Mwangi v Republic (Criminal Appeal 84 of 2015)
[2022] KECA 1106 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KECA 1106 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 84 OF 2015

W KARANJA, PO KIAGE & J MOHAMMED, JJA

OCTOBER 7, 2022

BETWEEN

JOSHUA GICHUKI MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nyeri (Mativo, J.) dated 11th November, 2015 in HCCRA NO. 215 of 2011)

The imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers

The appellant had been was charged, convicted and sentenced to 20 years imprisonment for the offence of defilement of a child aged 15 years. The court found that the ratio decidendi of Muruatetu 1, as applied to the unconstitutionality of mandatory sentences, could be applied mutatis mutandis to the mandatory nature of the sentences provided for in the Sexual Offences Act. The court further held that the imposition of mandatory sentences by the Legislature conflicted with the principle of separation of powers.

Reported by Kakai Toili

Constitutional Law *– doctrine of separation of powers – Judiciary vis a vis the Legislature – whether the imposition of mandatory sentences by the Legislature conflicted with the principle of separation of powers – Constitution of Kenya, articles, 25, 159(2)(a) and (e), and 160.*

Criminal Law *– sentences - mandatory sentences - whether the ratio decidendi of Francis Karioko Muruatetu & Another v Republic [2017] eKLR as applied to the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of the sentences provided for in the Sexual Offences Act.*

Brief facts

The appellant was charged with defilement of a child aged 15 years. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with the child. The trial court found the appellant guilty as charged and sentenced him to 20 years imprisonment. Aggrieved by both the conviction and sentence, the appellant appealed to the High Court on among other grounds that the trial court erred in law and fact

by; convicting the appellant based on evidence that was full of inconsistencies; convicting the appellant of defilement while penetration was never proved; and rejecting the appellant's defence which was not challenged by the prosecution.

The High Court upheld the conviction and sentence as meted against the appellant by the trial court and dismissed the appeal. Dissatisfied with the judgment of the High Court, the appellant preferred the instant second appeal, based on among other grounds, that the 20-year sentence imposed on the appellant was harsh and unconstitutional.

Issues

i. Whether the imposition of mandatory sentences by the Legislature conflicted with the principle of separation of powers.

ii. Whether the *ratio decidendi* of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR as applied to the unconstitutionality of mandatory sentences could be applied *mutatis mutandis* to the mandatory nature of the sentences provided for in the Sexual Offences Act.

Held

1. The court's role as the second appellate court and jurisdiction was limited to matters of law as defined in section 361 of the Criminal Procedure Code.
2. The argument that the purpose of the mandatory sentences in the Sexual Offences Act was to prohibit the accused from committing the same crime and also served as deterrence to the members of the public was one of the popular justifications for mandatory sentences. The predictability of imprisonment was said to enhance public safety by putting criminals away from society. However, the imposition of mandatory sentences did not permit judges to consider other appropriate sentences. The deprivation of liberty to tailor punishments in individual case and may, in some instances, result in unduly harsh sentences meted against some accused persons.
3. Even though the mechanical nature of mandatory sentences may promise certainty of severity of sentences, it was often at the expense of proportionality and an individualized approach to sentencing which balanced between deterrence and the rehabilitation of an accused.
4. It was not accurate that the application of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR (*Muruatetu* 1) case on the Sexual Offences Act was tantamount to amending the entire Act without going through the required legislative processes. The *ratio decidendi* of *Muruatetu* 1, as applied to the unconstitutionality of mandatory sentences, could be applied *mutatis mutandis* to the mandatory nature of the sentences provided for in the Sexual Offences Act.
5. The imposition of mandatory sentences by the Legislature conflicted with the principle of separation of powers, in view of the fact that the Legislature could not arrogate itself the power to determine what constituted appropriate sentences for specific cases yet it did not adjudicate particular cases hence could not appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases were as diverse as the various cases and merely charging them under a particular provision of laws did not homogenize them and justify a general sentence.
6. Being a judicial function, it was 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. That went against the independence of the Judiciary as enshrined in article 160 of the Constitution. Further, the Judiciary had 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. That included the provision of article 25 of the Constitution which provides that the right to a fair trial was among the bill of rights that shall not be limited. Courts had a duty to dispense justice not only to the complainants but also to accused persons.

Appeal allowed; the 20- year sentence set aside and substituted it with a 15-year sentence to run from the time the trial court imposed its sentence.

Citations

Cases

1. Athanus Lijodi v Republic (Criminal Appeal 177 of 2017; [2021] KECA 942 (KLR)) — Explained
2. Christopher Ochieng v Republic (Criminal Appeal 202 of 2011; [2018] KECA 59 (KLR)) — Applied
3. Daniel Kipkosgei Letting v Republic (Criminal Appeal 35 of 2018; [2021] KECA 444 (KLR)) — Explained
4. David Njoroge Macharia v Republic (Criminal Appeal 497 of 2007; [2011] KECA 406 (KLR)) — Explained
5. Dismas Wafula Kilwake v Republic (Criminal Appeal 129 of 2014; [2019] eKLR) — Explained
6. Evans Wanjala Wanyonyi v Republic (Criminal Appeal 312 of 2018; [2019] KECA 679 (KLR)) — Applied
7. Injiri, Jared Koita v Republic (Criminal Appeal 93 of 2019; [2018] KECA 78 (KLR)) — Applied
8. JKM v Republic (Criminal Appeal 54 of 2018; [2020] eKLR) — Explained
9. Korir v Republic (Criminal Appeal 100 of 2019; [2021] KECA 305 (KLR)) — Explained
10. Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR)) — Applied
11. Richard Kaitany Chemagong v Republic (Criminal Appeal 150 of 1983; [1984] KECA 64 (KLR)) — Mentioned
12. Simiyu v Republic (Criminal Appeal 49 of 2018; [2021] KECA 295 (KLR)) — Explained
13. SS v Republic (Criminal Appeal 43 of 2018; [2021] KECA 450 (KLR)) — Explained
14. Wambui v Republic (Criminal Appeal 102 of 2016; [2019] KECA 906 (KLR)) — Explained

Statutes

1. Constitution of Kenya — article 25; 50; 159 (2)(a)(e); 160 — Interpreted
2. Criminal Procedure Code (cap 75) — section 361 — Interpreted
3. Sexual Offences Act (cap 141) — section 8(1)(3); 11(1) — Interpreted

Texts

1. Roach K (2001), Searching for Smith; The Constitutionality of Mandatory Sentences (Vol 39 No 1 & 2, Osgoode Law Journal, 368)

Advocates

None mentioned

JUDGMENT

1. The appellant, Joshua Gichuki Mwangi, was arraigned before the Senior Principal Magistrate's Court at Karatina on March 11, 2011 and charged with defilement contrary to section 8(1) as read together with section (3) of the *Sexual Offences Act* (SOA). The particulars of the offence were that on the March 8, 2011 at [Particulars withheld] location in Mathira West District within the former Central Province, the appellant intentionally caused his penis to penetrate the vagina of JWM (minor) a child aged 15 years.

2. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

3. During the trial the prosecution called 5 witnesses in support of its case. It was adduced that the appellant went to the minor's home on March 8, 2011 at around 5 pm. He lied to the minor's mother that he had been sent by her father to go collect Napier grass together with the minor. The minor then followed him to the farm and at around 10 PM, as they passed by a bushy place, the appellant slapped

her and as she attempted to scream, he produced a knife and threatened to stab her. The appellant proceeded to retrieve a condom and defiled the minor. He then took her to his house where his wife was residing. As a result, a scuffle ensued between the appellant and his wife which attracted the appellant's extended family.

4. In the midst of the commotion, the minor ran into the bushes and eventually found refuge at a neighbouring home where she spent the rest of the night. The following morning, on her way back home, the minor met her father and other family members who were looking for her.

5. Once the prosecution closed its case, the trial Magistrate L Mbugua (PM) found that the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement and denied the charges. He claimed that he was maliciously implicated by some of his family members who wanted to take away his land.

6. The learned Magistrate (L Mbugua) evaluated the evidence tendered before the court and found the appellant guilty as charged and sentenced him to 20 years imprisonment.

