiction in second appeals like this one to only matters of law. That provision has received judicial interpretation in numerous decisions of this Court such as Chemogong V. Republic [1984] KLR 611, Ogeto V Republic [2004] KLR 14 And Koingo V Republic [1982) KLR 213 amongst others. In the latter case, it was pronounced:-
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> "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 it is based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karasi S/O Karanja V. R. [1956] 17 E.A.C.A 146)" [Emphasis added]

14. This position was restated in in Karani v R [2010] 1 KLR 73 that:-

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to

consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

15. We are mindful of the position adopted by this Court in Njoroge v Republic [1982] KLR 388 that:

> " On a second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence."

16. We are also guided by the decision in Adan Muraguri Mungara v R CA Cr App No 347 of 2007 where it was held thus:

> " As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by 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."

17. We agree that where the first appellate court fails to evaluate the evidence and subject it to fresh scrutiny, that may be a ground for a second appeal. That was the position adopted by this Court in Jonas Akuno O'kubasu v Republic [2000] eKLR where it was held that:

> " It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it… On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles."

18. We must point out, with due respect that the judgement of the High Court fell short of the legal expectations. Apart from simply stating that it had a duty to re-evaluate the evidence, there is nothing in the judgement to show that the said court actually re-evaluated the evidence. Re-evaluation of evidence is not the same as rehashing the evidence, which is what the learned Judge did. In our view- re-evaluation of the evidence requires a re-examination of the evidence and analysis of the same in order to arrive at a decision whether, in arriving at its decision, the trial court properly addressed itself to the evidence that was adduced before it. This approach was restated in the decision of the Supreme Court of India in Ganpat v State of Haryana (2010) 12 SCC 59. 4. where the court set out the principles to be borne in mind by a first appellate court while dealing with appeals and stated thus:

    a. "There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.

    b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.

    c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.

d. When the trial Court has breached provisions of *the constitution* or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question."

19. This would mean that, contrary to the requirements of section 169 (1) of the Criminal Procedure Code, there was no determination or pronouncements made by the court on the grounds raised by each of the respondents in relation to their peculiar facts. Section 169(1) specifies that:

> Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

20. Emphasising on the mandatory requirements of a judgment as stipulated by section 169(1), this Court in the case of *Kungu v Republic (Criminal Appeal 103 of 2018)* [2023] KECA 1452 (KLR) observed:

> " What that section stipulates is not a mechanical and mathematical formulae for writing a judgment. It is, rather, a substantive requirement that is aimed at ensuring that a court has analyzed and weighed the prosecution and defence evidence in its totality rather than each separately and in isolation." (emphasis ours)

21. Similarly, in the case of Geoffrey Muchugia Gitonga & another v Republic [2020] eKLR it was observed that:

> " To this we can only add that judgment writing is an art. The building blocks are provided by section 169 aforesaid. It cannot therefore entail a simple copy-and-paste exercise of the evidence recorded and pleadings. The Judge must analyze the evidence, determine what is and what is not important in the context of the case, analyze it along with submissions, distill the important and relevant points, apply the applicable law to the evidence and then present all of it as a determination of the issue at hand in a manner that is easily understood, not only by judges, judicial officers and advocates but by a broad audience."

22. In our view, where the first appellate court fails in its duty, this Court must as a matter of law delve into the evidence adduced before the trial court in order to determine whether it was sufficient to sustain the conviction.

23. The appellant was charged with rape and sodomy. Under section 3(1) of the *Sexual Offences Act*:

> " A person commits the offence termed rape if-
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> a. He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
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> b. The other person does not consent to the penetration; or
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> c. The consent is obtained by force or by means of threats or intimidation of any kind."

24. The ingredients of the offence of rape therefore include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent.

25. In the case of Republic v Oyier (1985) KLR 353, this Court held as follows:-

> " 1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
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> 2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.
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> 3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."

26. In this case, PW2 and her mother, the complainant were the appellant's tenants. The appellant seemed to have been unhappy about their erratic rent payments and notified them to vacate but the complainant and PW2 never complied. On 22nd March, 2017, when the complainant and PW2 were asleep, the appellant arrived at 3.00 am and started calling PW2. At that time PW2 was with PW3, her boyfriend while the complainant was sleeping in a different room. When PW2 failed to respond, the appellant threatened the complainant and PW2 that they would know him. He then proceeded to the complainant's room and shortly thereafter, screams were heard from that room. Three minutes after the appellant entered the room, he left. PW2 went to the complainant's room and confirmed that the complainant had been raped and sodomised and the matter was reported to the police.

27. PW2's evidence was corroborated by PW3 while PW1 confirmed that the examination of the complainant revealed that she had been raped and sodomised.

28. Both PW2 and PW3 testified that they were able to clearly see the appellant who was a person well known to them. In his evidence, the appellant confirmed that he was within the vicinity at the time when the incident took place having returned home drunk. He also confirmed that he had a bone to pick with the complainant and PW2 who declined to vacate his premises despite having warned them. From the evidence, it was clear that the appellant had both the motive and the opportunity to commit the offence. The evidence of PW2 and PW3 placed him squarely at the scene and identified him as the person who committed the offence. In our view, in light of the direct evidence of PW2, it was not necessary for PW2 to have been treated as an intermediary. Her evidence was that of a person who witnessed the offence as opposed to one who was relying on the information given to her by the complainant. Accordingly, we find no substance in the contention that PW2 ought not to have been treated as an intermediary. Her being treated as such was clearly an error but one which did not prejudice the appellant and nothing turns on it.

