Wesamba v Republic (Criminal Appeal E050 of 2023)
[2025] KEHC 531 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEHC 531 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E050 OF 2023

AC BETT, J

JANUARY 24, 2025

BETWEEN

JOSEPH KORI WESAMBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence from the decision of Hon. G. Ollimo (SRM) in Butere SPMC.S.O. No. E063 of 2020 delivered on 23rd day of November 2022)

JUDGMENT

Introduction

1. The Appellant herein Joseph Kori Wesamba was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 11th April 2020 at around 1600 hours, at (particulars withheld) within Kakamega County, he intentionally caused his penis to penetrate the vagina of PA a child aged 16 years.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006 whereby it was alleged that on 11th April 2020 at around 1600 hours, at (particulars withheld) within Kakamega County, he intentionally touched the vagina of PA a child aged 16 years with his penis.

3. The Appellant plead not guilty to both charges and after a full trial, he was convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* and sentenced to serve twenty-five (25) years imprisonment.

4. The Appellant was dissatisfied with the conviction and sentence of the trial court and lodged a petition of appeal dated 7th December 2022 in which he set out the grounds of appeal as follows:-

1. That, the trial court failed to prove that the elements forming the offence were not proved beyond reasonable doubt.

2. That, the court be pleased to consider that the sentence meted was excessive and arbitrarily delivered.

3. That, the Hon. court be pleased to subject the Appellant to a requisite sentence review.

4. That, the Appellant was a first offender who came into conflict with the law for the very first time.

5. That, the Hon. court be pleased to consider that the Appellant's defence statement was cogent and precise.

6. That, the Hon. court be pleased to consider that the Appellant's mitigating factors were literally sound.

7. That, the Hon. court be pleased to consider that provisions of section 333(2) of the CPC were not re-evaluated and considered.

8. That, the Appellant wishes to be present during the hearing of this appeal and/or be supplied with the trial record to enable him erect more grounds.

Duty of the Court

5. The duty of this court being a first appellate court is well settled. It is to re-evaluate and re-consider the evidence tendered before the trial court and arrive at its own independent conclusion bearing in mind the fact that unlike the trial court, it did not have the benefit of hearing and seeing the witnesses. This duty was elucidated in the celebrated case of Okeno -vs- Republic [1972] EA 32 by the Court of Appeal of Eastern Africa which rendered itself thus:-

> "The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. uwala -vs- R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion, it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

The Evidence

6. The Prosecution relied on five (5) witnesses. PW1 was the complainant who testified that she was currently eighteen (18) years old and a form 3 student. She stated that on 11th April 2020 at around 4.00 p.m., with her father's permission, she had gone to visit a friend at Shianda Village. Since she did not find the friend, she decided to return home. On the way, she heard someone call out to her and she turned back and saw a male individual who told her that the friend she was looking for was in a certain house and led her to that house. When they entered the house, the man hurriedly locked the door with a padlock from the inside and forcefully removed her clothes, then also removed his clothes and pushed her on the bed while threatening her not to scream. The man then inserted his penis in PW1's vagina and after he finished, asked her to sit on a chair. She demanded that he releases her but he refused whereby she screamed loudly and he opened the door. The witness stated that she went and reported the incident to her father who escorted her to the hospital and later to the police station.

7. PW2 was the father to the Complainant. He said that on 11th April 2020 he was at home when the Complainant emerged with her friend Everline. He noticed that the Complainant was crying. He queried her friend who informed him that the Complainant had gone to visit her but missed her and was defiled. According to him, the Complainant was composed. She informed him that the perpetrator had threatened to stab her with a knife.

8. According to PW2, the Complainant did not mention the name of the person who defiled her but her friend Everline mentioned his name as "Bai". The witness said that he lodged a report at Butere Police Station and later escorted the Complainant to the hospital. Afterwards, PW2 said that he led the police to the Accused's house where the Accused was arrested after he had gone underground for a while.

9. PW3 was the Complainant's friend, Everline. She testified that she knows the Accused who is her village mate. She stated that on the material date, on her way back home from hospital where she had gone for treatment, she sighted the complainant crying along the road. She approached her and inquired why she was crying. The Complainant informed her that she had been raped by one Joseph Kori. PW3 said that she escorted the Complainant to her home where the Complainant recounted the incident to her father who then escorted them to the police station and thereafter Butere Hospital.

10. PW4 was a Clinical Officer from Butere Sub-County Hospital. She produced the P3 form on behalf of one Camilla who was said to be away on training. She testified that she was conversant with Camilla's handwriting. According to her, P.A who was then aged 16 years was seen at their facility on 11th April 2020 with a history of defilement by a person well known to her.

11. On examination, the Complainant's external genitalia was normal with normal clear discharge and normal hair distribution. Her hymen was broken with no bleeding, bruises or laceration. A high vaginal swab showed epithelial cells. Other tests were normal. The conclusion on the P3 was that the history of the patient and the examination gave evidence of penetration. The witness produced the treatment book, Post Rape Care Form and the P3 as exhibits.

12. PW5 was the Investigating officer who took over the file from an officer who had since been transferred. At the time he took over the file, the investigations were complete. He recalled that he revisited the scene and arrested the Accused. He produced the Complainant's birth certificate which established that she was born on 8th August 2003.

13. In defence, the Accused gave a sworn statement. He stated that PW2 who is the Complainant's father had approached him on a date he did not disclose with a request that the Accused allows him to make bricks on his land and even offered him money but he declined. He said that roughly six months later, he was shocked to be arrested and charged with defilement. According to him, PW2 and the Complainant conspired to frustrate him because he declined PW2's request.

Submissions

14. The appeal was canvassed through written submissions.

15. The Appellant submitted that he was subjected to an unfair and unjust trial process. According to him, he did not have the benefit of legal representation. He posited that the court was under duty to ensure that his right to a fair trial was not infringed but did not do so in that it rejected his single request for an adjournment on account of bereavement while allowing the prosecution's numerous applications for adjournments. The Appellant submitted that the court did not care about his emotional, psychological and mental preparedness having lost an uncle and a father-in-law. The Appellant said that the trial court's decision was contrary to the spirit of Article 50 (2) (c) of *the Constitution*.

16. The Appellant also faulted the trial court for sentencing him to 25 years imprisonment without any aggravating factors whereas the prescribed minimum sentence for the offence was fifteen (15) years imprisonment. The Appellant contended that his right to benefit from the least severe of the prescribed sentence was violated. According to him, the sentence was discriminatory and repugnant to Article 27 and 28 of *the Constitution*. The Appellant's submissions were that the trial court acted on wrong principles in convicting and sentencing him.

17. Further, the Appellant submitted that the ingredients of defilement were not proved beyond reasonable doubt. According to him, there was no proof of penetration. He contended that a broken hymen is not direct proof of penetration. He relied on the Canadian case of The Queen v. Manel Vincent Quintanilla 199 ABQB 769 where the court held that it is erroneous to presume that the absence of hymen in a girl is not proof of defilement as some girls are born without a hymen.

18. The Appellant further submitted that the evidence adduced by the prosecution was inconsistent with the offence of defilement. He also contended that the evidence of identification was displaced, farfetched and ill perceived. The Appellant questioned how the Complainant, who testified that she came to know the Appellant after he had sexually assaulted her, identified him as the perpetrator. He faulted the evidence of PW3 who testified that when she asked the Complainant why she was crying, the Complainant said that she had been raped by Joseph Kori yet it was apparent that the Complainant did not know the Appellant by name.

19. In regard to the circumstances of the case, the Appellant's submissions were to the effect that he was framed by the victim's father. He submitted that PW3's evidence clearly showed that she was coerced into giving evidence and that she had told the court that she goes to [Particulars Withheld] Secondary School but had written in her statement with the police that she goes to [Particulars Withheld] Secondary School at the instance of the Complainant's father who had threatened her for being reluctant to attend court and testify.

20. There were no submissions filed by the State.

Issues for Determination

21. Upon perusing the Petition of Appeal and the Appellant's written submissions, and upon evaluating the evidence on record, and further upon careful consideration of the law, I deduce the following issues for determination:-

    i. Whether the Appellant's right to a fair trial as guaranteed by Article 50 (2) (c) of *the Constitution* was violated.

    ii. Whether the State proved the case against the Appellant beyond reasonable doubt.

    iii. Whether the sentence imposed on the Appellant was excessive in the circumstances.

Analysis and Determination

i. Whether the Appellant's right to a fair trial as guaranteed by Article 50 (2) (c) of *the Constitution* were violated

22. Article 50 (2) (c) of *the Constitution* provides:-

> " Every accused person has the right to a fair trial, which includes the right—

(c) to have adequate time and facilities to prepare a defence."

23. It is not in dispute that the Appellant was unrepresented. The record shows that he took plea on 23rd November 2020. On that date, he was informed of his right to legal representation and was supplied with a copy of the charge sheet, investigation diary, treatment form, P3 form and witness statements. A hearing date was fixed.

24. The record shows that despite the case being fixed for hearing severally, it did not proceed as scheduled. On the first date scheduled for hearing, no grounds of adjournment are recorded but on the second date, the matter could not proceed due to absence of witnesses. The matter was then adjourned to 7th July 2021 when the matter was adjourned once more for reasons not recorded.

25. The matter finally took off for hearing on 21st March 2022 despite the Appellant's protestations that he had lost his father-in-law and uncle in the past months and was therefore grieving and needed another date. The court held that the Appellant was employing delaying tactics and ruled that the matter do proceed.

26. It is the Appellant's contention that the failure by court to grant him an adjournment when he was still grieving meant the court did not care for his emotional, psychological and mental preparedness and how deeply related he was to the people he claimed to have lost.

27. The right to have adequate time and facilities to prepare a defence is sacrosanct. In Alex Kwaso Otieno -v- Republic [2019] eKLR, the Court held as follows:-

> "It is trite that fair trial is the object of criminal procedure. The court is thus under an obligation to ensure that the prerequisites of provision of witness statements and copies of exhibits are provided to the accused before the start of the case, and that failure to do so prejudices the accused, whatever the outcome may be..."

28. My understanding of Article 50 (2) (c) is that an accused person is entitled to a sufficient period within which he can prepare his defence. The sufficient time must be accompanied by ample and satisfactory facilities. Since *the constitution* does not define facilities, I have referred to the Oxford Dictionary which defines "facility" as follows:-

> "A place, amenity or piece of equipment provided for a particular purpose."
>
> Similar words to "facility" under the Oxford Dictionary are "provision", "space", "means" or "solution".

29. In the context of *the Constitution*, I am of the view that Article 50 (2) (c) of *the Constitution* should be read together with Article 50 (j) of *the Constitution* that imposes a duty on the courts to give an accused person reasonable facilities and time to prepare his defence. In Republic v Francis Muniu Kariuki [2017] eKLR, the court stated as follows: -

> "Our case law has now established without a doubt that it is the Prosecution's duty to provide the witness statements to an Accused Person and the Trial Court's duty to ensure compliance with the constitutional requirement. Article 50(2)(c) and (j) are quite clear and the Courts have said as much: the right to adequate time and facilities for the preparation of one's defence includes the right to receive beforehand the evidence that the Prosecution intends to adduce against the Accused. At a minimum, this right includes the right to receive

a copy of the charge sheet, witness' statements and copies of any documents which will be relied on at the trial."

30. In the present case the Appellant was furnished with the relevant documents necessary for preparation of his trial well ahead of the trial. He was made aware of his right to legal representation. In the premises, the Appellant had sufficient time and facilities to prepare for the trial.

31. The Appellant's complaint was that he was bereaved at the time of the trial. He did not give the exact dates of the bereavement which he said was in the past months. His bereavement was in respect of members of his extended family. Although the Appellant did not adduce any evidence to prove his claim of bereavement, the court held that recent bereavement was not sufficient grounds for an adjournment.

32. There is nothing on record to suggest that the Appellant suffered any prejudice by reason of being denied the adjournment. He was able to cross-examine the witnesses exhaustively and in a manner that demonstrates that he was able to follow the proceedings properly and understood the import of the evidence in chief. He was able to lay the basis of his defence from the outset. I am unable to agree with the Appellant that the trial infringed his rights as envisaged by Article 50 (2) (c) of *the Constitution*.

ii. Whether the State proved the case against the Appellant beyond reasonable doubt

33. Section 8 (1) and (4) of the *Sexual Offences Act* provides as follows:-

> " 8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

34. Following the provisions of Section 8 (1) and (4) of the *Sexual Offences Act*, key ingredients of the offence of defilement are the age of the victim, an act that causes penetration with the victim, and whether there is positive identification of the assailant. See George Opondo Olunga v. Republic [2016] eKLR.

35. In regard to age, a birth certificate was produced which showed that the Complainant was born on 8th March 2003. This places the Complainant's age at the time of the offence to be 16 years, four months shy of 17 years. The Court of Appeal in Edwin Nyambogo Onsango v. Republic [2016] eKLR considered the issue of proof of age in cases of defilement and rendered itself thus:-

> "...the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a Birth Certificate, Baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof" It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See *Denis Kinywa -vs- Republic Criminal Appeal No. 19 of 2014*) and (Omar Ucher *v Republic Criminal Appeal No. 11 of 2015*). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is

a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni -vs- Uganda Criminal Appeal No. 2 of 2000.

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

36. There is no doubt from the evidence adduced that the age of the Complainant was proven. She was above 16 years and below 18 years at the time of the offence and the issue of age is therefore put to rest.

37. The second ingredient of defilement is penetration. Section 2 of the *Sexual Offences Act* defines penetration as:-

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

38. The Complainant recounted clearly how the Appellant took his penis and inserted it into her vagina. Her evidence was corroborated by the P3 form which was produced by PW4 on behalf of the maker. The conclusion in the P3 form is that there was proof of defilement.

39. The Appellant claims that a broken hymen is not proof of penetration. Whereas I agree with him, the P3 form that was produced did not make reference to the broken hymen alone. The medical officer who examined the Complainant noted the presence of epithelial cells in the vagina. The findings by the examining medical officer was consistent with the Complainant's history as reflected in the treatment book and the Post Rape Care form. The presence of epithelial cells was evidence of recent trauma to the vagina wall. In the case of Philip Ochieng Owino v. Republic [2019] eKLR, the Court stated as follows:-

> " Medical evidence confirmed that the hymen was not freshly broken but the presence of epithelial cells which the clinical officer stated was evidence of friction on the vaginal wall corroborated the complainant's evidence that she had been repeatedly defiled. And although the evidence of defilement is that of a single witness, complainant's disappearance for 6 days and medical evidence provided sufficient proof that the complainant was telling the truth."

40. In the case of Gilbert Cheruiyot Yegon v. Republic [2019] eKLR, Mumbi Ngugi J as she then was upheld a decision where the trial Magistrate had held that the presence of epithelial cells in the vagina were proved by medical evidence to have been caused by penetration.

41. Flowing from the persuasive authorities cited above, I am in agreement with the learned trial Magistrate that the element of penetration was proven to the required standard.

42. The final ingredient in defilement charges is identification. The issue of identification is crucial lest the court condemns an innocent person who has been mistakenly identified as the perpetrator of an offence. In Francis Amukune Owina v. Republic [2017] eKLR, the Court of Appeal stated:-

> " First, accurate eyewitness identification is key to the apprehension and successful prosecution of criminal suspects. The converse is certainly perilous as inaccurate identification may lead to the prosecution of innocent persons and occasion substantial miscarriage of justice. In light of the inherent danger of miscarriage of justice, it is important that evidence of visual identification be approached with scrupulous care.
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> In response to widespread concern over the problems posed by cases of mistaken identification, Lord Widgery, CJ of the English Court of Appeal in the famous judgment in

Regina V Turnbull (1977) QB 224 laid down important guidelines for trial courts in respect of disputed identification evidence. The familiar passage in that judgment reads as follows;

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications..... Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made."
>
> The caution is required to avoid the risk of injustice because a witness who is honest may be wrong even if he is convinced that he is right; a witness who is convincing may still be wrong; that a witness who recognizes the suspect, even when the witness knows the suspect very well, may be wrong."

43. The testimony of PW1, PW2 and PW3 does not evince how the Appellant was identified. PW2 corroborated PW1's evidence that she did not know the Appellant before. That being the case, the Appellant was a stranger to PW1. During cross-examination, PW1 insisted that it was the Appellant who defiled her and that his face had stayed with her although he had shaved his beard since the incident.

44. PW2 recounted that when the Complainant reported the incident to him, she did not mention her assailant's name but he learnt from PW3 that the perpetrator was "Bai". No evidence was led as to how PW2 came to conclude that the person named "Bai" was the Appellant herein. Nowhere in the prosecution's evidence was it stated that the Appellant is also known by the name "Bai".

45. According to PW3, in response to her query as to why she was crying, the Complainant respondent that she had been raped by one Joseph Kori. This is doubtful as the Complainant testified that the person who defiled her was a stranger.

46. Looking at the totality of the evidence of the Complainant, PW2 and PW3 on the identity of the assailant, one cannot determine how the Complainant came to know that her assailant was the Appellant herein. The Complainant did not state how she came to know the Appellant to be her assailant considering she did not know him before the sexual assault. From the evidence, it is not manifest whether the Complainant ascertained her assailant's identity by virtue of his looks or by his name. If it was by virtue of his looks, there was no evidence that she described her assailant by his looks to any of the other witnesses or even to the police. There was also no identification parade that was conducted to enable the complainant single out her attacker.

47. No evidence was led to show how the Complainant came to know the assailant's name. PW3 found her walking along the road and not in the Appellant's house. Since PW2's evidence was that the Complainant did not know the name of the assailant, then PW3's evidence that when she found the distressed Complainant she informed her that Joseph Kori had raped her is doubtful. In any event, it is evident that only the Complainant had the opportunity of seeing the assailant.

48. In respect to the Complainant's evidence that the face of the Appellant remained with her, this court holds the view that such evidence must be treated with great caution in order to avoid a case of mistaken

identity. In the case of Cleophas Otieno Warunga v. Republic [1989] eKLR, the Court of Appeal held as follows:-

> " Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

49. In absence of any evidence as to how PW3 came to conclude that it is the Accused who sexually assaulted the Complainant, then the prosecution's evidence on the identity of the assailant is reliant on the Complainant's sole evidence.

50. Whereas the evidence of a single witness has been held to be sufficient to sustain a conviction, I find that the circumstances of the assault rendered it extremely difficult for the Complainant to observe her assailant properly and commit his features to her memory. In the case of Abdallah Bin Wendoh & Another v. Republic [1953] 20 EACA 166, the court rendered itself thus:-

> " Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

51. In the case of Francis Kariuki Njiru & 7 Others v. Republic [2001] eKLR, the Court of Appeal observed as follows:-

> " The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. v.Turnbull [1976]63 Cr. App. R.132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported), held that:
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> > "... it is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence.
> >
> > Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal - this being a proven reliable way of testing the power of observation,

and accuracy of memory of a witness and the degree of consistency in his evidence."

52. The prosecution did not lead the Complainant to testify as to how she came to identify the Appellant. She did not describe his height, his facial features, his complexion, or the clothes he was wearing at the time of the assault nor did she describe his house. The Complainant reportedly said that the Appellant threatened her with a knife but that was after she got into the house. It was not difficult for her to note the assailant's physical features and commit them to memory. The failure by the prosecution to lead cogent evidence on identification where the assailant was a stranger to the Complainant weakened their case.

53. It has been held that where the evidence relied on to implicate an accused person is entirely identification, such evidence should be watertight. See Republic v. Eria Sebwato [1960] EA 174. It has also been held that a witness may be honest but mistaken. See Roria v. Republic [1967] EA 583.

54. I have no doubt that the Complainant was sexually assaulted and that she was a minor at the time of the assault. However, the circumstances of the case are such that it is uncertain whether the Appellant was the perpetrator or he was a victim of mistaken identity.

55. It was incumbent on the prosecution to seal all the gaps in its case to ensure a conviction. As it is, the prosecution's case was rendered weak by the failure to prove beyond reasonable doubt, that the Appellant was properly and conclusively identified.

iii. Whether the sentence imposed on the Appellant was excessive in the circumstances

56. As to the sentence, the Appellant was sentenced to 25 years imprisonment. This was after a victim impact statement was taken from the Complainant's mother who stated that the Complainant was still traumatized. The appellant did not express remorse in mitigation but said that he was a father of four school going children. Given the mitigation and the sentencing trends, I would have reduced the sentence to the minimum sentence of fifteen years.

57. However, I must point out that the sentence of 25 years was not unlawful in any way for Section 8 (4) only prescribes fifteen years as the minimum sentence. This does not preclude the trial court, in exercising its discretion from imposing a stiffer sentence.

58. The minimum mandatory sentences prescribed under the *Sexual Offences Act* has been held to be constitutional. In Muruatetu & Another v. Republic, Katiba Institute & 4 Others (Amicus Curiae) [2021] KESC 31 (KLR), the Supreme Court issued directions in respect to the minimum sentence as follows:-

> "In the meantime, it is public knowledge, and taking judicial notice, we do agree with the observations of both Mr. Hassan and Mr Ochiel, that while the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to section 296(2) of the Penal Code, and others under the *Sexual Offences Act*, presumably assuming that the decision by this court in this particular matter was equally applicable to other statutes prescribing mandatory or minimum sentences. We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision."

59. The Supreme Court went further ahead and held as follows in Republic v. Mwangi, Initiative for Strategic Litigation in Africa (ISLA) & 3 OTHERS (Amicus Curiae) [2024] KESC 34 (KLR):-

> " Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below."

60. Being guided by the aforestated decisions of the highest court of the land, the court's hands are bound and until the Supreme Court renders itself otherwise or the law is amended, then the court must impose the mandatory minimum sentence set out by the law.

61. Having said that, I find that the conviction of the Appellant is not safe. I therefore allow the appeal, quash the conviction of the Appellant, and set aside the sentence meted out on him. The Appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF JANUARY 2025.

A. C. BETT

JUDGE

In the presence of:

Appellant in person

Ms. Chala for Respondent

Court Assistant: Polycap