CD v Republic (Criminal Appeal 31 of 2022)
[2023] KECA 431 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KECA 431 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 31 OF 2022

JW LESSIT, SG KAIRU & GV ODUNGA, JJA

APRIL 14, 2023

BETWEEN

CD ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Mombasa delivered on 5th September 2018 by Hon Justice D.S. Majanja in High Court Criminal Appeal No 187 of 2017) Original Mombasa CM Criminal Case SO 334 of 2017)

JUDGMENT

1. This second appeal is against the judgement delivered on September 5, 2018 by Majanja, J in Mombasa High Court Criminal Appeal No 187 of 2017. Being a second appeal our mandate is limited by Section 361(1) (a) to consider issues of law only but not matters of fact that have been tried by the first court and re-evaluated on first appeal. In *Njoroge v Republic* [1982] KLR 388 it was held by this Court on the said mandate on a second appeal:

> " 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."

2. As to what constitutes "matters of law" in relation to this Court's jurisdiction as the second appellate court, the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others* [2014] eKLR characterised the three elements of the phrase

> " matters of law" thus:

"(a) the technical element: involving the interpretation of a constitutional or statutory provision;

(b) the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record; and (c)the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."

3. This Court however held in *Jonas Akuno O'kubasu v Republic* Kisumu Criminal Appeal No 69 of 1999 [2000] eKLR 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." [Emphasis ours].

4. It was similarly held 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."

5. 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."

6. The determination of this appeal must therefore be based on the above principles. We shall briefly visit the facts of the case purely to satisfy ourselves whether the two Courts below carried out their mandate as required in law.

7. The Appellant had been charged before the Chief Magistrates Court at Mombasa with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act*. He faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

8. The evidence before the trial court was that on the date of the incident, PW1 who had earlier on knocked on PW6's door while crying in search of one Zena was later seen in the company of the Appellant by PW6 who saw the Appellant buy juice for PW1 before leading PW1 into his (Appellant's) house.

9. According to PW1, she was lured by the Appellant to the Appellant's house where the Appellant removed her innerwear and defiled her. PW1 narrated the incident to PW2, her grandmother and PW3 and led them to the Appellant's house. PW4, a member of Port Reitz Community Policing to whom the report of the incident was made received the Appellant from the members of the public who had arrested and detained him and took him to Changamwe police station. Upon examination, it was found that PW1 had a broken hymen, an abrasion in the anal opening, a bloody discharge and was infected with HIV Aids.

10. The investigations were conducted by PW7 and at the completion of the investigations, the charges were levied against the Appellant.

11. In his defence, the Appellant denied that he committed the offence and asserted that the charges were maliciously instigated.

12. In his judgement, the learned trial magistrate found that the prosecution had proved all the ingredients of the offence, convicted him and sentenced him sentenced him to life imprisonment.

13. The Appellant appealed to the High Court on the grounds that the prosecution case was not proven beyond reasonable doubt; that his defence was not considered; that it was unsafe to rely on the uncorroborated unsworn testimony of PW1; and that the identification evidence was contradictory. His appeal to the High Court was dismissed by Majanja, J on September 5, 2018 who upheld both the conviction and sentence.

14. The Appellant was dissatisfied with the decision and filed a notice of appeal. Before us the Appellant has taken issue with the fact that the prosecution did not prove its case beyond reasonable doubt; that there was no sufficient evidence of penetration; that there was no evidence that the complainant was 11years; that there was no evidence that it was the Appellant who defiled the Complainant; that the learned trial magistrate relied on hearsay as the maker of the medical documents was not called, that there were contradictions in the prosecution evidence; and that the sentence was harsh and excessive in the circumstances.

15. It is the Appellant's case that though he was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, with the former defining the offence and the latter section 8(2) setting out the sentence for the offence of defilement with a child (minor) of eleven (11) years or less, the clinic card that was relied upon as evidence of age showed that the minor was born on 6/4/2005 hence was 11 years and 10 month at the time the offence was committed and therefore did not fall within the age ambit contemplated by section 8(2) of the *Sexual Offences Act*. The Appellant was of the view that the case of Hadson Ali Mwachongo v R KCA Cr App No 65 of 2015 was wrongly decided since the section under which he was charged referred to 11 years or less hence there was no lacuna. According to him, since the law does not provide for punishment for a victim who is above 11 years but below 12 years, such a victim ought to be deemed to be 12 years. In the Appellant's view, to hold otherwise, is an attempt to place a short fall in a statute that is occasioned by the legislature, on the shoulders of the person charged under that Act.

16. It was submitted that since the victim had to be examined twice to confirm her HIV status, it must be taken that there was uncertainty and dissatisfaction over the findings of the first examination. The Appellant wondered why it was not deemed fit to subject him to HIV test in light of the forgoing. In the Appellant's view, the failure to do that ought to lead to the conclusion that the prosecution did not prove its case beyond reasonable doubt since the evidence of HIV was meant to corroborate the prosecution's case.

17. The Appellant pointed out that there was contradiction in the evidence of PW1 and PW2 regarding the prior identity of the perpetrator by PW1. It was further pointed out that the lady who led PW1 and PW2 to the home of the perpetrator was never called as a witness. On the authority of the case of *Bukenya and Others v Uganda* [19721 EA 549, it was submitted that the prosecution was under a duty to call the said lady.

18. It was submitted by the Appellant that the two lower courts failed to take cognizance of the current jurisprudence with regard to the sentencing of offenders. The Appellant urged that should this Court allow his submission on the conviction of the lesser charge under section 8(3) of the Act, the Court should consider imposing a more lenient sentence.

19. In opposing the appeal, it was submitted that the age of the Complainant was proved by way of a clinic card. According to the Respondent there was evidence of penetration both from the Complainant's evidence and the medical evidence which was properly produced in compliance with Section 77 of the *Evidence Act*. In this case it was submitted that the incident occurred in broad daylight hence there was no possibility of mistaken identification. According to the Respondent the evidence that was believed by the two concurrent courts below was unassailable and there was no requirement that all the witnesses be called to testify.

20. On the sentence, the Respondent relied on *Bernard Kimani Gacheru v Republic* (2002) eKLR and submitted that the sentence of life imprisonment as provided for in section 8(2) of the *Sexual Offences Act* remains legal and constitutional.

21. We have considered the issue raised in this appeal and as already stated hereinabove, this Court's jurisdiction on second appeal such as this one is restricted to matters of law. A cursory look at the grounds of appeal raised before us clearly reveals that the Appellant's grievances are directed at the decision of the Learned Trial Magistrate. That decision was the subject of the appeal before the High Court. While we have no power to revisit the concurrent findings of fact it is not lost to us that unlike this Court, the first appellate Court is under a legal obligation to analyse and re-evaluate the evidence placed before it. Therefore, an allegation that the first appellate court failed to undertake its legal obligation is a matter of law. It is therefore properly within our mandate to deal with the issue whether the two courts below carried out their mandate imposed on them by the law and whether the sentence imposed was lawful.

22. In this case, the Appellant has raised the issue whether based on the evidence placed before the trial court, it was proper to impose the sentence against him under Section 8(2) of the *Sexual Offences Act*. According to him, since the Complainant was 11 years and 10 months he ought to have been sentenced under Section 8(3) of the said *Act* which prescribes a lesser sentence. Regrettably, we did not have the benefit of the Respondent's submissions on this very important point.

23. From the evidence adduced, the offence occurred on February 27, 2017. According to the Complainant's clinic record, she was born on April 6, 2005. It is therefore true that at the time of the offence, the complainant was 11 years and 10 months as the Appellant submits. The question that falls for determination is under what section ought the Appellant to have been charged. Section 8(2) of the *Sexual Offences Act* under which the Appellant was sentenced states as follows:

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

24. According to the Appellant since the subsection adopts the phrase "eleven years or less", a plain reading of the said section must lead to the conclusion that the section is not intended to apply to situations where the victim is beyond the calendar years of 11 years.

25. We agree that taken literally, the said section ought not to apply where the victim is, say 11 years and one day old. It is however appreciated even by the Appellant himself that such an interpretation is not free of controversy since it would create a lacuna in respect of offences committed against victims whose ages fall between 11 years and one day and 11 years and 365 days. Though the Appellant contends that such an interpretation would have the effect of giving benefit to an accused person, this issue has been the subject of judicial determination in *Hadson Ali Mwachongo v Republic* [2016] eKLR in which this Court expressed itself as follows:

> " Before we conclude this judgment, it is necessary to say a word on computation of the age of the victim. The *Sexual Offences Act* provides for punishment for defilement in a graduated scale. The younger the victim, the severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is imprisonment for life. Defilement of a child of 12 years to 15 years attracts 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment. Rarely will the age of the victim be exact, say exactly 8 years, 10 years, 13 years etc., as at the date of defilement. It will be a few days or months above or below the prescribed age. The question then arises, is a victim who is, for example, 11 years and six months old at the time of defilement to be treated as 11 years old, or as more than 11 years old? If the victim is treated as more than 11 years old, to what term is the offender to be sentenced since the victim has not attained 12 years for which a sentence is prescribed? In the same vein, in the present appeal where the victim was aged 15 years and a couple of months old, but was not yet 16 years old, is the appellant to be sentenced as if the victim was exactly 15 years or as if she was 16 years old?"

26. The Court, while appreciating the difficulty imposed by lack of clarity in the law, proceeded that:

> " On the face of it, an attractive argument is that there is doubt as to the age of the victim and that the benefit of the doubt ought to be given to the accused person, so that the less severe sentence is imposed. Thus where the victim is say, 15 years and 2 months, she would be treated as 16 years so that the accused person is sentenced to 15 years imprisonment, as though the victim was aged between 16 and 18 years, instead of 20 years for a victim of 15 years.
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> Indeed, in Alfayo Gombe Okello v. Republic, (supra), this Court went about the issue as follows:
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> > 'The evidence of the mother was that she (the victim) was born in 1992. No month or date is mentioned. If she was born between January and July 1992, she would obviously have been above 15 years of age but below sixteen when the offence was committed. It seems to us that there is an obvious lacuna in the Act as there is no provision for punishment where the child is between the age of fifteen and sixteen years. Section 8 (4) caters for the ages of sixteen to eighteen years. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child as at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find.'

We are of a different mind for the following reasons. Section 2 of the *Interpretation and General Provisions Act* defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year. Back to the *Sexual Offences Act*, a victim who is days or months above 11 years will be treated as 11 years old so long as he or she has not attained 12 years of age. On the same reasoning, the victim in this case who was 15 years, 6 months and 13 days old must be treated to be 15 rather than 16 years old."

27. In determining such borderline cases, we are guided by the holding of this Court in *Kimutai v Lenyongopeta & 2 Others* Civil Appeal No 273 of 2003 [2005] 2 KLR 317; [2008] 3 KLR (EP) 72 in which this Court cited with approval The Discipline of Law 1979 London Butterworth at page 12 by Lord Denning that:

> "The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the "purposive approach". In all cases now in the interpretation of statutes such a construction as will "promote the general legislative purpose" underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, "There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind."

28. Since an interpretation that leads to the conclusion that offenders falling within the said grey area are not covered by the Act would be absurd and unjust, we are called upon to use our good sense to remedy the situation so as to do what Parliament would have done, had they had the situation in mind. There is no doubt that the *Sexual Offences Act* provides for punishment for defilement in a graduated scale and that the younger the victim, the severe the punishment. In our view in order to avoid further absurdity which would arise if we were to start dealing with situations where for example a victim is one day older than 11 years, we are fully in agreement with the interpretation adopted by this Court in *Hadson Ali Mwachongo v Republic* (supra).

29. Accordingly, this ground fails.

30. As regards the finding that PW1 was HIV positive, it is clear that the tests on both occasions returned the same results. We therefore do not agree with the Appellant that the mere fact that two tests were done was an indication of uncertainty. As for the failure to subject the Appellant to a similar test, while we agree that the court could have invoked its powers under section 36(1) of the *Sexual Offences Act* and directed that samples be taken from the Appellant for the purposes of ascertaining his status, it is our view that the failure to do so is not necessarily fatal where there is sufficient evidence to back up the prosecution's case. This Court in *Martin Nyongesa Wanyonyi v Republic* [2015] eKLR cited with approval *Geoffrey Kionji v Republic* Cr. Appeal No 270 of 2010 where it was held that:

> "Where available, medical evidence arising from examination of the accused linking him to the defilement is welcome. We, however, hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80, Laws of Kenya, a court can convict

an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

31. The Court concluded that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law.

32. In this case, the two courts below believed the evidence presented and we are not entitled to interfere with their concurrent findings of fact unless we are satisfied that such findings are perverse. Accordingly, this ground is unfounded.

33. It was argued before us that there was contradiction in the evidence of PW1 and PW2 regarding the prior identity of the perpetrator by PW1. We agree that where there are material contradictions or inconsistencies in the evidence of the prosecution witnesses which are not reconciled by the two courts below, this Court may well interfere since that may amount to the failure by the first appellate court to subject the evidence to a fresh analysis and re-evaluation in order to arrive at its own decision. In this case however, we have gone through the judgement of the High Court Judge as the first appellate court and we find that the High Court dealt with the matter and concluded that the alleged inconsistencies ere not material. We have no reason to disturb that finding.

34. It was contended that the lady who led PW1 and PW2 to the home of the perpetrator was never called as a witness. According to the evidence of PW6, she was the one who took PW1's grandparents to the Appellant's house. Therefore, the submission that the person who directed PW2 to the home of the Appellant was not called is not borne out by the evidence.

35. As regards the sentence, this Court sitting in Nyeri in Criminal Appeal No 84 of 2015 between *Joshua Gichuki Mwangi v Republic*, expressed itself as hereunder:

> " We emphasise that this Court is alive to the fact that some accused persons are obviously deserving of no less than the minimum sentences as provided for in the SOA due to the heinous nature of the crimes committed. And they will continue to be appropriately punished as was pronounced...On the other hand, there are definitely others deserving of leniency and this is the leeway we are asserting that ought to be at the disposal of courts... We acknowledge the power of the Legislature to enact laws as enshrined in *the Constitution*. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence. This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of *the Constitution*. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of *the Constitution* to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of *the Constitution*. This includes the provision of Article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited. In the end, courts have a duty to dispense justice not only to the complainants but also to accused persons. For these reasons we allow this appeal and we set

aside the 20-year sentence and substitute it with a 15-year sentence to run from the time the trial court imposed its sentence."

36. Similarly, this Court in *Eliud Waweru Wambui v Republic* [2019] eKLR has also rallied the above call for legislative amendments to the *Sexual Offences Act* by opining that; -

> "We need to add as we dispose of this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of a younger age than 16 years. We think it is rather unrealistic to assume that teenagers and maturing adults in the sense employed by the English House of Lords in Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 ALL ER 402, do not engage in, and often seek sexual activity with their eyes fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process, and not a series of disjointed leaps. As Lord Scarman put it in that case (at p421);
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> > "If the law should impose on the process of "growing up" fixed limits where nature knows only a continuous process, the price would be artificially and a lack of realism in an area where the law must be sensitive to human development and social change." At p. 422.
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> In England, for instance, only sex with persons less than the age of 16, which is the age of consent, is criminalized and even then the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age. See Archbold Criminal Pleading, Evidence and Practice, [2002] p1720. The same goes for a great many other jurisdictions. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation. For the reasons we have set out herein, we find that the appellant's conviction was not safe, given the full circumstances of the case and the sentence, clearly imposed on the basis of a mandatory minimum was clearly harsh and excessive."

37. In the *Joshua Gichuki Mwangi v Republic* (supra), the Court was clear in its mind that the sentences prescribed under the *Sexual Offences Act* are not unconstitutional and can still be meted out in deserving cases. We therefore disabuse the notion that the sentences prescribed under the *Sexual Offences Act* are unconstitutional. The Court only held that when imposed merely because they are mandatory without considering the circumstances of the case, then just like in Muruatetu 1 they contravene the constitutional principles.

38. We however note that though *Joshua Gichuki Mwangi v Republic* (supra) was decided on October 7, 2022, after the directions given by the Supreme Court in *Francis Karioko Muruatetu & another v Republic:Katiba Institute & 5 others (Amicus Curie)* (2021) eKLR had been given on 6th day of July, 2021, the Court in Joshua Gichuki Mwangi v Republic (supra) did not refer to the said directions (hereinafter referred to as Muruatetu 2). In order to appreciate the directions in Muratetu 2, and

considering the controversy surrounding the matter, it is, in our view necessary to produce, in extenso, the said directions in which the Supreme Court expressed itself, inter alia as follows:

> " [9] In addition, there is no harmony in the revised sentences by the Courts. The sentences which have been imposed after re-sentencing hearing range from commutation to the period served, probation, reduction of sentences to some specific period, or the preservation of the maximum sentences.
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> [10] It has been argued in justifying this state of affairs, that, by Paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the Court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it. In that paragraph, we stated categorically that;
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> > [48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of *the Constitution*; an absolute right". Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to Section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases."
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> [11] The ratio decidendi in the decision was summarized as follows;
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> > "69. Consequently, we find that Section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".
>
> We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."

39. The Supreme Court continued:

> "(14) It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating

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

(15) To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases. [Emphasis added].

40. The Supreme Court concluded that:

i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the *Penal Code*;

ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu;

iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re- sentencing hearing.

iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.

v. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under Section 329 of the *Criminal Procedure Code*, as well as those of the victims before deciding on the suitable sentence.

vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.

vii. .....

viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on resentencing.

ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu.

41. Our understanding of the Muruatetu 2 is that Muruatetu 1 was only dealing with the offence of murder and not any other offence. Therefore, as regards the sentences in respect of other offences in which mandatory sentences or minimum mandatory sentences are prescribed, we understand the position of the Supreme Court to be that parties are at liberty to challenge their constitutional validity by properly filing, presenting and fully arguing before the High Court and escalating them to the Court of Appeal, if necessary, at which a similar outcome as that in Muruatetu 1 may be reached. In other words, nothing bars this Court, upon hearing such challenges, from finding that minimum mandatory sentences, if imposed merely because the law prescribes the same without considering the circumstances of the case, is contrary to the letter and spirit of *the Constitution*.

42. It is clear that minimum mandatory sentences, prima facie, do not permit the Court to consider the peculiar circumstances of the case such as the differentiation in the ages of the victim and the culprit in order to arrive at an appropriate sentence informed by those circumstances as the Court is deprived of the discretion to consider whether a lesser punishment than the minimum prescribed, would be more appropriate in the circumstances.

43. The Kenya *Judiciary Sentencing Policy Guidelines* appreciates this fact by recognising that:

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

44. It is our view that the Supreme Court in both Muruatetu 1 and Muruatetu 2 did not address itself to the constitutionality of mandatory minimum sentences. It simply clarified that Muruatetu 1 only dealt with murder. We agree with that clarification. However, the Supreme Court left it open to the Courts to hear any challenge to the mandatory and mandatory minimum sentences and make a determination one way or another after which the determination may be escalated to the Supreme Court.

45. In our view, even without the application of the ratio in Muruatetu 1, we find that whereas the sentences prescribed under the *Sexual Offences Act* are not unconstitutional by the mere fact of such prescription and the trial courts are at liberty to impose them, the imposition of the same, as the minimum mandatory sentences, does not meet the constitutional threshold particularly Article 28 of *the Constitution*.

46. In the case before us, the learned trial magistrate, in imposing the life sentence, stated that the offence was serious and the law prescribed minimum sentences for the same. The learned Judge of the High Court also found that pursuant to section 8(2) of the *Sexual Offences Act*, the court was mandated to impose life sentence. Therefore, none of the two courts below considered any mitigating circumstances such as the contention by the Appellant that he was a first offender which was not challenged by the prosecution. We cannot be certain that the said sentence would have been imposed if mitigation had been considered. We are cognisance of the fact that the complaint was tested and found to be HIV positive. That would obviously have been a factor to be taken into account had there been evidence that the complaint's HIV status was as a result of the incident. There was no such evidence as the Appellant was never examined.

47. In the premises, we set aside the life sentence imposed on the Appellant and substitute therefore a sentence of 30 years to run from the date of his original conviction.

48. This judgement is delivered pursuant to rule 34(3) of the *Court of Appeal Rules, 2012* as Gatembu, JA declined to sign.

DATED AND DELIVERED AT MOMBASA THIS 14TH DAY OF APRIL 2023.

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR