Baraza v Republic (Criminal Appeal E006 of 2023)
[2025] KEHC 1352 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1352 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E006 OF 2023

JRA WANANDA, J

FEBRUARY 21, 2025

BETWEEN

FRANCIS FRANK BARAZA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Iten Senior Principal Magistrate's Court Criminal Case (Sexual Offences) No. E004 of 2022 with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, No. 3 of 2006.

2. The particulars were that on diverse dates between 1st November, 2020 and 24th December, 2020 at Irong location of Keiyo North sub-County within Elgeyo Marakwet County, he intentionally caused his penis to penetrate the vagina of BAO a child aged 15 years. He was also charged with the alternative offence of committing an indecent act with the same child, contrary to Section 11(1) of the same Act.

3. The Appellant pleaded not guilty to the charge and the case then proceeded to full trial in which the prosecution called 7 witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and placed him on his defence. In his defence, the Appellant gave an unsworn statement and called no other witness. By the Judgment delivered on 5/07/2023, he was convicted on the main charge and sentenced to serve 20 years' imprisonment.

4. Dissatisfied with the decision, the Appellant instituted this Appeal on 12/07/2023 in person. His Petition of Appeal, reproduced verbatim, is crafted as follows:

    i. That the Charge Sheet was defective.

    ii. That the trial Magistrate grossly erred in law and facts by not observing that prosecution did not prove their case beyond reasonable doubt.

iii. That the prosecution evidence was contradicted and fabricated.

iv. That penetration was not proven.

v. That I was not accorded a fair trial

vi. That the trial Magistrate grossly erred in law and facts by disregarding my alibi defence.

vii. That the trial Magistrate failed in law and facts by failing to realize that essential exhibits were not tendered in evidence as legally mandated by the law.

Prosecution evidence before the trial Court

5. PW1 was the minor-complainant. She testified that she was a 16 years old Form 2 student although she stated that she was born on 16/04/2006. She then referred to her Birth Certificate and stated that the Appellant is a neighbour, and she identified him in Court. She stated further that in October 2020, she started a relationship with the Appellant after he told her that he loved her, in November 2020, she went to his house and they had sex, and that after 2 weeks she learnt that she was pregnant and informed the Appellant as she had started vomiting and her periods failed. She stated that it was the first time she had engaged in sex with him, that she only told the Appellant about the pregnancy and that her mother only learnt of it after 5 months as the Appellant had told her not to tell her mother about it or that it is the Appellant who was responsible. She stated that she later gave birth on 19/09/2021 and that she was issued with a P3 Form. She reiterated that the Appellant is the father of her child.

6. PW2 was HA, the complainant's mother. She stated that the Appellant is her neighbour and identified him in Court. She stated that the complainant is her 2nd born child, that she learnt of the pregnancy in March 2021, that a Police officer called her after the Appellant locked one Winnie in the house, that they took the complainant to hospital where it was discovered that she was pregnant, and that it is the Appellant who was responsible. She stated further that she was not aware of the relationship between the Appellant and the complainant, and that the Appellant was arrested on 19/04/2021. She stated that she purchased a pregnancy kit for the complainant and upon conducting a test on her, she turned out positive. She stated that the Appellant was arrested 4 months after the child was born, and that the date of arrest was 19/09/2021.

7. At this stage, upon an oral application made by the Appellant, the Court directed that DNA tests be carried out on the Appellant, the complainant and the baby, to establish the paternity of the baby.

8. PW3 was WCK, also a minor. The Court was informed by the Prosecution Counsel that she was a complainant in another defilement case facing the same Appellant. She then gave incomprehensible testimony and appeared to be either unwilling to give evidence or did not comprehend the process. All she stated was that that she was born in 2006 and was a Form 4 student, and that she did not remember what happened in February 2021 but she knows the Appellant. With this turn of events, upon a request by the Prosecution Counsel, the witness was stood down to give Counsel to discuss the situation with her. She however never returned to complete her testimony.

9. PW4 was WT, a clinical officer at the Iten Hospital. He stated that the complainant, aged 14 years, went to the hospital on 19/04/2021 with a history of defilement and that on examination and/or laboratory test, she was found to be 8 weeks pregnant. He stated that as a result of the results, he made a conclusion that the complainant was defiled and impregnated. He then produced the P3 Form and treatment notes. In cross-examination, he stated that the complainant told him that she had been defiled since December 2020. He also stated that the complainant had conceived about 8 weeks earlier.

10. PW5 was Police Constable William Bushen, attached to the Directorate of Criminal Investigation (DCI), Keiyo North. He stated that he was the arresting officer, that on 19/04/2021, they received information that a young girl had been locked inside a house in [Particulars Withheld] area, they went to the house and found the house locked from outside, they broke the door and found WC (PW3) who told them that she was with the Appellant who had locked her in and left, and that they took her to the station and then to hospital. He stated further that a young girl AO (complainant herein) came and reported that she had been defiled by the Appellant, that they took her to the hospital and it was discovered that she was pregnant. He told the Court that the Appellant disappeared but in June 2022, they received information that he had been spotted heading to Total in Eldoret, and they went there and arrested him then charged him. He then identified the Appellant in Court. In cross-examination, he stated that the Appellant defiled two girls.

11. PW6 was Inspector Job Otieno, attached also at the DCI Keiyo North. He stated that he was the Investigating officer in the case, that on 19/04/2021, he received information that a minor, WJ, had gone missing, but had been spotted at a residential house within Iten, and that he gave the information to his colleague, (PW5) to go and rescue the minor. He stated that the girl was recused and brought to the station and on interviewing her, it was established that she was with the Appellant who had also defiled another minor, the complainant herein. He stated further that they looked for the complainant, who came to the station and whom they established was 15 years old as per her Birth Certificate, and that they escorted her to the Iten Referral Hospital where she was examined. He stated further that on 14/12/2023, he escorted the complainant, her child and the Appellant to the Government Chemist at Kisumu for the DNA test. He then produced the Birth Certificate. In cross-examination, he denied that he had framed the Appellant. He also stated that the DNA Report showed that the Appellant was the father of the complainant's baby.

12. PW7 was Jane Nabututu Waya, attached to the Government Chemist in Kisumu. She produced the DNA Report on behalf of its author, one Godwin Namala, whom she stated that she had worked with for 5 years and who had requested her to come to Court and produce the Report on his behalf as he was engaged before another Court. She testified that they were requested by PW6, under a Court Order, to carry out the DNA test on samples taken from the Appellant, the complainant and the baby, for purposes of determining the baby's parentage, that the samples were buccal swabs from sites of the mouth, and that upon concluding the test, it was found that the Appellant is the biological father of the baby. She then produced the DNA Report. In cross-examination, she denied that the results were doctored.

Defence evidence before the trial Court

13. When put on his defence, the Appellant opted to give unsworn testimony as DW1 and called no other witness. He testified that he is a mechanic and had lived in the subject plot for 4 years. He stated that the complainant's family moved into the same plot in October 2020 but that they used to be indoors most of the time, and he used to only see them on Sundays as they went to church as a family. He stated that being a businessman, he was always busy with his spare parts business. He conceded that the complainant was his neighbour but stated that she had framed him as he is never available except on Sundays.

Hearing of the Appeal

14. The Appeal was canvassed by way of written Submissions. The Appellant filed his undated Submissions on 9/11/2023, while the State filed its Submissions dated 17/09/2024, through Prosecution Counsel, Calvin Kirui.

Appellant's Submissions

15. On the issue of "penetration", the Appellant submitted that the same was not proved, as the DNA analysis could not prove "penetration", that "penetration" is an ingredient of defilement, not pregnancy and that, as in the biblical case of Jesus, pregnancy could occur without "penetration".

16. He urged further that the evidence was inadmissible, that the Prosecution "cooked" the DNA results and Phat the prosecution shifted the burden of proof to him since they could not find any evidence. He urged that the Prosecution provided forged documents which did not prove any of the 3 ingredients of the offence of defilement as PW7 could not authenticate the DNA report. He also faulted the Prosecution for coaching witnesses to give false and fabricated evidence, that he was declared by an Officer of being guilty even before the trial took place, and that he was not accorded a fair trial since he was convicted based on hearsay, fabricated statements and forged documents. In conclusion, he stated that he is the bread-winner of his aged parent who constantly needs medical attention, that he is young and in his most productive age and was not even married.

Respondent's Submissions

17. Counsel cited Section 8(1) and (3) of the *Sexual Offences Act* and submitted that the ingredients of the offence of defilement were set out in the case of George Opondo Olunga V Republic [2016] eKLR as "identification" or recognition of the offender, "penetration" and "age" of the victim. He appreciated that the Prosecution is under a duty to establish or prove all the above elements beyond reasonable doubt, and that the burden of proof never shifts to the accused who is under no duty to adduce or challenge the evidence adduced.

18. He submitted that in this case, the "identification" of the perpetrator was clear as the complainant being 15 years old, had the capacity to vividly remember the events of the incident and the perpetrator, and the Appellant and the complainant, being neighbours who lived next to each other for over 4 years, cannot be said to be strangers. According to him, "identification" was therefore by "recognition". On the issue of "penetration", Counsel cited the definition contained in Section 2 of the Act, and submitted that the complainant testified that the Appellant, in October 2020, told her that he loved her, they started relationship and in November 2020, she went to the Appellant's house where they had sex and that after 2 weeks, she discovered that she was pregnant. Counsel added that the DNA results also showed that the Appellant is the biological father of the complainant's baby, that PW4, the clinical officer, examined the complainant on 19/04/2021 and found that she was 8 weeks pregnant and concluded that she was defiled, and that the findings were noted in the P3 Form produced as exhibit, which also confirmed "penetration". According to Counsel, this evidence proved beyond reasonable doubt that there was "defilement".

19. Regarding "age" of the complainant, Counsel submitted that the Investigating Officer produced the complainant's Birth Certificate, and which indicates that the complainant was born on 16/04/2006. He submitted that the incident having happened between 1st November, 2020 and 24th December, 2020, it means that the complainant was 15 years old at the time of the incident. He added that the Appellant did not challenge this evidence, and produced no contrary evidence, and that as such, "age" was proved beyond reasonable doubt.

20. In conclusion, he submitted that the Appellant chose to adduce unsworn evidence which was a mere denial, which, according to Counsel, was untrustworthy, and the trial Court rightfully held that the Prosecution had discharged its burden of proving all the ingredients of the offence.

Determination

21. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See Okeno vs. Republic [1972] E.A 32)

22. I note that although the Appellant, in his grounds of Appeal, made the allegation that the charge sheet was defective, he did not at all revisit that ground in his written Submissions. I therefore presume that he has abandoned it.

23. Further, I note that, although in his grounds of Appeal, he did not at all touch on the issue of sentence, in his Submissions, he has briefly submitted on what he deems to be mitigating circumstances. As this points to the issue of the sentence, I will therefore, nonetheless, also interrogate that issue.

24. In the circumstances, the issues that arise for determination are the following:

    i. Whether the defilement charge against the Appellant was proved beyond reasonable doubt.

    ii. Whether the sentence of 20 years imprisonment was merited.

25. I now proceed to analyze the said issues.

i. Whether the defilement charge against the Appellant was proved beyond

26. It is trite law that for the offence of defilement to be established, 3 ingredients must be proved, namely, the age of the victim, penetration, and positive identification of the offender.

27. Regarding the above ingredients, Section 8(1) of the *Sexual Offences Act* under which the Appellant was charged, provides as follows:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

28. The importance of proving age was underscored by the Court of Appeal in the case of Hadson Ali Mwachongo v Republic [2016] eKLR, as follows:

> " The importance of proving the age of the victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In Alfayo Gombe Okello v Republic Cr. App 203 of 2009 (Kisumu) this Court stated as follows: -
>
> > "In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. This must be so because dire consequences flow from proof of the offence under section 8(1)".

29. In the instant case, the complainant testified that she was 16 years old. Her Certificate of Birth produced in evidence however indicates that she was born on 16/04/2006. Going by the Birth Certificate, the alleged offence having reportedly occurred between 1/11/2020 and 24/12/2020, it therefore means that at the time of the incident, she had crossed 14 years but had not yet attained 15

years. This therefore dispenses with the ingredient of "age" as it proves that the complainant was below the age of 18 years, and thus a child/minor.

30. In respect to "penetration", Section 2(1) of the *Sexual Offences Act* defines the phrase as:

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

31. As was held in the Supreme Court of Uganda case of Bassita Hussein v Uganda, Criminal Appeal No 35 of 1995, which was cited with approval in the subsequent case of E.E v Republic [2015] eKLR, the act of sexual intercourse or "penetration" may be proved by direct or circumstantial evidence, and usually, the sexual intercourse is proved by the victims through testimony, and corroborated by medical or other evidence.

32. In the present case, the complainant testified that the Appellant was her neighbour and that around October 2020, they got into a relationship. According to her, sometime in November 2020, she went to the Appellant's house and they had sex after which 2 weeks later, she realized that she was pregnant. She testified further that when she informed the Appellant about the pregnancy, he told her to keep it secret between themselves, and not to inform her mother. She stated that she later gave birth and was emphatic that the Appellant was her child's father. I have carefully reviewed the questions that the Appellant put to the complainant during cross-examination and upon analyzing the same, my impression is that the Appellant avoided asking any relevant questions dealing with the issue of whether he had a relationship with the complainant, whether he had sex with her and whether he was the father of the complainant's child. To me, the cross-examination was the perfect opportunity for the Appellant to put the complainant to test over the testimony given which opportunity he failed to make use of. My impression therefore is that the complainant's testimony remained unshaken.

33. Further, PW4, the Clinical Officer, also testified that the tests and examination conducted on the complainant on 19/04/2021, revealed that she was about 8 weeks pregnant. Unless evidence is produced to prove otherwise, pregnancy is no doubt confirmation of sexual intercourse, and by extension, "penetration".

34. Further, as foresaid, the complainant conceived and gave birth to a child. Section 36(1) of the *Sexual Offences Act* empowers the Court to direct that a DNA test be conducted and, in this case, it is in fact the Appellant who himself demanded that the Court invokes that power and orders for the DNA test to be conducted to establish the paternity of the baby. The Court obliged and ordered for the test. Upon the test being carried out, the results confirmed that indeed, the Appellant and the complainant were the biological parents of the baby.

35. In respect to the relevance of DNA test and/or results in cases of defilement, the Court of Appeal, in the case of Williamson Sowa Mbwanga v R [2016] eKLR, held as follows:

> " As regards the first ground of appeal, it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ

is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See Twehangane Alfred v Uganda, CR App No 139 of 2001)."

36. I therefore agree that in a charge of defilement, what is required is proof of "penetration", not proof of paternity, and that proof of paternity is not an essential ingredient of the offence. I also agree that, generally, while proof of paternity may be proof of "penetration" when fertilization and sexual intercourse takes place in accordance with the order of nature, paternity is not proof of "penetration" as in cases of in-vitro fertilization. However, in this case, "penetration" was established by the medical evidence of the pregnancy, which therefore corroborated the complainant's testimony. I therefore also find that the DNA results further corroborated the complainant's testimony in respect to "penetration".

37. I notice some apparent contradiction though as regards the timing of the pregnancy viz a viz the evidence adduced. I say so because according to the clinical officer (PW4) and the medical evidence he produced, the complainant was examined on 19/04/2021 and found to be about 8 weeks pregnant. This therefore indicates that conception occurred sometime in mid-February 2020. However, according to the complainant, she had sex with the Appellant sometime in November 2020. Nonetheless, I do not find this to be a major issue since as aforesaid, the issue of paternity is not an ingredient of the offence of defilement, and in any event, it is normal for witnesses, or any human being for that fact, to fail to recall accurate or exact dates of events and timelines. I also note that the charge sheet fixes the estimate date of defilement as "on diverse dates between 1/11/2020 and 24/12/2020". I also cannot ignore the testimony by the clinical officer (PW4) that the complainant told her that the Appellant had been defiling her "from December 2020". If true, then this indicates that the defilement was continuous, was not a one-off event, and occurred on several occasions thereafter. I will not therefore place too much premium on the slight contradictions in the evidence concerning the date of conception.

38. In view thereof, I am satisfied that the trial Court correctly found that there was direct evidence on record to proving "penetration".

39. On the issue of "identification", the Court of Appeal, in the case of Cleophas Wamunga v Republic [1989] eKLR, guided as follows:

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

40. In this case, it has not been disputed that the Appellant was a neighbour of the complainant's family and therefore a person well known to her. This, the Appellant, too, confirmed in his testimony. As aforesaid, the complainant testified that sometime in November 2020, the Appellant began seducing her upon which they commenced a "boyfriend-girlfriend" relationship and that in December 2020, they had sex in the Appellant's house. As I have already further found, the complainant's testimony was not shaken in cross-examination and was believed by the trial Magistrate. The rest of the witnesses also confirmed that this is the same consistent account that the complainant gave to each one of them separately and on different times. I therefore find this to be a case of "recognition" rather than identification of a stranger. Such "recognition" evidence is clearly more reliable and believable in

"identification". In respect thereto, in the case of Reuben Tabu Anjononi & 2 Others v Republic [1980] eKLR, the Court of Appeal guided as follows:

> "..... This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported).
>
> We consider that in the present case the recognition of the appellants by Wanyoni and Joice to whom they were previously well known personally, the first appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the appellants kept flashing about in Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the robbers left, Wanyoni reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three appellants to the police as the robbers who had robbed him.
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> We are satisfied that there was no mistake as to the identity of the three appellants and they were properly found guilty of the offence with which they were charged in count 1."

41. In light of the foregoing, I am also satisfied that the trial Magistrate correctly found that the Appellant had been positively identified. This ground of Appeal also therefore fails.

42. Accordingly, I find that the trial Court had before it, sufficient material to support its finding that the Prosecution proved its case beyond reasonable doubt. The testimony of the complainant was sufficiently corroborated and I cannot find any reason to suggest that the trial Court erred in convicting the Appellant. In any event, by dint of the proviso to Section 124 of the *Evidence Act*, even without corroboration, a trial Court can still convict on evidence of a victim of a sexual offence if it is satisfied that the victim is telling the truth.

43. The appeal on conviction therefore lacks merit and I dismiss it.

ii. Whether the sentence of 20 years imprisonment was merited.

44. The applicable principles in considering sentence on appeal were restated by the Court of Appeal in Bernard Kimani Gacheru v Republic [2002] eKLR, in the following terms:

> "It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist".

45. In respect to sentence, Section 8(3) of the *Sexual Offences Act* under which the Appellant was charged provides as follows:

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

46. In view of the above, it is clear that the sentence imposed by the trial Court, although the minimum prescribed, was within the law. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory or minimum sentences should be discouraged and that Courts should retain the discretion to depart therefrom where the circumstances deserve. In this regard, the Supreme Court in the case of Francis Karioko Muruatetu and Another vs Republic [2017] eKLR, while dealing with a case of murder, stated as follows:

> " (66) It is not in dispute that article 26(3) of *the Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of *the Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."

47. The Supreme Court then directed the Attorney General, the Director of Public Prosecutions and other relevant agencies to prepare a detailed professional review in the context of the Muruatetu Judgment with a view to setting up a framework to deal with sentence re-hearing cases. The Attorney General was then given 12 months to submit a progress report thereon.

48. On the strength of the Muruatetu decision and reasoning, the High Court and even the Court of Appeal routinely reviewed mandatory or minimum sentences imposed on convicts for different offences other than murder, including for sexual offences and robbery with violence. Examples are the Court of Appeal decisions in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR, the case of GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), and also the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR. I may also mention the oft-cited decision of Odunga J (as he then was), in the case of Maingi & 5 others *v Director of Public Prosecutions & another (Petition E017 of 2021*) [2022] KEHC 13118 (KLR).

49. However, by the clarification made by the same Supreme Court in its subsequent directions given 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 Court made it clear that Muruatetu only applied to murder cases, and not to any other type of case, not even sexual offences.

50. Recently, the Supreme Court reiterated and restated the above directions when dealing with an Appeal emanating under the Sexual Offence Act. This was in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment). In setting aside the decision of the Court of Appeal which had applied the Muruatetu reasoning in setting aside the mandatory minimum sentence of 20 years

imprisonment imposed on an Appellant for a defilement offence, the Supreme Court stated, inter alia, as follows:

> " 57. In the Muruatetu case, this Court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.
>
> ....."

51. In view of the decision and guidelines expressly set out by the Supreme Court as above, this Court will be acting ultra vires were it to set aside the sentence of 20 years imprisonment imposed herein, on the sole basis that the same, being a minimum sentence stipulated by statute, is unconstitutional. As clearly spelt out by the Supreme Court, Muruatetu is not applicable to cases under the *Sexual Offences Act*.

52. My above observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh, which I now proceed to do.

53. The Supreme Court, in the Muruatetu case, also guided that, in re-sentencing by the High Court, the following mitigating factors would be applicable; (a) age of the offender; (b) being a first offender; (c) whether the offender pleaded guilty; (d) character and record of the offender; (e) commission of the offence in response to gender-based violence; (f) remorsefulness of the offender; (g) the possibility of reform and social re-adaptation of the offender; and (h) any other factor that the Court considers relevant.

54. The sentence meted out on an offender must therefore be commensurate to the blameworthiness of the offender and before settling on a sentence, the Court must consider the facts and the circumstances of the case in its entirety. In restating the above principles, the Court of Appeal in the case of Thomas Mwambu Wenyi Vs Republic (2017) eKLR quoted the decision of the Supreme Court of India made in the case of Alister Anthony Pereira Vs State of Mahareshtra where it was held as follows:

> " 70. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.
>
> 71. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence
>
> As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The

court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

55. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal stated as follows;

> " ..... 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. ....."

56. Applying the above principles to the facts of this case, I may repeat that the Appellant was liable to a sentence of not less than 20 years imprisonment, which coincidentally is the minimum prescribed by statute. The trial Court did not however expressly state that it meted out that sentence because it was the minimum stipulated by law.

57. It is not in dispute that the Appellant was given the opportunity to mitigate, which he did. According to the Prosecution, he was not a 1st offender. The crime of defilement is also treated as a serious offence under Kenyan law and society and for this reason, it is always severely punished. The Appellant preyed on a young Form 2 schoolgirl and took advantage of her naivety to quench his sexual urges. In the process, he impregnated the girl and, at her young age, made her a mother, and may have therefore perhaps even shattered her pursuance of further education. This is totally unacceptable. Even if the complainant seemingly agreed to the sexual act, due to her age, the law considers her as lacking the capacity to give consent for her participation to the sexual act. Looking at the record, I cannot find any meaningful "mitigating" circumstances to favour a reduction of the sentence imposed.

Final orders

58. The upshot of my findings above is that this Appeal lacks merit and the conviction therefore is upheld and the sentence affirmed. Accordingly, the Appeal is dismissed in its entirety.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF FEBRUARY 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

The Appellant

Ms. Mwangi for the State

Court Assistant: Brian Kimathi