MKM v Republic (Criminal Appeal E030 of 2023)
[2025] KEHC 5264 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5264 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E030 OF 2023

AK NDUNG'U, J

APRIL 29, 2025

BETWEEN

MKM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No E100 of 2021– B.M Mararo, SPM)

JUDGMENT

1. The Appellant, MKM was convicted after trial of sexual assault contrary to Section 5(1)(a)(i) as read with Section 5 (2) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on the 05/12/2021 at [Particulars Withheld] in Laikipia East Subcounty Laikipia County unlawfully used his fingers to penetrate the vagina of one DN a child aged 9 years. On 27/03/2023, he was sentenced to ten (10) years imprisonment.

2. Being dissatisfied with the conviction and the sentence, he lodged this appeal vide a petition of appeal filed on 30/03/2023 and amended by the filing of supplementary grounds of appeal together with his submissions. He is challenging the conviction and the sentence on the following grounds;

    i. The learned magistrate erred convicting him by placing full reliance on single witness evidence of a minor without warning himself of the danger and admissibility of such evidence.

    ii. The learned magistrate erred by placing reliance on corroborative medical evidence that was contradictory, inconsistent and riddled with material discrepancies thus rendering it unsafe to base a conviction upon.

    iii. The learned magistrate erred convicting him without weighing his defence against the weak prosecution's case thus violating Section 169 of the *Criminal Procedure Code*.

iv. The learned magistrate applied the wrong principle during sentencing by meting out a harsh and excessive mandatory minimum sentence without considering his constitutional rights due to his age and disability.

3. The appeal was canvassed by way of written submissions summarized as appears here below.

4. In his written submissions, the Appellant argued that PW3 did not corroborate PW1's evidence to the effect that she (PW1) was summoned by the Appellant to sit on his lap, a fact PW3 could not have forgotten as she was seated next to the Appellant. That it beats logic why PW1 would agree to sit on the Appellant's lap having being fingered before by him. That the case was hinged on single witness evidence as PW3 did not corroborate PW1's testimony as she only corroborated the fact that they had visited the Appellant's home only. The learned magistrate did not warn himself of the danger of relying on the single witness evidence which in most cases is susceptible to third party interference as was observed in the Jamaican Court of Appeal Criminal Appeal No. 53 of 2009 (2014) JMCA and in the book; Evidence: Cases and Materials 2nd Edition Butterworths London 1984, 84 by Heydon that children can be influenced by adults and other children and have little notion of the duty to speak the truth. That if he had guilty conscious, he would have denied that the children had visited on the material day but he conceded to that fact. That if the complainant would have been sexually assaulted by him, she would have ceased from visiting DW2.

5. He submitted that it beats logic why the clinical officer placed full reliance on the broken hymen when a broken hymen can be caused by other factors. That the pus cells observed was due to an infection and it is normal for a girl to get UTI due to lack of hygiene and an inflamed vagina orifice need not be as a result of a sexual assault. That medical evidence is not infallible and courts have been warned not to rely wholly on medical evidence which can be flawed. That the clinical officer's evidence had some anomalies as she testified that she filled the PRC form on 06/12/2021 and that lab results were dated 07/12/2021 raising a question how she filled the PRC form without the lab results. She did not produce treatment notes raising a question whether PW1 was taken to hospital. On cross examination, she changed her narrative and testified that she saw the complainant on 07/12/2021 raising the question how she filled the PRC form on 06/12/2021 while she examined the complainant on 07/12/2021. Also, did it mean that she filled the PRC form even before the lab results were out? He urged the court to declare the medical report null and void as it lacked authenticity.

6. He argued that his admission that the minor had visited their home on material day did not mean that he perpetrated the heinous act on the minor. Only PW3 could have adduced cogent evidence on whether she saw PW1 siting on his lap since she was present and in close proximity. He submitted that the medical evidence and PW3 failed to corroborate PW1 and he urged the court to revaluate the evidence afresh. Further, that the trial court failed to record PW1's demeanour under Section 199 of CPC and on her truthfulness as per Section 124, *Evidence Act* which requires court to record reasons for believing the victim.

7. As to sentence, he submitted that mandatory minimum sentences have been frowned upon since they deny the trial court its sentencing discretion and ignore mitigation of an accused person. That the provisions in regards to sentence for sexual assault is not couched in mandatory terms since it uses terms as liable and may which have been interpreted by the superior courts not to mean mandatory provisions. He submitted that the trial court failed to consider his mitigation in that he is 75 years old with special need due to the fact that he is lame on both legs hence in needs of walking aids for mobility and he therefore falls under category of special attention persons in the PWDA. Article 21(3) of *the Constitution* also obliges state organs to ensure such people are protected by law. Para 3.1 of the Sentencing Policy Guidelines also states that the right to equality, gender, disability and

status of the offender must be respected. Further Para 20:25 obliges the court to consider the state of the offender and ensure that sentence does not amount to inhuman treatment for offenders who are elderly, terminally ill or who have disabilities. That he falls under the category of special needs individual due to his advanced age and disability. He urged the court to relook into the sentence with a bid to reduce it or afford him a non-custodial sentence.

8. The Respondent's counsel in support of the conviction and the sentence submitted that penetration was proved as PW4 noted that PW1's vagina was inflamed with a broken hymen, there were pus cells and concluded that the patient had been defiled with a blunt object which could be fingers. PW1 also testified that the appellant removed her clothes and touched her 'where I pee' and she started feeling pain. That he had tried it before when she was in grade 3 and this was not challenged by the Appellant in his defence which could only lead to a conclusion of the truth by the victim. Further, PW2 testified that she found PW1 naked in bed and in pain and when she checked her, she saw blood in her pants.

9. As to identification, he submitted that the Appellant was a neighbour as confirmed by PW2 that he had been their neighbour for 7 years. That the Appellant confirmed that he was at the scene on the material day and so too PW1. He also confirmed that he knew PW2 but added that a grudge arose when he failed to give her money when he sold his cows. Counsel concluded that the ingredients of the offence were sufficiently proved and the evidence was consistent and corroborative hence sufficient to convict him for the offence. Further, the learned magistrate considered his defence which was a mere denial and did not dislodge the water tight testimony by the prosecution.

10. Regarding sentence, counsel submitted that it was upon the Appellant to demonstrate that the sentence was excessive, the trial court took into account an irrelevant factor or that a wrong principle was applied as was held in Shadrack Kipkoech Kogo vs R Eldoret Criminal Appeal No. 253 of 2003 but he failed demonstrate the above factors. Further, the trial court considered his mitigation, the aggravating factor and seriousness of the offence. Therefore, the sentence was not only lawful but lenient in the circumstances.

11. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

12. The Supreme Court of India in K. Anbazhagan vs. State of Karnataka and Others, Criminal Appeal No. 637 of 2015 put it more succinctly as follows:-

> " The appellate Court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,...The appellate Court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

13. A suitable point of departure then would be a the summary of the evidence adduced at the trial court which was as follows.

14. The evidence before the trial court was as follows. The complainant testified as PW1. She stated that on 05/12/2021 after church, in the company of her sister, they went to greet Appellant's mother their cucu called I. The Appellant was their cousin. It was near their place and they found cucu in the kitchen and was on the bed. The Appellant was outside on a chair. I said she was unwell and she was going to sleep. The Appellant told her sister to go harvest fruits and she accompanied her sister. When they returned, she sat at the corner and her sister in the middle but the Appellant told her to sit on her (sic..) legs. She sat on him. She was wearing a trouser, panty and a skirt and he started removing her clothes. He touched where she pees from and put his hands under her skirt. She started feeling pain and she started to flee and she was successful. That he did it again when she was starting grade 3. That she pretended that she was going to cut (sic..) him and he followed her but they used a different room and they fled. She testified that her mom went home at 6:00pm and found her sleeping. She had removed clothes as she was feeling pain and had covered herself with a blanket. She told her mom not to beat her and she said she would not and she therefore told her what had happened. Her panty had blood which she showed her mom and she put it in water so that it does not get dry and she washed it. That her mom took her to police station and to hospital. She testified that she could not implicate the Appellant.

15. On cross examination, she testified that she tried to scream. She was feeling pain and she decided to go home. That she did not know how he was arrested. That he had done it previously and she had not told anyone. That she was fearing her mom. She was in pain and could not help it. That they went the same night with a lady who call herself chief and they went to the police on that day and on the next day and to the hospital and thereafter. They went to his home with the police. That she was examined and returned home.

16. PW2, the complainant's mother testified that on the material day, she went to church and left the complainant and her sister and when she returned at 5:00pm, the complainant was in pain/shocked and she said that she was feeling pain. She informed her that they went to Appellant's mother where they found the Appellant sitting outside and he asked her to sit on her (sic.) She (sic.) removed her clothes and inserted his fingers in the private parts. She testified that she removed her clothes and checked her pants and saw blood on her parts(sic.) She cleaned her and wiped her and she used her panty to wash herself. Her husband came later and they reported at the chief's and they were referred to the station the next day and they were referred to hospital. She testified that the Appellant was their neighbour and she had known him for more than 7 years. That she was there when he was arrested and he tried to flee. She produced the complainant's birth certificate on further examination as Pexhibit1.

17. On cross examination, she testified that the Appellant was arrested on a Monday by the police. That when her husband came at night, they went to his home and he accepted but sought for forgiveness.

18. PW3, was not sworn, no voir dire was conducted and was not cross examined by the Appellant. Her testimony was irregularly taken and therefore not admissible and it is just as well that the trial court ignored her short testimony.

20. PW4, a clinical officer examined the victim. She testified that the allegation was of defilement. That it was not a one-time incident. On examination, the vagina was inflamed with no discharge, hymen was old broken and on lab examination, there were no yeast cells, and on urinalysis, there were pus cells which was an indication of an infection. That the victim was defiled as the hymen was broken. The object used could be blunt and fingers were one of the probable object used. That it could be fingers. That there were no epithelial cells. She testified that the PRC form was filled on 06/12/2021. She produced both the PRC and P3 forms as exhibits as well as the lab results. On cross examination,

she testified that the patient reported that it was not the first time that the act had taken place. That she saw her on 07/12/2021.

21. PW5, the investigating officer testified that PW2 reported that on 05/12//2021, someone had inserted fingers in her daughter. He interrogated the complainant who informed him that they had been left with the younger sister and they decided to visit the Appellant. The Appellant told the sister to go and collect fruits. The Appellant inserted his fingers in the complainant's private parts after pulling down her pants. They went to hospital and confirmed that something had happened. He recorded their statement and commenced investigations. He visited the scene and the complainant showed him where the incident had occurred. He testified that on 11/12/2021, the Appellant was seen in the homestead and they arrested him. The complainant identified him. He produced the investigation diary as Pexhibit4.

22. On cross examination, he testified that they arrested him on 11/12/2021 whereas the incident occurred on 05/12/2021. That they had to conduct investigations. That they reported to the station and there was a lady who was there but did not witness. That the victim said it was not the first time to be assaulted by him. That she is a child and it is difficult to open up. That she felt pain on that day and she had to tell her mom. That he did not know about money and he did not think that the child was threatened. He did not know him prior and that the victim identified him.

23. In his sworn defence, the appellant testified that he heard the evidence and the child said that he had locked(sic) her but that did not happen. He stated that he had sold two goats and complainant's mother wanted that money. He used to give her money. It was during corona time. That she used to go to him for help. That the child was forced to lie and threatened to be beaten. That her mother wanted money. That he did not give her money and that was the problem.

24. On cross examination, he testified that he was home on that day and the girls went there and left. They stayed for a while and his mother told them to go home. That he was seated outside and did not tell anyone to go harvest fruits. That his mother escorted them out and that the complainant did not sit on him. That he had no relationship with the girls' mother but would give her money when she did not get money. That they wanted money but did not tell the police as they decided to settle the matter then. That they were his neighbours. He was not speaking to her.

25. DW2 was the Appellant's mother. She testified that she was at home when two children went there and asked for food as their mother had gone to Nanyuki. She told them that there was none as they had eaten and told them to go and check on goats. She told them to go as she had been treated and she wanted to sleep. The Appellant was seated outside and that she was with the Appellant only. That in the evening, the complainant mother and father went to their house and broke into Appellant's house and the Appellant screamed and they left after he screamed. She asked what had happened and the Appellant informed her that they wanted money and she told them that the Appellant had no money and then she went to sleep.

26. That was the totality of the evidence before the trial court. I have had occasion to consider the evidence as recorded at the trial court. I have taken cognizance that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses testify and have given due allowance for that fact. In addition, I have considered the applicable law, submissions on record and case law cited.

27. Of determination is whether the prosecution proved its case to the required legal threshold and if in the affirmative, whether the sentence meted out on the appellant was legal and appropriate in the circumstances.

28. Section 5 of the Act provides for the offence of sexual assault as follows:

> " 5(1) Any person who unlawfully-
>
> a. penetrates the genital organs of another person with-
>
> i. any part of the body of another or that person; or
>
> ii. an object manipulated by another or that person except where such penetration is carried out for proper and professional medical hygiene or medical purposes;
>
> b. manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.
>
> (2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life."

29. The ingredients of the offence were discussed by the court of appeal in the case of John Irungu v Republic, [2016] eKLR where the court stated thus;

> " The offence is constituted by committing an act which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

30. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.

31. As regards to proof of penetration, the complainant, PW1 testified that they went to the Appellant's homestead and he requested her to sit on his lap. She was wearing a trouser, panty and a skirt and he started removing her clothes. He touched her 'where she pees' from and put his hands under her skirt. She started feeling pain and she started to flee and she was successful. She stated that this was not the first time as he had done it again when she was in grade 3. She testified that she went home and covered herself with a blanket as she had removed clothes as she was feeling pain. When her mom got home, she asked her not to beat her and she said she would not and she therefore told her what had happened. Her panty had blood which she showed her mom and she put it in water so that it does not get dry and she washed it.

32. Her testimony was corroborated by PW2, her mom who testified that she found her in pain/shocked. She informed her that she was feeling pain and also informed her that they had visited DW2 and they found the Appellant sitting outside who asked her to sit on him. He removed her clothes and inserted his fingers in the private parts. She testified that she removed her clothes and checked her pants and saw blood on her pants. She cleaned her and wiped her and she used her panty to wash herself.

33. PW4, the clinician examined the complainant and confirmed that there was indeed penetration. She testified that her hymen was broken (old), the vagina was inflamed and there was presence of pus cells which was an indication of an infection. She stated that fingers could have been used.

34. The Appellant tried to impeach her evidence on account that she testified that she filled the PRC form on 06/12/2021 whereas the lab results were dated 07/12/2021 which shows that the PRC form was filled before the lab results were out.

35. PW4 in cross examination confirmed that she examined the complainant on 07/12/2021 as indicated on the PRC form. The P3 and PRC forms were stamped on 08/12/2021. The PRC form indicates that she was seen on 07/12/2021 supporting PW4 testimony that she was seen on 07/12/2021. The date 06/12/21 is the date when matter was reported to police a fact quite clear from the PRC form recording. and not 06/12/2021.

36. I have reviewed the Appellant's evidence to the effect that he was framed as the victim's mother wanted some money from him after he sold goats.

37. To my mind, the prosecution's evidence on penetration is watertight. The evidence of PW1 is materially corroborated by the evidence of PW2. That evidence is given further credence by the evidence of the clinical officer, an independent witness with no discernible stake in the matter who confirms that the victim's vagina was inflamed. The fact of penetration was proved.

38. Regarding the identity of the perpetrator, there is no doubt that the Appellant was known to the complainant before. He was a neighbor and indeed there is admission by the Appellant that the complainant and her sister went to the home. This fact is affirmed by DW2, the Appellant's only witness. DW2 was not present at the actual scene of crime as she was in bed sick. The act was in broad daylight. The incident happened in his homestead and he was squarely placed at the scene of crime. No other male person was mentioned to be at the scene. DW2 testified that she was asleep hence she could not testify as to what transpired when she left the children with the Appellant. It therefore follows that the Appellant had time and opportunity to commit the offence.

39. The Appellant has not raised any cogent reason why PW1 would have the propensity to frame him with the offence. The defence that it is PW1's mother who instigated the charges after the Appellant refused to give her money is in light of the evidence on record a belated lame attempt to circumvent justice. The issue of money was not put to PW2 in her testimony and cross examination. Its introduction at the defence stage is clearly an afterthought that does not aid the Appellant's cause. Such a defence ought to be put to the witnesses and especially PW2 so that they can have an opportunity to address the issue. Failure to raise it when cross-examining the witnesses leads to the inevitable conclusion that it is an afterthought which cannot possibly be true.

40. Thus the trial court was correct the finding in its analysis of the evidence that the Appellant's defence that he was framed was not cogent. Am satisfied that the identity of the Appellant as the perpetrator of the offence was proved.

41. The Appellant further submitted that he was convicted on single witness evidence. While that statement is not entirely true as per the analysis above, it is trite that a conviction can be based on a

single witness testimony as was held in Anil Phukan vs State of Assam 1993 AIR 1462, 1993 SCR (2) 389 as follows: -

> " A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone"

42. Furthermore, the charge of sexual assault is a sexual offence. Sexual offences are usually not committed in public, they almost always happen in privacy or secrecy or away from the public eye. It should not be expected that there would be eyewitness evidence to such events. The only available account would often be of the victim in which case Section 124 of the *Evidence Act* sets in. This, I hasten to add, is not applicable in this case as there was clear corroboration of the evidence.

43. On the sentence, the Appellant was sentenced to 10years imprisonment. That is the sentence provided in law and which sentence can be enhanced to life imprisonment. The sentence is challenged on account of the Appellant's age and disability and the fact that the provisions in regards to sentence for sexual assault is not couched in mandatory terms since it uses terms as liable and may which have been interpreted by the superior courts not to mean mandatory provisions.

44. Section 5(2) of the *Sexual Offences Act* provides that;

> (2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life."

45. It therefore follows that the sentence for sexual assault should not be less than ten years.

46. The Supreme has affirmed the legality of the mandatory sentences in the Sexual offences in its recent decision in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024). The court stated;

> " We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law.....
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> 68. Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.

47. Not to be lost is that it is trite law that Sentencing is at the discretion of the trial court. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

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

48. Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> " It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

49. The East African Court of Appeal set the law much earlier in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, when it pronounced itself on this issue as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

50. A look at the sentencing proceedings and the sentence itself in the matter clearly shows no infraction of the principles enunciated above to warrant interference with the sentence.

51. I must make a special mention on the prayer by the Appellant to have his sentence reduced based on his age, illness and disability. This issues sprang up in this appeal for the first time. At trial, the record shows that the Appellant only sought forgiveness. The issues of illness and disability were not raised then.

52. Similarly, in this appeal, other than a cursory mention of the illness and disability in the submissions and which is not backed with any medical or other reports, the issue is not raised in the initial grounds of appeal and even in the amended grounds of appeal. The issue could thus not be competently canvassed in this appeal. No wonder that the prosecution only addressed the propriety of sentencing based on the legal principles applicable to an appellate court interfering with the sentence imposed by a trial court.

53. Courts have intervened in deserving cases where convicts are terminally ill or of extreme old age placing reliance on Article 50(6) and 159 of *the constitution* and The Sentencing Policy Guidelines 2023, Paragraph 3.3 and paragraph *20*;*25*. Such an application must of necessity be backed by cogent evidence of the terminal illness of frailty arising from old age.

54. Notwithstanding this judgement, the Appellant would be at liberty to raise such an application should he so desire in the interests of justice.

55. A word of caution though. The exercise of such a jurisdiction which is, in my view, largely dependent on the inherent powers of the court to achieve fairness, justice and to mitigate human suffering, is fraught with danger as the parameters to be employed are fluid and the possibility of abuse is real and not far fetched. Ultimately, each case must be determined on its own circumstances.

56. The plea by the Appellant is a post-conviction and sentence plea. There is no lacuna in the law in dealing with inmates with special difficulties in incarceration. The panacea to such difficulties is properly anchored in *the Constitution* under Article 133 which provides;

1. On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by –

    (a) granting a free or conditional pardon to a person convicted of an offence;

    (b) postponing the carrying out of a punishment, either for a specified or indefinite period;

    (c) substituting ales severe form of punishment; or

    (d) remitting all or part of a punishment.

2. There shall be an Advisory Committee on the Power of Mercy, comprising –

    a. The Attorney-General;

    b. The Cabinet Secretary responsible for correctional services;

    and

    c. At least five other members as prescribed by an Act of Parliament, none of whom may be a State officer or in public service.

3. Parliament shall enact legislation to provide for –

    a. The tenure of the members of the Advisory Committee;

    b. The procedure of the Advisory Committee; and

    c. Criteria that shall be applied by the Advisory Committee in formulating its advice.

    4. The Advisory Committee may take into account the views of the victims of the offence in respect of which it is considering making recommendations to the President.

57. The Advisory Committee has for the longest remained moribund appearing to abdicate this constitutional duty. It is time that this constitutional edict is enforced, a step that would shield the court from possible ursapation of powers of another arm of Government. The Appellant could as well consider this option as a redress to his grievance.

58. In our instant Appeal, the conviction and sentence achieve legal muster and must be upheld. I make a finding that the appeal lacks merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF APRIL 2025.

A.K. NDUNG'U

JUDGE