29. Having subjected the evidence adduce to a fresh scrutiny as we are bound, in the circumstances of this case to do, we find that there was sufficient evidence to warrant sustaining the decision of the trial court. The 1st appellate court therefore arrived at the correct decision albeit without undertaking the legal mandate placed on it.

30. In the premises, we find no reason to disturb the conviction.

31. As regards the sentence, the principles guiding interference with sentencing by the appellate Court were properly, in our view, set out in S v Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> “ A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”.’

32. This Court dealt extensively with the principles that guide interference with sentencing in Bernard Kimani Gacheru v R. [2002] eKLR where it held that:

> “ It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. The position was stated succinctly by the Court of Appeal for East Africa in the case of OGOLA s/o OWOURA VS REGINUM (1954) 21 270 as follows:-
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> ‘The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James V R., (1950) 18 E.A.C.A 147:
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>> “ It is evident that the Judge has acted upon some wrong principle or overlooked some material factor." To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. V Sher shewky, (1912) C.C.A. 28 T.L.R. 364."’
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> Ogola s/o Owoura’s case has been accepted and followed by this Court and the High Court on matters of sentence for many years. What was stated there still remains good law to-date. For example, in the High Court case of WANJEMA VS R. 1971 E.A 493, more particularly, on page 494 letters (D) to (E) this is what that court said:-
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>> “ A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned, a custodial order was appropriately made. But that which was made cannot possibly be allowed to

stand. An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this court's interference with it on each of these grounds. No account was taken as it should have been, of the fact that the appellant pleaded guilty: Skone (1967), 51 Cr. App. R. 165 and Godfrey (1967), 51 Cr. App. R. 449 (This admits of no doubt because the magistrate awarded the maximum sentence to this first offender; which of itself is unusual.) Matter extraneous to the trial was acted upon for the magistrate bore in mind that he had "issued a warning only last week that dangerous drivers will be dealt with severely by the court.'

In the appeal before us, the learned trial Judge made comprehensive notes on sentence. He took into account everything that was urged before him by the appellant's advocate. He did not disregard any material factor, nor did he take into account any matter immaterial. Similarly he did not act on any wrong principle. The very same matters that the appellant urged before us were urged before the learned trial Judge and he took all of them into account. We fully agree with the learned trial Judge that the appellant, as a police officer, abused his position and used the firearm against an innocent member of the public. There was absolutely no justification or reason for the appellant to purport to place the deceased and her boyfriend under arrest, let alone to open fire and shoot the deceased as she followed the appellant's command to be escorted to the police station, or merely because she asked for reasons for their arrest. The sentence was entirely in the discretion of the learned trial Judge and we are satisfied that he exercised that discretion properly and on the facts before him. The sentence he gave was well deserved and was not manifestly excessive. We have found absolutely no reason to interfere with it and for these reasons, we order this appeal to be and is hereby dismissed in its entirety. Orders accordingly."

33. In the case of Muryani Nyanje v Republic [2006] eKLR, the court opined that:

> " Rape is one of the most heinous and demeaning offences that a man can commit against a woman. It leaves the woman traumatized for the rest of her life."

34. Similarly, the court in Lekasia Lemalia v Republic [2017] eKLR stated that:

> " The offence of rape is undoubtedly a terrible violation of one's body. It is a terrible and traumatic wrong against the victim."

35. While we find no compelling reason to interfere with the sentence imposed by the trial court, the appellant took issue with the imposition of the sentence to run consecutively.

36. Section 14 of the Criminal Procedure Code provides for circumstances in which a court can direct sentences to run concurrently or consecutively and provides in part as follows:-

"(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of

imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

37. Judiciary Sentencing Policy Guidelines gives guidance on the issue in the following terms:

    13. Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.

    14. The discretion to impose concurrent or consecutive sentences lies in the court.

38. In the case of Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97, the predecessor of this Court in a judgment read by Sir Joseph Sheridan stated that the practice is that where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, concurrent sentences ought to be imposed. Similarly, this Court in Peter Mbugua Kabui v Republic [2016] eKLR expressed itself on the matter as hereunder:

> " As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."

39. The same position was adopted in Peter Mageria v Republic [1983] eKLR where this Court held that:

> " It has been said many times that where different offences form part of one transaction and are committed at the same time – as was the case here – then the sentences should be made to run concurrently unless there are exceptional circumstances for not doing so."

40. This Court in Peter Mbugua Kabui v Republic [2016] eKLR expressed itself on the matter as hereunder:

> " As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7 (1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totalling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful" We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same."

41. We have considered the sentence imposed and find no reason to interfere with the exercise of the discretion by the learned trial magistrate as regards the sentence. Accordingly, find no merit in the appeal which we hereby dismiss in its entirety.

42. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

J. LESIIT

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

………………………

JUDGE OF APPEAL

G.V. ODUNGA

………………………

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR