



**Chome v Republic (Criminal Appeal 92 of 2022)
[2023] KECA 69 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 69 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL 92 OF 2022
P NYAMWEYA, SG KAIRU & JW LESSIT, JJA
FEBRUARY 3, 2023**

BETWEEN

ONESMUS SHAURI CHOME APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Garissa (Mutuku, J) delivered on February 12, 2013 in High Court Criminal Appeal No 29 of 2012)

Supreme Court decision in Francis Karioko Muruatetu & Another v Republic only applies to murder cases.

The main issues for determination were whether the accused's counsel proceeding to present the accused's defense, despite the trial court's failure to inform the accused of his options under section 211 of the Criminal Procedure Code, constituted the accused fully exercising his rights under section 211; and whether the principle established in Francis Karioko Muruatetu & Another v Republic [2017] eKLR, which pertain to the unconstitutionality of mandatory minimum/maximum sentences, applied to cases under the Sexual Offences Act. The Court of Appeal held that the accused's advocate act of proceeding with the defence and the appellant and his witnesses having the testified, the appellant duly and fully exercised his rights notwithstanding the omission by the court to explain as required by section 211. On mandatory maximum/minium sentences, the Court of Appeal held that the decision by the Supreme Court in Francis Karioko Muruatetu & Another v Republic [2017] Eklr only applies to murder cases.

Reported by John Ribia

Criminal Law – defilement – ingredients – elements - what were the ingredients of the offence of defilement – Sexual Offences Act, CAP 63A.

Criminal Procedure – defence – options that an accused had on defence – obligation of the trial court to inform the accused person of their options in defence after they had been declared to have a case to answer - whether the trial court's failure to comply with section 211 of the Criminal Procedure Code, that obliged the court to inform an accused of the three options available to them in mounting their defence after they had been declared to have a



case to answer constituted a procedural irregularity that would prejudice an accused's right to a fair trial - whether the accused's counsel proceeding to present the defense, despite the trial court's failure to inform the accused of his options under section 211 of the Criminal Procedure Code, constituted the accused fully exercising his rights under section 211 – Criminal Procedure Code, Cap 75, 211.

Constitutional Law – fundamental rights and freedoms – right to fair trial – claim of unconstitutionality of mandatory minimum/maximum sentences – *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR - whether the principle established in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, which pertained to the unconstitutionality of mandatory minimum/maximum sentences, applied to cases under the Sexual Offences Act - *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR; *Francis Karioko Muruatetu & Another v Republic* [2021] eKLR.

Brief facts

The instant appeal was a second appeal by the appellant, Onesmus Shauri Chome. Following a trial before the resident Magistrate's Court at Hola, the appellant was convicted for the offence of defilement contrary to section 8(1) and 8(3) of the Sexual Offences Act, No 3 of 2006 in a judgment delivered on August 4, 2011. He was sentenced to imprisonment for a term of twenty (20) years.

The appellant in his supplementary grounds of appeal complained that the High Court erred in failing to consider that no formal documentary evidence was produced to prove the age of the complainant; failing to find that the trial court had no jurisdiction to pass the sentence that it did; and failing to comply with section 211 of the Criminal Procedure Code prior to recording the defence. Other complaints were that no certified original or photocopy of the P3 Form was produced as an exhibit; that the mandatory minimum sentence of 20 years meted out under section 8 of the Sexual Offences Act was in conflict with section 216 and 329 of the Criminal Procedure Code and was unconstitutional.

Issues

- i. What were the ingredients of the offence of defilement?
- ii. Whether the trial court's failure to comply with section 211 of the Criminal Procedure Code, that obliged the court to inform an accused of the three options available to them in mounting their defence after they had been declared to have a case to answer constituted a procedural irregularity that would prejudice an accused's right to a fair trial.
- iii. Whether the accused's counsel proceeding to present the accused's defence, despite the trial court's failure to inform the accused of his options under section 211 of the Criminal Procedure Code, constituted the accused fully exercising his rights under section 211.
- iv. Whether the principle established in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, which pertained to the unconstitutionality of mandatory minimum/maximum sentences, applied to cases under the Sexual Offences Act.

Held

1. The Court of Appeal's mandate on a second appeal was limited to matters of law.
2. In considering whether the offence of defilement was proved to the required standard, two ingredients were necessary, the age of the complainant and penetration. The two elements had to be proved to the standard required.
3. The complainant was 13 years when the offence was committed. The age of the complainant was established to the required standard. On the ingredient of penetration, the complainant testified that she had sexual intercourse with the appellant on numerous occasions. Even without a P3 Form, there was a basis for the conclusion reached by the trial court that the offence was proved. Under section 124 of the Evidence Act no corroboration was required. Moreover, the evidence of the doctor who examined the complainant stated in evidence that the complainant's hymen was not intact. There was penetration. The doctor also signed the P3 Form and produced it as an exhibit without any objection.



- by the appellant. The age of the complainant as well as the ingredient of penetration, were proved to the required standard.
4. The appellant having been charged with an offence under the Sexual Offences Act, 2006, the trial court had the requisite jurisdiction to sentence the appellant in accordance therewith.
 5. The record of proceedings did not show that there was compliance with that section 211 of the Criminal Procedure Code. It was incumbent upon the trial court to comply with the command of section 211 and the omission to do so was irregular. However, the record showed that throughout the trial including when the matter was called out for defence hearing on July 11, 2011, the appellant was represented by an advocate. On that date, counsel for the appellant was recorded as having stated that “the accused will adduce sworn evidence. We intend to call three witnesses. We are ready to proceed.” The appellant thereafter proceeded to give evidence on oath, was cross-examined and re-examined. His three witnesses also gave evidence on oath and were also cross-examined. In effect, the appellant duly and fully exercised his rights notwithstanding the omission by the court to explain as required by section 211. The omission by the court to comply with section 211 did not in any way prejudice the appellant or otherwise occasioned a failure of justice.
 6. Whereas the appellant challenged the mandatory nature of the sentence under the Sexual Offences Act, the principle laid out in *Francis Karioko Muruatetu & Another v Republic* [2021] eKLR on mandatory minimum/maximum sentences was only applicable to murder cases.

Appeal dismissed.

Citations

Cases

Kenya

1. *Gathire, Samuel Kabinga & another v Republic* Criminal Appeal 45 & 60 of 1996; [1997] eKLR - (Mentioned)
2. *Karani v Republic* Criminal Appeal 30 of 2010; [2014] eKLR - (Explained)
3. *Muiruri Njoroge v Republic* Criminal Application 115 of 1982; [1983] eKLR - (Mentioned)
4. *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* Petition 15 & 16 of 2015; [2021] KESC 31 (KLR) - (Explained)
5. *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR) - (Mentioned)
6. *Okiru v Republic* Criminal Appeal 266 of 2011; [2014] eKLR - (Mentioned)
7. *Wambui, Eliud Waweru v Republic* Criminal Appeal 102 of 2016; [2019] eKLR - (Explained)

Uganda

Francis Omuroni v Uganda Criminal Appeal No 2 of 2000 - (Explained)

Statutes

Kenya

1. Constitution of Kenya In general - (Cited)
2. Criminal Procedure Code Act (cap 75) sections 7 (1) (b), 211, 216, 329- (Interpreted)
3. Evidence Act (cap 80) sections 66, 124- (Interpreted)
4. Sexual Offences Act, 2006 (Act No 3 of 2006) section 8 (1)(3)- (Interpreted)

Advocates

None mentioned



JUDGMENT

1. This is a second appeal by the appellant, Onesmus Shauri Chome. Following a trial before the resident magistrate's court at Hola, the appellant was convicted for the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act*, No 3 of 2006 in a judgment delivered on August 4, 2011. He was sentenced to imprisonment for a term of twenty (20) years.
2. The particulars of the offence were that between the month of September 2010 and January 2011 at Zubaki Location in Tana River District within Tana River County, he intentionally caused his penis to penetrate the vagina of MB, a child aged 13 years. The appellant's first appeal against the conviction and sentence was dismissed by the High Court at Garissa (S N Mutuku, J) in a judgment delivered on February 13 2013.
3. The factual background is that the complainant, MB (PW1), was at the material time a student in class five at Lava Primary School. She lived with her family, including her mother and father (PW2 and PW3 respectively) at a place known as Kibuyu. The appellant, a nurse attached to Hola District Hospital who also ran a private clinic resided in the same plot as PW1's family.
4. According to MB, the appellant was in the habit of sending her on errands to the shop. He would give her money in reward. In the course of time, the appellant told MB, "that he wanted to have sex" with her. Initially, she declined. She pointed out to him that, "he is grown up" and that she was "a child". MB stated in her evidence that the appellant told her that he would give her drugs to use to prevent pregnancy. She narrated that the appellant was living alone in his house at that time and that:

"Later, we agreed that I would go to his house at night. At about 10.00pm, I went to his house. I opened our bedroom and I went to the accused person's house. When I went to the accused person's house, we had sexual intercourse. After having sex the accused gave me drugs which I took. The accused did not use any protection when we had sexual intercourse with him. It was the first time I was having sex. During that night we had sex on one occasion."
5. She went on to testify that after that, "we continued with our relationship and we had sex" She enumerated other incidents when that had happened and that on each occasion the appellant gave her drugs to prevent pregnancy. It was MB's testimony that in January 2011, after having sexual intercourse with him, the appellant promised to marry her, and asked her to go to Mombasa where he would later join her; that to execute that plan she bought clothes with the money provided by the appellant and took them to her friend, AR (PW6), a fellow student at her school to avoid any questions by her mother. She stated that on February 27, 2011 at about 8.00 pm she left her house after her parents had slept, took all her belongings and went to PW6's house and spent the night there having planned to go to Mombasa; that in the morning, when her friend PW6 enquired from her whether she was going to school, she told her that she would not do so as her uniform was dirty; that she remained in PW6's house until her mother (PW2), accompanied by others knocked on the door later that day.
6. MB's mother (PW2) stated that her family comprised of her husband (PW3) and eight children including MB and lived in a rented house in Kibuyu; that MB was "born during the El Nino" is 13 years old and a pupil in class five in [particulars withheld] Primary School. She recalled that on February 27, 2011 she was at home with her family, including MB, and went to sleep at about 9.00 p.m. She woke up about midnight and heard one of the children crying. On checking, she realized that MB was missing. She alerted her husband. They went out looking for her in the neighbourhood but did not find her.



7. The following morning, PW2 went to MB's school but MB was not there. Upon making enquiries at the school, PW6 revealed that she had left MB at her house and that MB was planning to travel to Mombasa. With that information, PW2 sought assistance from the district officer's (D.O's) office and accompanied by two administration police officers, proceeded to PW6's house where they found MB. They took her, and her bag, to the D O's office, where MB narrated what had transpired between her and the appellant culminating with the plan to move to Mombasa.
8. MB's father (PW3) stated that he was at home in Kibuyu on February 27, 2011 when his wife (PW2) woke him up at 3.00 am and informed him that their daughter, MB, was missing. Their attempts to trace her that night and the following morning did not bear fruit but on his returning home in the evening, he found her at home. On interrogating her, he stated that she informed him "that they had arranged with the accused, that is Chome, that the said Chome would marry her." He stated that he knew the appellant as his neighbour and that on March 1, 2011, he went to the D O's office accompanied by his wife (PW2), MB and other people and thereafter to the police station where they reported the matter. He stated that MB is 13 years old, that she was born on December 1, 1997 and was a pupil in class five at [particulars withheld] primary school, and that the appellant knew that MB was a pupil.
9. Police constable Richard Kipyegon (PW8) of the crime office Hola Police Station was the investigating officer. He was on duty on March 1, 2011 at about 8.30. am when MB accompanied by her parents (PW2 and PW3) and a teacher from [particulars withheld] primary school reported to the police station having been referred there by the D O's office. On interrogating MB, she stated that she had spent the night of February 27, 2011 at the appellant's house and that they had sexual intercourse; that the appellant had asked her to sneak out of home and carry her luggage so that they could travel to Mombasa. He stated that inside MB's bag brought to the station by her mother were clothes and some tablets. He accompanied MB and her mother to Hola District Hospital where MB was examined and her age assessed and a P3 Form filled out. He stated that he took the tablets to a doctor who informed him they were known as Postinor-2 used for pregnancy prevention. He stated further that the appellant presented himself at the police station on the same day and his statement recorded; that the appellant was subsequently summoned to the station and arrested on March 14, 2011 and issued with a free bond.
10. Dr Sultana Sherman (PW4) of Hola District Hospital examined MB on March 22, 2011 who presented with a history of defilement. She noted that her "hymen was not intact. There was penetration." She produced the P3 Form which she signed on March 22, 2011.
11. Other prosecution witnesses who testified before the trial court included SWW (PW5) the headteacher at [particulars withheld] primary school who recalled that PW2 reported at the School on February 28, 2011 that her daughter MB was missing; that he later accompanied PW2 to the D O's office where he interviewed MB and on inquiring from her why she had not gone to school, she informed him that "she was with a doctor the previous night"; that he was also present when MB's bag was opened and clothes and medicine retrieved.
12. MB's friend, AR (PW6), a student in class six in [particulars withheld] primary school stated that she was at home on February 28, 2011 at about 6.00 am preparing to go to school when MB went to her house carrying a bag and wearing home clothes; that she informed her mother (PW7) that MB had come and she left. She stated that MB did not go to school on that day; that when she (AR) returned home at lunch time, she did not find her mother or MB.
13. AR's mother (PW7) stated that she was at home on February 28, 2011 at about 6.00 am preparing breakfast when MB arrived carrying a bag; that she (MB) claimed to have been chased away by her



- parents and requested her for bus fare to travel to Mombasa but that she was not in a position do so; that she left MB in her house and went to her parents; that MB's mother later picked her up from the house.
14. In his sworn statement in defence, the appellant denied defiling the complainant and asserted that he was framed for having married, as his second wife, a relative of the complainant's mother's family. He stated that on February 28, 2011 at 4.00 pm he was at his private clinic when he got information that his wife had been arrested; that he proceeded to the D O's office and found his wife and a police officer where a demand for kshs 20,000 was made of him "so that the issue could be solved" but he declined to pay and thereafter claims were made that he had defiled the complainant. He stated that at the police station, the complainant alleged that she was defiled from March 2010 whereas he had reported to Hola in April 2010; that the complainant also said that she was defiled again on February 27, 2011 in the evening.
 15. Under cross examination, the appellant stated that "we used to live with the complainant and her parents in the same plot. I started living in the plot in the month of May 2011" and that he was aware that "she is a primary school pupil." He maintained that the charges were framed up as "the complainant's mother alleged that I grabbed their relative a(sic) wife".
 16. The appellant's wife (DW2) stated that she was at home on February 28, 2011 at 1.00 pm when the complainant's mother accompanied by administration police officers arrived and requested her to accompany them to the D O's office; that at the DO's office claims were made that she had given the complainant money; that she was asked about her husband who was then called; and that the husband and the police officer were then left in the office; that the following day at the police station where they had gone to report that the police officer had demanded a bribe, the complainant's mother alleged that the appellant had defiled her. She maintained that there was a problem between her and the complainant's mother because her first husband was a relative of the complainant's parents.
 17. MHH (DW4) a resident of [particulars withheld] stated that on February 28, 2011, she witnessed the arrest of her neighbour DW2 and that she was not aware of the cause of the grudge between the complainant's mother and DW2.
 18. Ilu Saidi (DW3) a boda boda rider testified for the appellant. He stated that he transported the appellant to the D O's office on February 28, 2011; that earlier that month, he had met the complainant in a disco when she informed him that she was escaping from home and was planning to go to Mombasa as her mother was disturbing her; that later he again met her and she claimed that her mother was forcing her to say that the appellant had defiled her.
 19. Having reviewed the evidence, the trial court was satisfied, that all the ingredients of the offence of defilement had been established to the required standard and, as already stated, convicted the appellant and sentenced him to 20 years imprisonment term.
 20. In his first appeal before the High Court, the appellant urged that the charge sheet was defective; that the prosecution did not prove its case to the required standard; that the evidence was contradictory; that the trial court was biased and that his mitigation was not considered and the sentence imposed was excessive. That appeal, as indicated, was dismissed in a judgment delivered on February 13 2013.
 21. In this, his second appeal, the appellant in his supplementary grounds of appeal complains that the High Court erred in: failing to consider that no formal documentary evidence was produced to prove the age of the complainant; failing to find that the trial court had no jurisdiction to pass the sentence that it did; and failing to comply with section 211 of the *Criminal Procedure Code* prior to recording the defence. Other complaints are that no certified original or photocopy of the P3 Form was produced



- as an exhibit; that the mandatory minimum sentence of 20 years meted out under section 8 of the *Sexual Offences Act* is in conflict with section 216 and 329 of the *Criminal Procedure Code* and is unconstitutional.
22. Expounding on those grounds before us on July 28, 2022, the appellant in orally highlighting his written submissions urged that the evidential threshold was not met; that with regard to the age of the complainant, no birth certificate or age assessment report was produced; that sentencing under the Sexual Offences Act is dependent on the proved age of the complainant and in that regard the evidence on the age of MB was far below standard required by law as both the trial and High courts relied on mere estimations of her age. The appellant referred *Muiruri Njoroge v Republic*, Criminal Appeal no 115 of 1982, (a decision of this court reported as *Muiruri Njoroge and Joseph Waweru Koimbatha v Republic* [1983] eKLR) for the argument that a court of law should not act on mere assertions not supported by evidence; that although PW8 stated that an age assessment was carried out, the report was not produced; and that age must be proved beyond reasonable doubt. It was submitted that on account of that omission, there was a failure of justice.
 23. As regards jurisdiction of the trial court, the appellant submitted that the trial magistrate did not have the mandate to give a sentence beyond 7 years. Reference was made to section 7(1)(b) of the *Criminal Procedure Code*; that the magistrate ought to have handed over the case to a superior magistrate above his rank; that the sentence is therefore illegal.
 24. The appellant further submitted that immediately the trial court determined that he had a case to answer, no explanation regarding the provisions of section 211 of the *Criminal Procedure Code* was given; that he was not informed of his right to give evidence; and that his defence, including his alibi, was not adequately considered.
 25. The appellant contended further that penetration, a necessary ingredient of the offence, was not proved as the P3 Form produced was not certified and did not meet the requirements of the *Evidence Act*; that what was produced was a copy of the P3 Form “which was not certified at the lower court criminal registry by commissioner for oaths as required by section 66 of the *Evidence Act*”.
 26. As regards the sentence, the appellant submitted that the same, being a minimum sentence is unconstitutional as it deprives the trial court the judicial discretion to impose appropriate sentence based on the circumstances of the case.
 27. Learned senior principal prosecution counsel Mr Mulamula holding brief for Vivian Kabage for the respondent, whose application for adjournment of the hearing of the appeal on grounds that Ms Kabage was attending a course in Nairobi was declined, stated that he was not in a position to respond to the appellant’s submissions.
 28. We have considered the appeal. Our mandate on a second appeal is limited. In *Karani v R* [2010] 1 KLR 73 this court stated:

“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.”



29. With that in mind, the first issue for consideration is whether the offence was proved to the required standard. Specifically, whether two of the necessary ingredients of the offence, namely the age of the complainant, and penetration, were proved to the standard required. As regards the age of the complainant, it is trite, as pronounced by this court in *Eliud Waweru Wambui v Republic* [2019] eKLR, that:
- “There is no doubt that in an offence such as faced the appellant, indeed in most of the offences under the Act where the age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt.”
30. There are concurrent findings by the trial court and the High Court that MB was 13 years when the offence was committed. On its part, the High Court after analysis concluded:
- “I am satisfied that the complainant was age 13 years. I have no reason to doubt the father and given the reason in the cited cases it is safe to settle on this age.”
31. Apart from the complainant’s own testimony that “I am 13 years old”, her mother (PW2) was stated that MB “is 13 years old”. PW 2 stated that MB was born during El Nino, and that she was in class five. In cross examination she stated that she gave birth to the complainant at home and that she had lost the clinical card. The complainant’s father was categorical that the complainant “is 13 years old. She was born on December 1, 1997. She is a pupil in class five...”.
32. The investigating officer (PW8) stated that the complainant was examined and the P3 Form filled and that age assessment was done, although the report on that assessment was not produced.
33. Based on the foregoing, there was evidence on the basis of which both courts concluded that the age of the complainant was established to the required standard. We have no basis for interfering with the concurrent findings in that regard. As the Uganda Court of Appeal stated in the often cited case of *Francis Omuroni v Uganda*, Criminal Appeal No 2 of 2000, apart from medical evidence, age may also be proved by birth certificate, “the victim’s parents or guardian and by observation and common sense.”
34. As regards penetration, the appellant has taken issue with the P3 Form asserting it was not certified. However, MB’s evidence was that she had sexual intercourse with the appellant on numerous occasions. The learned trial magistrate was impressed by her candor. He remarked in his judgment that:
- “I had the opportunity and or advantage of observing the demeanor of PW1. She was calm and confident a fact which was appreciated by the defence counsel which made the counsel to remark in her submissions that the complainant willingly engaged in sexual intercourse. My assessment of her demeanor demonstrated that she was truthful in her testimony.”
35. Even without the P3 Form, there was a basis therefore for the conclusion reached by the trial court that the offence was proved. Under section 124 of the *Evidence Act* no corroboration was required. Moreover, the evidence of Dr Sherman (PW4), who examined the complainant stated in evidence that the complainant’s “hymen was not intact. There was penetration”. He stated further that he signed the P3 Form and produce it as an exhibit (Exhibit 2) without any objection by the appellant’s counsel. We are therefore satisfied, as were the two courts below, that the age of the complainant as well as the ingredient of penetration, were proved to the required standard.



36. As for the complaint that the trial magistrate did not have the mandate to give a sentence beyond 7 years, we are entirely in agreement with the decision of the learned judge of the High Court that “the trial magistrate had jurisdiction to try the case.” The trial was presided over by MO Obiero, a resident magistrate. Section 7(1)(b) of the Criminal Procedure Code provides that a subordinate court of the first class held by (a)...

“(b) a resident magistrate may pass any sentence authorized by law for an offence under section 278, 308(1) or 322 of the Penal Code or under the Sexual Offences Act,2006.” [Emphasis added]

37. The appellant having been charged with an offence under the Sexual Offences Act, 2006, the trial court had the requisite jurisdiction to sentence the appellant in accordance therewith.

38. Next is the complaint that section 211 of the Criminal Procedure Code was not complied with. The record shows that on June 21, 2011, the trial court delivered its ruling that the prosecution had made a *prima facie* case against the appellant to warrant him to be placed on the defence. The matter was then fixed for hearing on July 11, 2011. Section 211 of the Criminal Procedure Code commands that:

“...if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does, so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, in the court shall then hear the accused, and his witnesses and other evidence (if any).”

39. The record of proceedings does not show that there was compliance with that provision. The appellant’s complaint in that regard is not without foundation. It was incumbent upon the trial court to comply with the command of section 211 and the omission to do so was irregular. However, the record shows that throughout the trial including when the matter was called out for defence hearing on July 11, 2011, the appellant was represented by an advocate. On that date, counsel for the appellant is recorded as having stated that “the accused will adduce sworn evidence. We intend to call three witnesses. We are ready to proceed.” The appellant thereafter proceeded to give evidence on oath, was cross examined and re-examined. His three witnesses, DW2 to DW4, also gave evidence on oath and were also cross examined. In effect, the appellant duly and fully exercised his rights notwithstanding the omission by the court to explain as required by section 211. In the circumstances, we do not think that the omission by the court to comply with section 211 in any way prejudiced the appellant or otherwise occasioned a failure of justice. See decisions of this Court in Samuel Kabinga Gathire & anor v Republic [1997] eKLR and Kossam Okiru v Republic [2014] eKLR.

40. Lastly, there is the complaint regarding the constitutionality or otherwise of the mandatory minimum sentence under section 8(3) of the Sexual Offences Act. The appellant, in effect, invites us to apply the principle in the Supreme Court decision in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR. However, we are unable to do so in light of the subsequent decision of the Supreme Court of July 6, 2021 in Francis Karioko Muruatetu & Another v Republic and Katiba Institute & 5 Others (amicus curiae) [2021] eKLR, which clarified that the principle in the earlier decision is only applicable to murder cases. In that regard the Supreme Court expressed that:

“...Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating



that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.”

41. All in all, we do not find merit in this appeal. It is dismissed in its entirety.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF FEBRUARY 2023.

GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P NYAMWEYA

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JUDGE OF APPEAL

J LESIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

