REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MALINDI
[CORAM: NYAMWEYA, LESIIT & ODUNGA JJ.A]

CRIMINAL APPEAL NO.12 OF 2021

BETWEEN

JULIUS KITSAO MANYESO…….....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Malindi (R. Nyakundi J.) dated and delivered on 14th May 2020 in High Court Criminal Appeal No. 60 of 2018 arising from the original trial in Malindi Criminal Case No. 64 of 2013)

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JUDGMENT OF THE COURT

1. Julius Kitsao Manyeso ('the Appellant') has challenged the dismissal of his first appeal by the High Court, which he had lodged against his conviction for the offence of defilement and the sentence of life imprisonment that had been imposed by the Senior Principal Magistrate at Malindi (hereinafter 'the trial Court'). The particulars of the offence were that on 24th January 2013 at Arabuko Village in Malindi District within Kilifi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of Neema Mramba, a child aged 4 ½ years. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The Appellant entered a plea of not guilty in the trial

Court, whereupon the prosecution called six (6) witnesses to testify in the ensuing trial, while the Appellant gave unsworn testimony and did not call any witnesses.

2. The relevant facts, as stated in the testimony of the prosecution witnesses, were that NM (PW1), after a *voire dire* examination, stated she knew the Appellant, and that he did *'bad manners and put dirt in her place for urinating"* and that she told her mother, who checked her place for urinating, saw the dirt and took her to hospital. PW1's mother, EK who testified as PW2, testified that on 24th March 2013, she was home when she decided to visit her grandmother and left her daughter asleep alone in the house. That she then heard PW3 shouting that the Appellant, who was a neighbour, had gone to her room, and after going to the room and asking the Appellant what he was doing there, he ran away. She found PW1 lying on the bed and when she pulled up PW1's cloths, she saw male discharge on PW1's body and private parts. PW2 reported the matter to the village elder and Malindi Police station, took the child to hospital and given medication and the P3 form was filled.

3. SR (PW3) after a *voire dire* examination, stated that PW 1 was her sister, and on the material day, they were outside the house with the Appellant who entered the house to return chairs, and when she entered the house she saw the Appellant coming from her mother's bedroom. When she questioned him, he left and after she saw that PW1 was dirty and had

discharge she shouted and her mother (PW2) then came. She gave a similar account as that of PW2 of the events that followed. JK, the village elder testified as PW4 that he knew PW1 and the Appellant, and that he received the report that the Appellant had defiled PW1 and after reporting the matter to the sub-chief, PW1was taken to hospital and the Malindi police station. Julius Munene (PW5), an AP officer, was at the police station when the report was made, and after interrogating the Appellant, arrested him. PW 6 was Ibrahim, a Clinical Officer at Malindi Hospital who examined PW1 on 29th January 2013 and filed the P3 form of PW1 who was aged 3 years and 7 months. On examination, he noted that she had no injuries and that her hymen was broken; she was HIV negative and venereal disease negative, and concluded that she had been defiled.

4. The Appellant gave unsworn evidence as DW 1, and stated that he was a student at Arabuko and that on 20th January 2013 at 9 pm he was at home, when he heard noises at his neighbour's house and went to check what had happened, and then went to the village elder to report that people were saying that he had gone to his neighbour's house. That the village elder told him to go to the sub chief, who questioned him, and he denied that he had done anything. That they started to beat him and he was taken to the police station and interrogated and put in the cell.

5. The trial Magistrate (***Hon. Gicheha SPM***) delivered a judgment on 3rd October 2013 after finding that the prosecution had proved the charge of defilement, convicted the Appellant and sentenced him to life imprisonment. The Appellant was aggrieved by the finding of the trial Court and proffered an appeal to the High Court being **Malindi Criminal Appeal No 60 of 2018** and faulted the learned Trial Magistrate for admitting a charge which was defective; failing to find that the actual age of the victim was not proved beyond reasonable doubt, failing to consider that he was underage during the commission of the alleged offence, and for failing to consider his defence. The appeal was canvassed by way of submissions, and in a judgement delivered on 14th May 2020, the High Court (***R. Nyakundi J.***), found that the Appellant was convicted on overwhelming evidence and dismissed the appeal and upheld the sentence. The Appellant was dissatisfied with the decision in the High Court and proffered the instant appeal. The Appellant has raised three (3) grounds of appeal in supplementary grounds of Appeal filed on 13th October 2022 namely:

   a) *The Learned High Court Judge erred in law in upholding his convictions and by failing to consider that the Appellant was denied his right to information disclosure prior to taking plea in breach of article 50 (2) (a) (b) (c) (j) of the Constitution of Kenya.*
   b) *The Learned High Court Judge erred in law in upholding his conviction and by failing to consider the Appellant was his right to legal representation as stipulated or in violation of Article 50 (2) (g) (h) of the Constitution*
   c) *The High Court Judge erred in law in upholding his conviction and by failing to consider that the legal provision for mandatory life sentence under section 8 (2) of the Sexual Offences Act denies*

the judicial officer their legitimate jurisdiction to exercise of discretion in sentence not to impose an appropriate sentence in an appropriate case based on the scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and unfair in breach of Article 27 (1) (2) (4) of the Constitution of Kenya. Hence, the sentence imposed on the Appellant is unlawful.

6. We heard the appeal on the Court's virtual platform on 25th January 2023, and the Appellant, **Julius Kitsao** who was present in person appearing virtually from Malindi Prison, informed us that he had filed written submissions dated 18th October 2023 which he would rely on. Learned prosecution counsel, ***Mr. Mwangi Kamanu*** holding brief for ***Ms. Ongeti*** appeared for the Respondent and relied on written submissions dated 23rd January 2023.

7. The Appellant's case in summary is as follows. Firstly, that his right to information disclosure prior to taking plea was violated contrary to the provisions on the right to a fair hearing provided in Article 50 (2) (a) (b) (c) and (j) of the Constitution, and which, being an absolute right, is non-derogable and cannot be withdrawn from the litigant. The Appellant submitted that the witness statements should have been furnished to him before plea taking so as to be well informed of the charge he was facing and enable him prepare for the defence. However, that the prosecution failed to comply with this requirement and that the witness statements were not served to him until the closure of the prosecution case which occasioned him a failure of justice.

8. Secondly, that he was denied his right to legal representation at the state expense in violation of Article 50 (2) (g) and (h) of the Constitution and that the trial Court ought to have recorded in the proceedings that it had informed the Appellant of this right promptly and his response thereto, but failed to do so. The Appellant relied on section 43 (1) (a) and (b) of the Legal Aid Act and the decisions in **Republic vs Karisa Chengo & 2 others [2017] eKLR** that where an accused is an indigent to have him secure the service of a counsel from the state at the state expenses, as well as the decision in **Albanus Mwasia Mutua vs Rep Criminal Appeal No 120 of 2014** that an unexplained violation of the constitutional right will normally result in an acquittal irrespective of the nature and strength of the evidence which may be adduced in support of the charge. The Appellant urged that he was not informed of the complexity of the case and the consequences of not having legal representation at the start of the trial, and could not validly waive that right.

9. Lastly, the Appellant submitted that section 8 (2) of the Sexual Offences Act provided for a mandatory life sentence and forced the trial Court to impose sentence predetermined by the legislature, contrary to the doctrine of separation of powers between the judiciary and the parliament pursuant to article 160 (1) of the Constitution thereby depriving the magistrate of sentencing discretion. The Appellant contended that individual cases called for individual circumstances and mitigation and that infliction of punishment was a matter of the

discretion of the trial Court and to the extent that the mandatory sentence in Section 8 (2) of the Sexual Offence Act took away the Court's discretion and infringed on a fair trial as guaranteed under Article 50 of the Constitution and noted in the **Kenya Judicial Sentencing Policy Guidelines**. In addition, that the section was inconsistent with the provision of Article 27 and 28 of the Constitution on the right to equality before the law and right to dignity. Reliance was placed on various decisions including **Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2019] eKLR, Evans Wanjala Wanyonyi vs Rep [2019] eKLR** and **Jared Koita Injiri vs Republic Kisumu Crim.App No 93 Of 2014** it was held that mandatory sentences are unconstitutional. While highlighting his submissions, he stated that he was arrested in 2013 at a young age when he could not express himself asked Court to consider his age.

10. The prosecution counsel on his part placed reliance on various provisions of the Sexual Offences Act and various judicial decisions to submit that the ingredients of the offence of defilement was proved and urged that section 8 (2) of the Sexual Offence Act provided for the penalty for the offence and while citing the decision in the case of **David Mutai vs Republic [2021] eKLR** submitted that it was trite law that even an appellate Court could not interfere with the sentencing Court's discretion unless it was established that there was a real error on application of the sentencing principles.

11. The role of this Court as an appellate Court was set out in **Karani vs R (2010) 1 KLR 73** as follows:

> *"This is a second appeal. By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior Court on fact unless it is demonstrated that the trial court and the first appellate Court considered matters they ought not to have considered or that they failed to consider matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law."*

12. While the main issue that the Appellant is raising in this appeal is whether his constitutional right to a fair trial was violated, we shall nevertheless start our consideration by reiterating the holding by this Court *(Makhandia, Ouko & Murgor JJ.A*) in **John Mutua Munyoki vs Republic [2017] eKLR** that under the Sexual Offences Act, the main elements of the offence of defilement are as follows:

> *i) The victim must be a minor, and*
> *ii) There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.*

13. In this regard, it is notable that the age of the victim was indicated in the P3 form produced by PW6 as 4½ years, although in his testimony he stated that the victim was 3 years and 7 months, and the trial Court noted that the child could not have been more than 5 years. The Appellant was placed at the scene at the time of the commission of the offence and

identified by the victim, (PW1), PW2 and PW3, and was well known to them as he was a neighbour. We have perused the evidence as evaluated against the elements of the crime of defilement, and note the evidence as regards penetration by PW1 was as follows:

> *"I know the accused person. He did me bad manners. He put me dirt in my place for urinating. Mum took me to hospital. I went to Malindi hospital. I was treated. He put me dirt with his thing for urinating."*

14. PW2 and PW3 testified that after examining PW1's body and private parts they saw that male discharge and PW6 in his examination reported in the P3 form that her hymen was broken and labia inflamed. The elements of defilement were therefore established. We also note that the Appellant indicated that he was 15 years old at the time of the trial, and after perusal of the record of the trial Court, we note that the Appellant did raise this as an issue during the commencement of the trial on 28th January 2013, and also in his appeal to the High Court. However, as also found by the High Court, the trial Court directed that an age assessment be made of the Appellant, and recorded on 31st January 2013 that the Appellant was 18 years of age.

15. The Appellant's claim in this appeal is that his right to a fair trial was violated in two respects. Firstly, by not being availed the witness statements before taking of the plea to be aware of the charge and evidence, and prepare for his trial and defence. It is notable in this regard that under Article 50(2) the right to a fair trial includes:

"(b) to be informed of the charge, with sufficient detail to answer it;
(c) to have adequate time and facilities to prepare a defence;
(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"

16. The record shows that on 31st January 2013 and he pleaded not guilty, and the trial thereafter commenced on 12th April 2013, after PW1 had commenced her testimony, the prosecutor stated as follows:

"Prosecutor: The child has not written a statement. I request another date. Accused also requires statement.
Accused 1 have no materials.
Court: Matter is adjourned. Hearing 7/5/2013. Mention 26/4/2013."

17. The record does not indicate that any further request or objection was made by the Appellant, and on the contrary at a hearing held on 6th August 2013 when PW5 testified, he indicated he was ready to proceed. Therefore, contrary to the Appellant's assertions, the record shows that the prosecution indicated that they would avail the witnessed statements and the Appellant thereafter did not raise any concerns about not to being availed the said statement and participated in the trial and cross-examined the prosecution witnesses. We also note that this issue was not raised in his first appeal to the High Court.

18. Secondly, the Appellant claims that his right to legal representation was also violated. Article 50(2) (g) and (h) of the Constitution in this respect provides that the right to a fair trial includes the right:

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

19. This Court (*Kairu, Mbogholi-Msagha and Nyamweya JJA)* held in **William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) vs Republic (Criminal Appeal 49 of 2020) [2022] KECA 23 (KLR) that** the operative circumstance that triggers the necessity of legal representation in criminal proceedings is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person, or the incapacity and inability of the accused person to participate in the trial. The Court also noted that it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since the Constitution demands it. However, in the present appeal, the Appellant did not raise the issue of legal representation either in the trial Court and the High Court, and the record of the trial Court shows that the Appellant participated in the trial and cross-examined the witnesses, and it is not evident that he suffered any or any substantial injustice. For these reasons, we do not find any merit in the Appellants arguments that their rights to a fair trial on under Articles 50(2)(g) and 50(2)(h) of the Constitution were violated.

20. The last issue raised by the Appellant is that of his sentence. In this regard, sentencing is at the discretion of the trial Court, and as a second

appellate Court we cannot interfere with this exercise of discretion unless it is shown that the Court passed an illegal sentence. During the hearing of the appeal, the Appellant also stated that he was young, and did not know how to express himself, and that the Court considers that the time he has spent in prison since his arrest in 2013. The Appellant in this regard indicated that he had nothing to say after the Prosecution indicated that he was a first offendor. The trial Court in sentencing him to life imprisonment considered that the offence was committed on a girl aged 4 years who had been traumatized for life, and was of the view that a deterrent sentence was called for.

21. We note that the decisions of this Court relied on by the Appellant, namely **Evans Wanjala Wanyonyi vs Rep [2019] eKLR** and **Jared Koita Injiri vs Republic Kisumu Crim.App No 93 of 2014** were decided before the Supreme Court clarified the application of its decision in **Francis Karioko Muruatetu & another v Republic [2021] eKLR** and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code. This fact notwithstanding, we are of the view that the reasoning in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of

equality before the law under Article 27 of the Constitution. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in **Vinter and others vs The United Kingdom** (**Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013**) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

22. The European Court of Human Rights held as follows in that case:

> *"111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.*
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> *112. Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his*

progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment..."

23. In **R vs. Bieber [2009] 1 WLR 223** the Court of Appeal of the United Kingdom had held as follows:

> *"40. The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment…".*

24. It is notable that the question of whether the indeterminate life sentence was unconstitutional was raised in **Francis Karioko Muruatetu & another v Republic [2017] eKLR**, but the Supreme Court of Kenya found that not having been canvased before the two courts below, it was not available for the court's determination. The Supreme Court however noted as follows:

> *"[88] Unlike some of the cases mentioned above, the life imprisonment sentence has not been defined under Kenyan law (see the Kenya Judiciary Sentencing Guidelines, 2016 at paragraph 23.10, page 51). It is assumed that the life sentence means the*

number of years of the prisoner's natural life, in that it ceases upon his or her death.

[89] In order to determine whether this Court can fix a definite number of years to constitute a life sentence, we first turn to the provisions on the rights of detained persons as enshrined under Article 51 of the Constitution, which reads:

"51. (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.

(3) Parliament shall enact legislation that—

(a) provides for the humane treatment of persons detained, held in custody or imprisoned; and

(b) takes into account the relevant international human rights instruments."

[90] It is clear from this provision that it is the Legislature, and not the Judiciary, that is tasked with providing a legal framework for the rights and treatment of convicted persons…"

25. The Supreme Court, in recommending that Attorney General and Parliament commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'; further noted and found as follows:

"[92] The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:
"Sentences are imposed to meet the following objectives:
1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
5. Community protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community's condemnation of the criminal conduct."
The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.
[93] In addition, and in accordance with Article 2(6) of the Constitution, "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution". In 1972, Kenya ratified the International Covenant on Civil and Political Rights of 1966, and for that reason, the Covenant forms part of Kenyan law. Article 10(3) of the Covenant stipulates that—"[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."
[94] We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.
[95] We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the

protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism".

26. We are equally guided by this holding by the Supreme Court of Kenya, and in the instant appeal, we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence. We note in this respect that the Appellant did raise the concern of his sentence of life imprisonment while he was 18 years of age in his first appeal, and the High Court held as follows in this regards;

> *"The nature of the offence and the makeup of the offender are of such a nature that the public require protection for a considerable time, unless there is a change of circumstances of the appellant. Clearly there are no set of circumstances that are different to warrant interference with the legal sentence imposed by the trial Court. In my view, it cannot also be said to be excessive, unlawful or punitive to the extent that this Court jurisdiction can be invoked to vary it."*

27. The Appellant also did not say anything in mitigation after conviction by the trial Court, which he attributes to his young age at the time. We are also alive to the fact that he was convicted for defiling a child of 4 years and of the likely ramifications of his actions on the child's future. We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We,

therefore in the circumstances, uphold the Appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the Appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction.

28. It is so ordered.

Dated and delivered at Mombasa this 7th day of July 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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