7. Aggrieved by both the conviction and sentence, the appellant appealed to the High Court at Nyeri on 4 grounds, condensed as that the learned trial Magistrate erred in law and fact by;

    a. Convicting the appellant based on evidence that was full of inconsistencies.

    b. Convicting the appellant of defilement while penetration was never proved.

    c. Rejecting the appellant's defence which was not challenged by the prosecution.

8. Mativo, J re-evaluated and re-analysed the evidence and upheld the conviction and sentence as meted against the appellant by the trial court and dismissed the appeal.

9. Dissatisfied with the judgment of the High Court, the appellant has preferred this second appeal, based on 5 grounds, which in the main complain that the 20-year sentence imposed on the appellant was harsh and unconstitutional. The court was urged to reduce it so as to allow him go back to his family.

10. During the initial hearing of the appeal on May 5, 2021, we requested learned Counsel Mr Gikonyo to represent the appellant on pro bono basis given the important issues raised in the appeal. He graciously accepted and the matter was adjourned to enable him to file to written submissions.

11. On May 12, 2021 when the matter came up for hearing, Mr Gikonyo duly appeared for the appellant while the respondent was represented by Mr Ondimu the learned Senior Principal Prosecution Counsel. Both had filed written submissions.

12. It was submitted for the appellant that the mandatory nature of the sentence provided for in section 8(3) of the SOA deprives courts of their legitimate jurisdiction to exercise their judicial discretion in sentencing. The appellant relied on the decisions of this court in *Christopher Ochieng -vs- Republic* [2018] eKLR, *Jared Koita Injiri V Republic* [2019] eKLR and *Evans Wanyonyi V Republic* [2019] eKLR where in each instance, this Court interfered with the mandatory sentences imposed on the basis that the mandatory nature of the sentences was unconstitutional.

13. It was urged that *Francis Karioko Muruatetu & another V Republic* [2017] eKLR (Muruatetu 1) was applicable to the SOA since the Supreme Court held that the nature of mandatory sentences deprives courts of their legitimate jurisdiction to exercise discretion and this is not in conformity with the tenets of a fair trial as provided for in article 50 of the *Constitution*.

14. We were implored to apply the doctrine of stare decisis and not to depart from this courts previous precedents as this will cause what Counsel termed a "pandemonium" to emphasize which he paused

the questions; What will happen to those who have already been released? Will they be rearrested so that they can complete their jail terms? It was suggested that we substitute the 20-year jail term with a 10-year sentence which the appellant has already served having been in custody from March 10, 2011.

15. The respondent submitted that sentencing is a crucial aspect of the criminal justice system, one of its aims, is to protect the society from the harmful acts of criminal defendants. Sentencing also serves as a prohibition to the accused from repeating the crime and also as a deterrent from members of the public committing similar crimes. It was asserted that defilement is a particularly serious crime, one which continues to afflict our society; hence the SOA states its purpose in part as to protect all persons from harm from unlawful sexual acts is a clear indicator of the intention of the legislature to prescribe punitive measures to deter such heinous acts from plaguing our society.

16. The logic behind mandatory minimum sentences is to set a baseline sentence for perpetrators of particular offences. Given that the legislature acknowledged the seriousness and prevalence of sexual offences in this country and passed the SOA in order to curb it, the judiciary should not disregard this function of the legislature in the name of discretion.

17. On the Muruatetu 1 case, it was contended that it was not meant to apply to the SOA. The spirit of the Muruatetu 1 decision was to abolish the mandatory death sentence as it was unconstitutional. Since the SOA does not provide for the death sentence and further has a possibility of remission, then the Muruatetu 1 case is not applicable. Applying the Muruatetu 1 case to the SOA is tantamount to amending the entire Act without going through the required legislative processes.

18. It was argued that minimum sentencing as provided for in the SOA do not take away judicial discretion. To the contrary unlimited judicial discretion may lead to judicial tyranny and legislation from the Bench without due process. It was affirmed that the sentence passed by the trial court and upheld by the High Court was proper based on the circumstances. This Court was invited to dismiss the appellant's appeal.

19. We have considered the record of appeal as well as submissions made by the appellant and the respondent. We appreciate our role as the second appellate court and our jurisdiction which is limited to matters of law as defined in section 361 of the *Criminal Procedure Code*. This was affirmed by this Court in *David Njoroge Macharia v Republic* [2011] eKLR as follows;

> "That being so only matters of law fall for consideration – see section 361 of the *Criminal Procedure Code*. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see *Chemagong v R* [1984] KLR 611."

20. The sole issue before us is that of sentencing. The appellant complained that the 20-year sentence meted out against him the trial court and affirmed by the High Court was not only excessive but also unconstitutional. This latter complaint is a matter of law within our jurisdiction. He sought the reduction of the sentence to 10 years, a term which he has already served.

21. The rival arguments made before us are not without force. They are a reflection of the age-old tension that attends the question of mandatory sentences. It is not unique to this jurisdiction and has been the

subject of scholarly discourse. In *Searching for Smith; The Constitutionality of Mandatory Sentences*, Vol 39 No 1 & 2, Osgoode Law Journal, 368 (2001), Kent Roach expresses it thus;

> "The constitutionality of mandatory sentences raises difficult and complex questions at the intersection of constitutional law and sentencing. When a court is asked to strike down or not apply a mandatory sentence .... it is being asked to engage on judicial review of a democratically enacted law. The court's view of its relationship with the legislature is bound to enter into equation."

22. The respondent argued that the purpose of the mandatory sentences in the SOA is to prohibit the accused from committing the same crime and also serves as deterrence to the members of the public. The argument advanced by the respondent is one of the popular justifications for mandatory sentences. Also, the predictability of imprisonment is said to enhance public safety by putting criminals away from society. However, the imposition of mandatory sentences does not permit judges to consider other appropriate sentences. The deprivation of liberty to tailor punishments in individual case and may, in some instances, result in unduly harsh sentences meted against some accused persons.

23. For instance, in *Evans Wanjala Siibi v Republic* [2019]eKLR where it was established that the appellant was 17 years old and was in fact in a relationship with the 15-year-old complainant. He was found guilty of defilement and sentenced to 20 years imprisonment. On a second appeal, this Court held;

> "We think, with respect, that had the two courts below adopted a more fair-minded and-even-handed approach to the case, they would at the very least have sought to establish the appellant's age. Instead, what emerges is a rush to punish him in a zealous deployment of the *Sexual Offences Act* for the supposed protection of the complainant. Once again the unfair consequences of a skewed application of that statute predominantly against the male adolescent is quite apparent: two youths caught engaging in sex receive diametrically opposite treatment. The girl is branded a victim and guided to turn against her youthful paramour while the boy, Juliet's Romeo, is branded the villain, hauled before the courts and visited with a lengthy jail term. We very much doubt that it conduces to good sense, policy and our own conceptions of justice and fairness that the law should be deployed in a manner so disparative and discriminative in effect. A supposed justice resting on the shaky foundation of injustice against young boys hardly warrants the term."

24. Similarly, in *Eliud Waweru Wambui v Republic* [2019]eKLR the complainant was assessed to be 17 years 5 months, was pregnant and considered the appellant her husband. On the other hand the appellant's defence was that he reasonably believed the complainant was of age and had taken her as his wife. He was sentenced to 15 years imprisonment. This court decried;

> "This appeal epitomizes for the umpteenth time the unfair consequences that are inherent in a critical enforcement of the *Sexual Offences Act*, No 3 of 2006 (the Act) and the unquestioning imposition of some of its penal provisions which could easily lead to a statute-backed purveyance of harm, prejudice and injustice, quite apart from the noble intentions of the legislation. The case poses one more time whether it is proper for courts to enforce with mindless zeal that which offends all notions of rationality and proportionality.
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> ...
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> So understood, we would think that had the two courts below properly directed their minds to the appellant's defense and the totality of the circumstances of this case, they would in all

likelihood have arrived at a different conclusion on it. It was a non-direction that they did not do so, rendering the conviction unsafe.

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 Vs. 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...."

25. Even though the mechanical nature of mandatory sentences may promise certainty of severity of sentences, it is often at the expense of proportionality and an individualized approach to sentencing which balances between deterrence and the rehabilitation of an accused. In *Daniel Kipkosgei Letting Vs. Republic* [2021] eKLR this court pronounced itself as follows;

> " With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment."

26. The respondent disputed the application of the Muruatetu 1 case on the SOA and argued that it is tantamount to amending the entire Act without going through the required legislative processes. Respectfully, this is not accurate. In Muruatetu 1, the Supreme Court held, in part, as follows;

> 47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in article 10 of the Universal Declaration of Human Rights, and in the same vein article 25(c) of the *Constitution* elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.
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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.
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> ...
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> 50. We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the *Constitution* provides that every person has inherent dignity and the right to have that dignity protected.

It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

51. The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial. (Emphasis added)

27. It is our conviction that the foregoing recapitulates the ratio decidendi of Muruatetu 1 and we believe that the same, as applies to the unconstitutionality of mandatory sentences, can be applied mutatis mutandis to the mandatory nature of the sentences provided for in the SOA. This court has on several occasions pronounced itself on the applicability of Muruatetu 1 on the SOA. For instance, in *Christopher Ochieng Vs. Republic* [2018] eKLR it held;

> In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."

28. Similarly, in *Jared Koita Injiri V Republic* [2019] eKLR; *Evans Wanjala Wanyonyi V Republic* [2019] eKLR and *SS V Republic* [2021] eKLR this court differently constituted applied the *Muruatetu 1* case and reduced the sentences meted against the respective appellants to what it considered appropriate.

29. In a recent decision, this court in *Simiyu V Republic* (Criminal Appeal 49 of 2018) [2021] KECA 295 (KLR) (3 December 2021) (Judgment) was persuaded by the holding in *JKM V Republic* [2020] eKLR which applied the Muruatetu 1 case on the unconstitutional nature of the mandatory minimum sentences provided for in the SOA and substituted the life imprisonment meted against the appellant with a 30–year sentence. 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 in *Athanus Lijodi V Republic* [2021] eKLR;

> On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu's case (supra) notwithstanding. This court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for instance *Evans Wanjala Wanyonyi v Republic* [2019] eKLR). Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited."

30. 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. A good example is in the holding of this court

in *Korir V Republic* (Criminal Appeal 100 of 2019)[2021] KECA 305 (KLR) while reducing the appellant's sentence to the period already served. It reasoned;

> "The appellant has contended that he was a first offender and a young man whose life is greatly affected by the imprisonment and that while in prison he had taken full advantage of the rehabilitative programmes offered in the correctional facility. It is also not lost on this court that the appellant has been in custody since February 2015, a period of slightly over 6 years to date. We also note that the appellant had serious intentions of marrying GC, a girl aged 15 years. However, the law does not allow for the marriage of girls below the age of 18 years.
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> In our considered opinion and in view of the above, these factors coupled with the facts in this case mitigate for leniency. The appellant had the intention of marrying PW1. He took her to his grandparents' place and left her to stay there. In applying the Muruatetu decision (supra) that removed the bar to discretion posed by minimum sentences, and considering that the appellant has been in custody for slightly over 6 years, we consider the period that he has served to be sufficient sentence in the circumstances of this case."

31. The respondent further contended that the Legislature acknowledged the seriousness of the prevalence of defilement as it passed the SOA. Therefore, the Judiciary should not disregard the function of the Legislature on an issue affecting the society in the name of discretion.

32. 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.

33. 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. This was well articulated by this court in *Dismas Wafula Kilwake Vs. Republic* [2019] eKLR as follows;

> Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

34. In the end, courts have a duty to dispense justice not only to the complainants but also to accused persons.

35. 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. Orders accordingly.

37. Finally, we would like to thank Mr Gikonyo heeding to our entreaty and taking up this appeal on *pro bono* basis and Mr Ondimu for the insightful arguments advanced herein. Both Counsel have assisted this court dispense justice on behalf of the appellant.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2022.

W. KARANJA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR