Simiyu v Republic (Criminal Appeal 112 of 2019)
[2023] KECA 175 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 175 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 112 OF 2019

FA OCHIENG, LA ACHODE & WK KORIR, JJA

FEBRUARY 17, 2023

BETWEEN

MARTIN WEKESA SIMIYU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Eldoret (J. Mativo, J.) delivered on 20th July, 2015 in HC Criminal Appeal No. 130 of 2013)

JUDGMENT

1. Martin Wekesa Simiyu, the appellant herein, was charged before the Principal Magistrate Court's at Eldama Ravine with the offence of defilement contrary to section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. As per the charge sheet dated May 9, 2012, the particulars of the charge were that on May 5, 2012, the appellant committed an act which caused his penis to penetrate the anus of SJ, a child aged 8 years. The act took place at a village (name withheld) in Koibatek District within Baringo County. Arising from the same facts, the appellant also faced an alternative charge of indecent act contrary to section 11(1) of the *Sexual Offences Act*.

2. Upon hearing the matter, the trial court convicted the appellant on the main charge and sentenced him to life imprisonment. Aggrieved by the conviction and sentence of the trial court, the appellant lodged an appeal in the High Court. In a judgment dated July 20, 2015, the High Court dismissed the appeal hence upholding the findings of the trial court.

3. The appellant is now before us on a second appeal. A perusal of his memorandum of appeal and the supplementary grounds of appeal shows that the appellant is aggrieved that the trial court did not conduct voir dire examination on PW1 as required by law; that he was not subjected to medical examination to establish whether he was linked to the offence; that the prosecution's case did not meet the required standard of proof and that it was based on fabricated evidence which was not

corroborated; that he was not accorded a fair trial which is contrary to articles 50 and 25(c) of the *Constitution*; that the charge sheet was fatally defective and could not therefore support his conviction; that his conviction cannot hold as the elements of identity and penetration were not proved by the prosecution; and, that the mandatory life sentence as passed by the trial court and upheld by the first appellate court is unconstitutional.

4. The case against the appellant was constructed by the prosecution based on the evidence of six witnesses. In summary, the case was that on the material day, the mother of the complainant who testified as PW2 left for the posho mill at about 6.00pm leaving behind SJ alongside her younger brother. The appellant then went into her house and asked SJ to lie on her belly. He then tore her pants. SJ felt pain and cried. Immediately, PW2 came back and called SJ's name from outside. The appellant then left the house running. SJ informed her mother what had happened and also mentioned that she knew the assailant.

5. SJ was taken to hospital the next day in the company of AM (PW3) where she was admitted overnight. The incident was reported to the police. The complainant was later attended to by JKM (PW6) who also filled a P3 form confirming that SJ had been defiled. The appellant was later re-arrested by SK (PW4), an administration police constable, from the crowd that wanted to assault him after which he was handed over to SS (PW5), a police corporal who later testified as the investigating officer in the matter.

6. In his defence, the appellant gave unsworn testimony and stated that on May 5, 2012, he had been called by the chief who asked him for Kshs. 1,000 and threatened to press undisclosed charges against him if he did not comply. When he did not oblige, the chief later came with policemen and arrested him.

7. The appellant also called EKT (DW2) who was his employer. DW2 testified that on the material day, the appellant went to his home at about 6.00pm and took milk. The next day, the appellant was arrested for allegedly defiling a girl.

8. When this matter came up for hearing on October 19, 2022, both the appellant and the respondent's counsel opted to majorly rely on their written submissions and did brief oral highlights of those submissions. We summarize the gist of the opposing submissions below.

9. For the appellant, he relies on the decision in *Christopher Kang'ethe v Republic* [2010] eKLR to urge this court to delve into the findings of fact by the two courts below since he was not represented by an advocate. His submission is that after doing so, this court should find that the evidence on record does not support his conviction.

10. With regard to the age of the complainant, the appellant submits that the evidence of PW2 and PW6 does not agree with the clinic card as to her age. It is his view that while the charge sheet and oral evidence indicated that the appellant was 8 years, the clinic card proved that she was yet to attain 8 years. He is therefore of the view that in the circumstances, the age of the complainant was not proved to the required standard. On the necessity of proving the age of the victim in sexual offences, the appellant relies in the case of *Maripett Loonkomok v Republic* [2016] eKLR

11. The appellant also submitted that the evidence on penetration was not conclusive. According to the appellant, the evidence of PW2 contradicted that of PW6 as to whether it was the anus or the vagina that was penetrated. He also contends that there was no evidence that linked him to the alleged penetration.

12. On identification, the appellant submits that the evidence of the complainant cannot be relied upon as it fails to sufficiently address how she managed to identify him as the perpetrator. It is therefore his

case that the trial court and the first appellate court failed to address themselves to these inconsistencies and insufficiencies in the evidence tendered by the prosecution.

13. It is also the appellant's submission that the charge sheet was defective as it omitted the words "unlawfully" and "intentionally". It is his view that such omissions offended Section 134 of the *Criminal Procedure Code*. To buttress this point, he argues that he was not represented and it was upon the prosecution or the trial court to invoke section 214(1) of the *Criminal Procedure Code* and amend the defect, which they did not.

14. The appellant further submits that his right to a fair trial was infringed upon when the trial was conducted without him being issued with witness statements by the prosecution. On the right of an accused person to be supplied with witness statements, the appellant relies on the case of *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] eKLR.

15. Finally, the appellant also relies on the case of *Christopher Ochieng v Republic* [2018] eKLR, among others, to submit that the sentence meted against him by the trial court and affirmed by the first appellate court is unconstitutional and excessive in its entirety. He therefore urged us to allow his appeal on both conviction and sentence.

16. The respondent's submissions were short and mainly to the effect that all the elements of the offence of defilement were proved to the required standard. On penetration, counsel submitted that this was proved by the evidence of PW6 and the P3 form. As for the age of the victim, it was submitted that the complainant was proved to be below 11 years hence the offence fell within the provisions of section 8(2) of the *Sexual Offences Act*.

17. Counsel for the respondent also submitted that the appellant was sufficiently identified by the complainant who happened to have known him prior to the incident. Finally, on the issue of the appellant's right to a fair trial, counsel submitted that the trial court issued an order that the appellant be supplied with the statements of the witnesses after which the appellant never raised the issue again up until in this appeal. He urged the Court to dismiss the appeal and uphold the findings of the two courts below.

18. This being a second appeal, our role is limited to only addressing matters of law. In delivering on our mandate, it is expected that we leave undisturbed the findings of fact by the two courts below. However, we may interfere with such findings of fact by the two courts if it is proved that such findings were not based on any evidence or that the findings so made are bad in law. Our statement finds support in the holding of this court in *Adan Muraguri Mungara v Republic* [2010] eKLR that:

> "As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere."

19. We have reviewed the record of appeal, submissions by counsel as well as the authorities cited and the law. The issues for determination are whether the charge sheet was defective; whether the failure to subject the appellant to medical examination was fatal to the case; whether the procedure for voir dire was complied with; whether the appellant was properly identified; whether the appellant was accorded a fair trial; and lastly, whether this court should interfere with the life sentence imposed on the appellant.

20. The appellant is of the view that the omission of the words

> "intentionally" and "unlawfully" from the statement of the charge rendered the charge defective. According to the appellant, with such an omission, the charge did not meet the threshold as legislated by section 134 of the *Criminal Procedure Code*. We have no hesitation in finding no merit on this ground of appeal.

21. We agree with the position adopted and the analysis of the first appellate court on this issue. Perhaps just to add that the act of defilement is in itself a criminal offence and the exclusion of the words "intentionally" and "unlawfully" from the charge sheet does not render the charge defective. This issue has been addressed several times by this Court before. We only need to refer to the case of *Kaaka Masara Margeti v Republic* [2020] eKLR where this court addressed the issue as follows:

> "Similarly, we reject the ground that the charge sheet was defective because the words "intentionally" or "unlawful" were not included. The act of defilement in itself is unlawful. The words do not constitute any of the elements of the offence of defilement as was explained in the case of Josephat Wanjala Olbai v Republic, Eldoret Criminal Appeal No. 92 of 2015, which stated:
>
> > "[25] The offence of defilement is unlawful and the absence of the words "intentional" and "unlawful" in the particulars of the charge do not render the charge defective. The words 'intentional' and 'unlawful' are not ingredients of the offence of defilement under section 8(1) of the *Sexual Offences Act*. Defilement itself is unlawful. Those words are only elements of a charge of rape and attempted rape under section 3(1) and section 4 of the *Sexual Offences Act* respectively.""

22. Similarly, we agree with the first appellate court's analysis and determination on the issue as to whether the failure to subject the appellant to medical examination was fatal to the case. To add our voice to this issue, we state that in sexual offences such as the one facing the appellant, the prosecution need not conduct a medical examination on the accused in order to prove the offence. Such an examination can be pursued, but even in its absence, the prosecution's case still stands if the elements of defilement are proved. In some instances, an accused may not be arrested immediately after the offence and subjecting him or her to medical examination may not yield any useful evidence. In this case, the appellant was arrested a day after the offence. Perhaps, the need for medical examination was meant to satisfy the appellant's own medical curiosity as opposed to dislodging the prosecution's case. The failure to subject the appellant to medical examination upon his arrest did not visit any prejudice on his case. It was the duty of the prosecution to prove its case against the appellant beyond reasonable doubt and if that onus was discharged, the failure to present the appellant to a medic cannot be a ground for overturning his conviction.

23. The appellant has also raised an issue as to whether the procedure for voir dire examination was complied with before the evidence of the complainant was received by the trial court. This issue was not raised before the first appellate court and was therefore not addressed by that court. The High Court, however, noted at paragraph 2 of page 3 of the judgment that the trial court conducted the voir dire examination as the law demands. The appellant did not pursue this ground in his submissions before us. We have looked at the record of appeal, specifically with regard to the evidence of PW1, and we do not find merit in this ground of appeal.

24. In view of the failure of the appellant to elucidate in his submissions on his grouse with the manner in which the voir dire examination was conducted upon the complainant, we are at a loss as to what his complaint is. A perusal of the proceedings of the trial court on 4th July, 2012 shows that the trial magistrate meticulously conducted a question-and-answer session with the child before concluding that the child was to give unsworn testimony. The trial magistrate therefore complied with the procedure for carrying out the task as established by this court in *Maripett Loonkomok v Republic* [2016] eKLR as follows:

> "...we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R (1983) KLR 447. The courts today accept both the question-and-answer format and the recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and another v Msa Criminal Appeal No 373 of 2006."

25. The next issue is whether the appellant was clearly identified as the defiler. To be considered alongside this issue is whether the complainant was penetrated. The appellant takes the view that identification and penetration were not proved to the required standard. He also argues that the evidence relied upon by the prosecution was either contradictory or fabricated and not corroborated. The two courts below found that the evidence on record was sufficient to establish these two elements of the offence.

26. On penetration, we have reviewed the evidence on record. PW1 stated as follows at page 10 of the record of appeal:

> "He told me to lie down facing down... He laid on me. I was putting on my clothes properly, when he laid on me. He tore my "kinyasa"."

The evidence of PW6 at page 40 of the record is as follows:

> "...she had no injuries except on the genitalia... she had bruises and tears around her anal canal."

27. It is our view that the evidence of PW6 corroborates that of the complainant who testified as PW1. This evidence is sufficient proof of penetration. Nothing much turns on the appellant's argument that the evidence of PW6 was contradictory to that of PW2 regarding the point of injury because both witnesses confirmed injury to the complainant's genital organs. It is to be noted that the definition of "genital organs", pursuant to Section 2 of the *Sexual Offences Act*, includes the anus.

28. On the issue of identification, the appellant is aggrieved that the evidence of PW1 was not sufficient to prove how she managed to identify him and the circumstances of such identification. The judgment of the first appellate court is exhaustive on the principles that govern recognition more so in instances where it is the evidence of a single witness. To that extent, we can only restate in our own words that the evidence of a single witness concerning identification of an accused person can be relied upon, more so in sexual offences. Offences such as defilement, and that is the offence with which the appellant was charged, are most often as in this case, committed in secrecy and with the complainant being the only

witness as to the identity of the assailant. We, however, appreciate that even in sexual offences courts must not drop their guard as regards the need to treat the evidence of a single witness with caution. The evidence still remains that of a single witness and can in some instances, be erroneous.

29. In the present case, we find that both the two courts below were alive to the principles guiding the manner in which the evidence of a single witness should be treated. The trial court at page 52 of the record of appeal noted that the complainant was credible and that she identified the appellant, having known him way before the material day. The first appellate Court similarly interrogated the complainant's evidence and reached a similar conclusion. This is a finding of fact and we do not find any reason to depart from that finding. In fact, to buttress this finding, the record also reveals that the complainant gave evidence which was not challenged on cross-examination, that the appellant had on a different occasion defiled her in a maize plantation when she was on her way from the market. Indeed, PW3 testified that a day after the incident three people were arrested and when the complainant was asked to identify her assailant, she did not hesitate in pointing at the appellant. We find that the evidence on record did prove the appellant's identity, as the perpetrator of the act of defilement.

30. Another issue raised by the appellant is that his right to a fair trial was trampled upon by the trial court. To buttress this point, the appellant contends that the trial proceeded without him being issued with witness statements. On this issue, and as submitted by the respondent, we note that at line 12 of page 20 of the record of appeal, the trial court ordered that the appellant be supplied with a copy of the charge sheet and witness statements and other exhibits. This issue was never raised again. The appellant never informed the court that he had any challenge in accessing those documents from the prosecutor. If the order was not complied with, the trial court, without the prompting of the appellant, could not have known of the non- compliance. The record shows that a directive was made. Thereafter, it would be unfair to accuse the trial court of a violation of the appellant's right to access the documents, when the appellant never informed the court that its order was not complied with. We find no merit on this ground of appeal.

31. We also note that the appellant participated in the trial and even cross-examined the witnesses. This means that he was able to understand and appreciate the charges facing him and the evidence that was being adduced by the respondent's witnesses. He also had an opportunity to question those witnesses and at the end, was accorded an opportunity to state his side of the story in his defence. We really do not find any prejudice visited upon the appellant in the circumstances.

32. The appellant's complaint about the age of the victim not being proved is indeed a perplexing one. His complaint is that the witnesses testified that the child was eight years old whereas the documentary evidence adduced, being the clinic card, showed that she was yet to attain eight years. One of the elements the prosecution was required to prove as per section 8(2) of the *Sexual Offences Act* was that the complainant was "aged eleven years or less". The appellant agrees that the prosecution established this fact. There is therefore no merit in his claim that the age of the victim was not proved.

33. The final issue we deal with is whether this Court should exercise its discretion and interfere with the life sentence imposed on the appellant. The appellant was sentenced to life imprisonment which the trial court noted is the explicit minimum sentence provided in the *Sexual Offences Act*. The same view was held by the first appellate court. The sentence was passed by the trial court in 2013 and confirmed in 2015 by the first appellate court. We cannot fault the two courts below because this was the law as at that time. However, the law has since evolved. We are even past the confusion regarding the application of the rationale in *Francis Karioko Muruatetu &nanother v Republic* [2017] eKLR to sexual offences, as the Supreme Court clarified in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) that the decision was only in respect to murder under section 203 as read with section 204 of the *Penal Code*.

34. Notwithstanding the directions of the Supreme Court in 2021 that its decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR was only in respect to the offence of murder, emerging jurisprudence from this Court and the High Court point to the application of the rationale in the decision to offences other than murder. When one reads the reasoning of the Supreme Court in the stated decision it becomes apparent why the courts below it have applied that decision, to the minimum sentences in the *Sexual Offences Act*. Our statement can better be understood by reading the determination of the Supreme Court. We cite part of that decision as follows:

> "(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.
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> 52. ... It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.
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> 53. If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of overpunishing the convict.
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> 54. A fair trial has many facets, and includes mitigation and, the right to appeal or apply for review by a higher Court as prescribed by law....
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> 56. We are therefore, in agreement with the petitioners and amici curiae that section 204 violates article 50 (2) (q) of the *Constitution* as convicts under it are denied the right to have their sentence reviewed by a higher Court – their appeal is in essence limited to conviction only. There is no opportunity for a reviewing higher court to consider whether the death sentence was an appropriate punishment in the circumstances of the particular offense or offender."

35. It is clear from the above quotation that the jurisprudence developed by the Supreme Court cannot be limited to the mandatory death sentence in murder cases which was the subject of litigation in that instance. That reasoning also applies to minimum sentences provided by other statutes. Therefore, notwithstanding the directions issued by the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6

July 2021) (Directions), the courts below the Supreme Court have, correctly, in our view, continued to apply the *ratio decidendi* in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.

36. For instance, in *Joshua Gichuki Mwangi v Republic*, Nyeri Criminal Appeal No 84 of 2015 this Court (differently constituted) applied the decision in Francis Karioko Muruatetu & another v Republic [2017] eKLR by holding that:

> " 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...
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> > 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."

37. The court went ahead to discuss the limiting nature of mandatory minimum sentences on the discretionary powers of the courts and their negative impact on the constitutional rights of the accused persons as follows:

> " 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...
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> 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...
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> 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. 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.
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> This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of the *Constitution*. Further, the Judiciary has a mandate under article 159 (2) (a) and (e) of the *Constitution* to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the *Constitution*. This includes the provision of Article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited...

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

38. It is important to appreciate that the cited decision of this court was delivered on October 7, 2022 which was over one year after the Supreme Court had given its guidelines on July 6, 2021 in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions).

39. As for the High Court, Odunga, J (as he then was) considered the place of minimum sentences in sexual offences in *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) and held that:

> " 107. In my view, even without the application of the ratio in Muruatetu 1, based on what I have stated hereinabove, I find that whereas the sentences prescribed under the *Sexual Offences Act* are not unconstitutional by the mere fact of such prescription and the trial courts are at liberty to impose them, the imposition of the same as the minimum mandatory sentences does not meet the constitutional threshold particularly section 28 of the *Constitution*...
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> 109. This Court does not doubt the good intentions of the drafters of the *Sexual Offences Act* in taking steps to curb the menace of sexual offences and the trauma it causes to the victims of the said offence.
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> The perpetrators of the said offences must be condemned by all means. However, the sentences to be imposed must meet the constitutional dictates...
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> 111. My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the Courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under Article 28 of the *Constitution*. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than the *Constitution*, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of the *Constitution* as appreciated in the Muruatetu 1 case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional.
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> 112. At the risk of being repetitive, I must make it clear that my finding herein does not mean that the court ought not to mete out what appears as prima facie mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentences as are appropriate to the offence committed."

40. We observe that the decision of Odunga, J (as he then was) satisfied the requirement of the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) that any challenge to mandatory sentences for offences other than murder be made through constitutional petitions in the High Court. Be that as it may, we agree with the views propagated in *Joshua Gichuki Mwangi* (*supra*) and Maingi

& 5 others (supra) as regard the place of mandatory minimum sentences when juxtaposed against the progressive nature of our Constitution.

41. In the appeal before us, the appellant was sentenced to life imprisonment as provided in the *Sexual Offences Act*. It is our view that although there is nothing unconstitutional about the life sentence, it deprives a convicted person of the benefit of certainty as to the length of his or her retribution. Such a sentence should be reserved for depraved offenders who are likely to continue being a threat to society and where there is not even the slightest indication that they are likely to reform. Jailing a convict until death renders meaningless, the policy that imprisonment is meant to reform him or her. Those who are imprisoned must have hope that one day, however long it takes, they will be able to rejoin the free society. Even for crimes like sexual offences, which are in most cases committed by men, there come a time when the lion in the man shall roar no more (aphrodisiacs notwithstanding) rendering the fear of reoffending unrealistic. In the circumstances, we are inclined to exercise our discretion and interfere with the sentence imposed on the appellant.

42. In reviewing the appellant's sentence, we must take into consideration both the aggravating and mitigating factors. The appellant's mitigation as captured in the record was that he had a blind parent and a sister in class seven who relied on him. He also had two children in classes 1 and 4 who also relied on him after their mother ran away. The prosecutor had also indicated that the appellant had no previous record and we therefore take it that he was a first offender.

43. On the other hand, we note that the appellant's actions were heinous to the minor. He caused the victim physical injuries and mental trauma that she may never recover from.

44. Weighing the mitigating factors against the aggravating factors, we find that a long incarceration period is called for. We would have considered the appellant's age in imposing the sentence so as not to pass a life sentence in the guise of imposing a definite custodial sentence. Unfortunately, for the appellant, nowhere in the record do we find his age. The appellant will, however, not be prejudiced because if he is of an advanced age, he can benefit from the presidential pardon if he is found befitting of such mercy. In the circumstances we set aside the sentence of life imprisonment and substitute it with one of 35 years imprisonment to run from May 9, 2012 being the date when the appellant was first held in custody; as there is nothing on record to show that he was released on bail during the trial. This is in tandem with the proviso to section 333(2) of the *Criminal Procedure Code* which requires a court, in passing sentence, to consider the period a person has been held in custody prior to the sentencing.

45. The upshot of the foregoing is that the appeal against conviction is without merit and is hereby dismissed. The appeal against sentence succeeds and the sentence of life imprisonment is hereby set aside and substituted with a sentence of Imprisonment for 35 years to run from May 9, 2012.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF FEBRUARY, 2023.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR