Danieli v Republic (Criminal Appeal E061 of 2022)
[2025] KEHC 5648 (KLR) (6 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5648 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E061 OF 2022

AK NDUNG'U, J

MAY 6, 2025

BETWEEN

DANIEL MURITHI MUTIA ALIAS ALVIN MURITHI ALIAS DANIELI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(rom original Conviction and Sentence in Nanyuki CM Sexual Offences Case No E016 of 2022– L. Nyaga, RM)

JUDGMENT

1. The Appellant, Daniel Murithi Mutia Alias Alvin Murithi Alias Danieli was convicted after trial of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on 27/07/2020 at Timau township and on the 9th and 10th day of August 2020 at [Particulars withheld] area [Particulars withheld] township Buuri West Sub-county Meru County intentionally caused his penis to penetrate the vagina of SW a child aged 15 years old. On 18/10/2022, he was sentenced to fifteen (15) years imprisonment.

2. Being dissatisfied with the conviction and the sentence, he lodged this appeal vide a petition of appeal filed on 01/11/2022 and amended the same in the amended grounds of appeal filed on 29/08/2024. The conviction and the sentence are being challenged on the following grounds;

    i. The trial magistrate erred by not finding that there was no clear medical evidence to connect him with the offence.

    ii. The trial magistrate erred by failing to note the critical witness were not called and that police investigation were incomplete or shoddy.

iii. The trial magistrate erred convicting him relying on identification parade that did not pass the judges test.

iv. The trial magistrate erred convicting him relying on forensic analysis (finger prints) report which was wrongly admitted in evidence.

v. The trial magistrate erred convicting him while relying on prosecution evidence which was full of contradictions, inadequate and inconsistencies.

vi. The trial magistrate erred in matter of law and facts that the charge was not proved beyond reasonable doubt.

3. The appeal was canvassed by way of written submissions. In his written submissions, the Appellant argued that the prosecution failed to lead PW4 to lay basis so as to testify on behalf of the clinical officer who examined the complainant and filled the medical documents. Therefore, the medical evidence tendered during trial was rendered hearsay and inadmissible by operation of Section 33 and 48 of the *Evidence Act*. That as to who was Dr Jackson Mutwiri Njagi and whether he was skilled in the area of medicine remained unanswered. That the police investigations were incomplete for reasons that PW1 testified that she used to call him through her sister's phone but the said phone was not subjected to forensics analysis to prove that there was communication between him and PW1. That PW1 testified that there were four people in the house whereas PW2 testified that there were three people thus giving contradictory testimony. That if these people were adults, the question was why the police failed to record their statement.

4. Regarding identification, he submitted that it was in question as identification parade that was carried out was unfair as police only called PW1 but failed to call PW2 to confirm whether she confirmed his arrest when she accompanied the police to his house. That the trial court erred by finding that he was properly identified yet there was no evidence by the parade officer as the parade forms were produced by PW3, the investigating officer. The identification parade was flawed as there was no evidence it complied with the set guidelines. That failure to call the parade officer denied him the opportunity to cross examine him and without calling him, there was no way the court would have been satisfied that the parade was conducted in a fair manner.

5. He submitted that the trial court convicted him relying on a forensic finger prints analysis that was wrongly admitted as evidence contrary to Section 48, 62 and 63 of the *Evidence Act*. The prosecution did not give the reasons why the maker of the said report was not available and PW3 had no power or authority to tender in evidence the forensic analysis which was in contravention of Section 77 of the *Evidence Act*. That forensic analysis can only be tendered in evidence by an expert in accordance with Section 48 of the *Evidence Act* and PW3 was not an expert and she did no lead evidence whether she knew the maker's signature or whether she was conversed in forensic analysis. The trial court also failed to ask him whether he objected to its production but went ahead and admitted it. That by admitting the forensic analysis report without the maker and without any explanation why he was not available and testing his findings, the trial court flouted Section 48,62, and 63 of the *Evidence Act*.

6. In rejoinder, the Respondent's counsel submitted that the age of the complainant was proved as she testified that she was 15 years old at the time of the incident and this was corroborated by PW2, her mother and PW4 through Pexhibit 1 and 2. Further, that as it was stated in Edwin Nyambogo Onsongo vs Republic (2016) eKLR, age can be proved by birth certificate, baptismal card or by oral evidence of a child if the child is sufficiently intelligent, the evidence of the parents or guardian or medical evidence. As to penetration, she submitted that it was supported by PW4 and PW1 who testified that she was

invited to the Appellant's house and they had unprotected sex on 27/07/2020 and from that day, she went to his house every day and they would have unprotected sex hence penetration was proved.

7. As to identification, she submitted that the victim's identification was very clear as the same was through recognition. That not only was he well known to PW1, she had spent time with him for close to three weeks before they were caught together in his house. That identification remained a well established fact as the same was not challenged during cross examination. That it was a case of identification by recognition which is more assuring and more reliable.

8. On the question whether critical witnesses were called, counsel submitted that the prosecution called all the witnesses to establish the charge and they were not under any obligation to call any other witness because it was not necessary.

9. On the allegation that the identification parade was flawed, it is submitted that the parade was duly performed by Inspector Kitetu and a report dated 26/03/2022 was produced as Pexhibit5 which shows that the parade was properly conducted in accordance with the law. Nevertheless, the minor recognised him and the parade was merely conducted to augment the issue of identification.

10. On whether the forensic report was wrongly admitted in evidence, it is the Respondent's submission that there was no evidence of prejudice occasioned on him by investigating officer producing the said report. That he did not point out the prejudice that he suffered from the contents or finding of the expert and the contents of the report remained unchallenged.

11. On the submission that prosecution evidence was contradictory, counsel submitted that nothing on record shows grave contradictions to warrant an acquittal and the Appellant failed to point out what contradictions he was alluding to.

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

13. To place this court on a suitable pedestal to re-evaluate the evidence, a recap of the evidence tendered at the trial court is summarized as follows.

14. The complainant testified as PW1. She testified that in July 2020, she was 15 years old and in class 8. It was during corona pandemic and she went to visit her sister in Timau where she met the Appellant who was her sister's neighbour. After 3 days, he approached her and sought they have a relationship which she declined. On 27/07/2020, he invited her to his house when her sister went to work. The Appellant asked her to sleep with him and they had unprotected sex. That from 27/07/2020 to 02/08/2020, she used to go to his house on a daily basis and they engaged in unprotected sex. On 02/08/2020 when she was to go home, the Appellant wrote his phone number on a piece of paper and gave it to her. She would communicate to him through her sister's phone.

15. On 09/08/2020, he contacted her and requested that they meet at Sirimon centre. She lied to her mother that she was going to church. She met with him and at around 5:00pm, she told him that she wanted to go home but he requested that they go to his house and she went with him to his friend's house at Riverside in Timau where they stayed for two days. That they used to have unprotected sex on those two days until 11/08/2020. On the said day, she heard a knock on the door and when she opened, she found it was her parents and police officers. They were arrested and they were taken to Timau police station cells. She was taken to hospital on the next day. She identified the Appellant and testified that on 26/03/2022, she was at home and she was informed that the Appellant was arrested and was denying having sex with her. She was taken to police station to identify him she positively identified him among eight persons.

16. On cross examination, she testified that she got his two names from his national identity card while in his house. That he did not have a brother. That they were staying at his friend's house who was married to one Karimi and when police found them, they were four people in the house. That she could not remember the number she was using to call him but she used to call him through her sister's number. That her sister was staying at Mukuri, Timau near where he was staying and that it was his father who sold to them the plot.

17. On re-examination, she testified that Karimi was the Appellant's friend's wife and they were staying in one big house that had been partitioned. That she used to sleep with him while Karimi slept with her husband. That they did not use a condom.

18. PW2, the complainant's mother testified that on 09/08/2020, PW1 informed her that she was going to church and later on she will visit her sister, one Kathure who was staying at Sirimon. At around 6:00pm, she informed her husband that the complainant had gone to church and was to thereafter go to her sister's place. Her father contacted Kathure but her mobile was off. Kathure called the next day and when asked whether she was with the complainant, she informed them that she had not seen her. Kathure's daughter informed them that she had seen the complainant with a man at Sirimon centre. They contacted her daughter who lives at Sirimon, Makena who said she had not seen her. They started searching for her and Makena went around searching for her and she informed them that she got information that the complainant was staying with a man in his house.

19. By 11/08/2020, they had known where the complainant was and they reported at Timau police station and they were given an officer to accompany them. They went to Appellant's house and they found the complainant and the Appellant sitting in the house. The Appellant was arrested and they took the complainant to hospital. On 26/03/2022, she was contacted by police officer who informed her that the Appellant was arrested and she was required to go to the station to record a statement. She identified the Appellant.

20. On cross examination, she testified that she had seen him in the past. That she saw him in the house where they found him with the complainant. They were three in the house with PW1 and another lady. That she had not seen him at her home and she did not know the distance from Sirimon to his place. That when he was arrested, he was taken to police station with the complainant. On further cross examination, she maintained that they found the complainant at his house seated on the bed as he was cooking rice. There were three people in the house, the complainant, him and another lady. She did not know whose house it was and he found him seated with his daughter.

21. PW3, the investigating officer testified that he took over the matter from the former investigating officer who was transferred. He confirmed what was reported and testified that the Appellant took the complainant to his brother's house at Riverside where they stayed until 10/08/2020 and they were found on 11/08/2020 by the complainant's parents and police officers. That they were escorted to police station and on the next day, they were taken to hospital. That the Appellant was taken to court vide Nanyuki CM CR. Misc Application No. 86/2020 which he produced as Pexhibit3. That before the date given by the court, the Appellant and others escaped from Timau police station. That on 21/03/2022, they were informed by members of the public that the Appellant had been seen at Mukuri relief food distribution centre and they went there and arrested him. That he declined that he was known as Alvin Murithii alias Danieli and said that he had an identity card bearing the name of Daniel Murithi Mutea. Finger prints were taken and sent for forensic examination at CID and confirmed that they belonged to the same person. He produced the finger print analysis report as Pexhibit 4. He traced the complainant and an identification was done by inspector Kitetu. The parade consisted 9 people

and the complainant positively identified him by touching him. He produced the identification parade as Pexhibit5.

22. On cross examination, he testified that he was found at night with the complainant and his brother did not record a statement. The complainant's sister did not record a statement. That on the first instance, he took the complainant to Mukuri and later on took her to Riverside.

23. PW4 was the clinical officer. He produced the P3 and PRC forms as Pexhibit1 and Pexhibit2 respectively on behalf of Jackson Mutwiri Njagi who was on transfer. He testified that he had worked with Jackson for a period of two years and that he could confirm that he filled the P3 form as he knew his handwriting and signature. On examination, there were no injuries and there was no abnormal discharge. Urinalysis was done and it showed that she had a urinary tract infection. The hymen was broken (old) which meant that it was not freshly broken. The PRC form was also filled on 12/08/2020 and on examination, everything was normal. There were no signs of injuries.

24. On cross examination, he testified that one could tell if defilement was dome where there were injuries on private parts and in this case, the doctor noted that there were no injuries on the private parts.

25. The Appellant opted to give sworn defence. He testified that he is an electronic engineer and that on 29/03/2020, he went to work at Kisima Lewa Down and there was so much work that he was forced to spend the night there. As he was looking for a place to sleep, he received a call from a man in Riverside giving him work. He went there and he was paid Kshs.45,000/ and he was requested to hand over his work documents and national identity card which he gave to his wife who then gave them to their daughter who was holding a baby aged around 1 year. As they were taking tea, there was a knock on the door and when the woman opened the door, there were uniformed police who informed him that they were there to arrest him. They told him that he would know the reason for his arrest later. He was taken to the police station where he remained for three days. The police started asking for money for his release but he refused to give them. He later on gave Inspector Kibe Kshs.27,000/- and he was released. He testified that he was arrested on 03/03/2022 and he was told the reason for his arrest was because of escape from custody. Later on, he was informed of defilement charges which he continued to deny.

26. On cross examination, he testified that he was Daniel Murithi and not Alvin. He lived at Timau Mukuri area. He did not know the complainant but came to know her in court and also saw her at the place where he was arrested. That he did not get to know the name of the child he referred to. That while in police cell, he was asked to give out money and he gave out Kshs.27,000/- which he was informed would act as bond for his release. That he was arrested and was not given a chance to explain what had happened. He was beaten and forced to sign a statement which he was not even given a chance to read. That he did not record a statement but was forced to sign. He denied that the signature on the statement was his. That in July 2020, he was living in Mukuri, his home to date. That he was an electronic engineer as was indicated in his statement. He denied that he saw the complainant at Mukuri as it was written in the statement. He denied communicating through the phone with the complainant and that the allegations that were in his statement that he met the complainant was not true and that it was not true that he carried her on a motorcycle. That he knew how to ride a motor cycle but did not have one. He denied taking the complainant to his brother's house and had sex with her. He testified that he did not have a brother.

27. I have had occasion to consider the evidence as recorded in the trial court. I have taken cognizance of the fact that unlike the trial court, I did not have the advantage of seeing and hearing the witnesses testify and have given due allowance for that fact. I have taken into account the applicable law, the submissions made and case law cited.

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

29. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the *Sexual Offences Act* No. 3 2006.

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

31. Proof of age is important in a sexual offense. In Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

32. In the present appeal, the Appellant did not dispute the age of the complainant. The Respondent's counsel submitted that age was proved through the complainant's testimony that she was 15 years old at the time of the alleged offence which was corroborated by PW2, her mother and PW4, the clinical officer. The trial magistrate was also satisfied that her age was proved and that though the birth certificate was not produced, her evidence on age which was corroborated by PW2 and PW4 was not challenged by the Appellant.

33. In this case, no documentary evidence was produced to prove the age of the complainant. In Thomas Mwambu Wenyi v Republic (2017) eKLR the Court of Appeal cited with approval Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2 of 2000 where it was held that:-

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense...."

34. The courts have also held that where the actual age of the victim is not proved, the apparent age of the victim shall suffice. The Court of Appeal in Evans Wamalwa Simiyu vs. R [2016] eKLR held that:-

> " Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the *Sexual Offences Act*."

35. The Court further observed that –

> " As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required

is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years.

36. What emerges from the authorities is that whilst the best evidence of age is the birth certificate followed by age assessment, the minor's parent evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant. In the instant case, the complainant testified that at the time of the alleged offence, she was 15 years old and in class 8. PW2, her mother testified that she was 15 years old at the material time. PW4 testified that the complainant was 15 years old at the material time. The P3 form indicated her estimated age to be 15 years old.

37. Following the decision in Evans Wamalwa Simiyu (supra), it therefore follows that the apparent age according to the evidence adduced in the lower court places the complainant in the age bracket of 15 years. Hence, the complainant's age was proved to fall under that age bracket and this means that she was a child for the purpose of *Sexual Offences Act*.

38. As regards to proof of penetration, the Appellant attacked the credibility of medical evidence on account that PW4 produced the P3 and PRC forms on behalf of Dr. Jackson Mutwiri Njagi without laying a basis. That the medical evidence tendered during trial was therefore rendered hearsay and inadmissible by operation of section 33 and 48 of the *Evidence Act*. That as to who was Dr Jackson Mutwiri Njagi and whether he was skilled in the area of medicine remained unanswered.

39. This is not the case as PW4 as seen earlier testified that the doctor who filled the forms was transferred and that he had worked with the said doctor for two years so he knew his signature and handwriting. The Appellant had objected to PW4 producing the P3 and PRC forms which was considered by the trial court and the trial court held that it was in the interest of justice that the forms be produced by PW4 so long as he lay a basis for the same. A proper basis was laid for the production of the medical evidence as it was demonstrated that the evidence of the maker could not have been procured without an amount of delay or expense. Suffice it to note too that, even if the contrary be true, prove of penetration is not solely dependent on medical evidence.

40. The trial court while finding that penetration was proved observed that corroboration in sexual offences is not cast on stone as the court need to be satisfied that the child is truthful and she quoted the case of J.W.A v Republic (2014) eKLR where the Court of Appeal reaffirmed the provisions of section 124, *Evidence Act*. The trial court demonstrated a clear appreciation of the law, specifically the import of Section 124 of the *Evidence Act*. The court stated that it conducted a voir dire examination (which I note was really not necessary, the minor being 15years old) and was satisfied that the complainant possessed the requisite intelligence and understood the meaning and nature of an oath. Most importantly, that she gave sworn evidence and the court viewed her as a truthful witness.

41. Her evidence is corroborated and given further credence by the evidence of PW2 who was present when the Appellant was arrested while in the company of PW1 in a house.

42. PW4, the clinical officer testified that everything was normal on examination as there were no injuries on the genetalia. He testified that the hymen was however broken (old) which meant that it was not freshly broken and on urinalysis, the complainant had a urinary tract infection. This evidence affirmed that the hymen was broken old and read together with the rest of the evidence, the cause of the penetration remains the Appellant's act.

43. It is not lost on this court that from the evidence, the sexual encounters between the Appellant and PW1 were habitual and not a one off affair. In those circumstances, it would not be expected to have evidence of injury to the genetalia as the sole prove of penetration.

44. This court is very much alive to the requirement that to prove penetration a victim of a sexual offence needs to describe the specifics of the act of penetration. This was the finding of this court in IMW V Republic {2024} KEHC 15434 (KLR) citing the decision in Julius Kioko Kivuva v Republic [2015]eKLR.

45. While agreeing with the persuasive authority in Julius Kivuva case (supra) this court in Nanyuki HCCRA No. E069 of 2023, stated;

> " In the circumstances of this case and in other similar cases where the prosecution's case on defilement is based on facts that reveal a long cohabitation and sexual relation complete with the birth of a child, it would be an absurdity to expect medical evidence to reveal any of the expected findings of a freshly broken hymen, tears on the labia majora, labia minora, lacerations, presence of spermatozoa (unless there is sexual activity shortly before examination) etc at the genetalia.
>
> It would be a second absurdity to expect evidence of sensory details where the sexual intercourse is habitual.
>
> In such circumstances resort must be had to the victim's evidence and other evidence as clearly put in Bassita v Uganda.
>
> The evidence of PW1 was that she had a long term relationship with the appellant with 2 continuos periods of cohabitation between January 2022 to March 2022 and again from October 2022 to 23/12/22. Out of the union, she testified that she got a child a fact confirmed by the evidence of PW2 and PwW4. PW3 too corroborates this evidence and indeed was there on the material night when PW1 was chased away when the appellant came with another woman....".

46. In my considered view, there is direct evidence of PW1 of penetration through several sexual encounters with the Appellant and which evidence is corroborated by the evidence of PW2 who was present when the Appellant was found with the minor.

47. The next crucial ingredient for prove was identification of the Appellant as the perpetrator of the act complained of. The onus on the prosecution to prove the charge against the accused beyond reasonable doubt never shifts and there is no onus on the accused to prove his innocence. A trial court has a duty to weigh the evidence adduced in court by all the parties

in totality and make a finding on the culpability or otherwise of the accused.

48. The Appellant was arrested in a house with the complainant. This was confirmed by the complainant herself, PW2 and PW3, the investigating officer. The Appellant has made heavy weather of the production of an identification parade form and finger prints report by a witness other than the maker. I think this was a misdirected arsenal that does not aid his cause. The evidence of identification is direct from PW1 and PW2. PW1 was quite familiar with the Appellant, a person who had befriended her and who had several sexual encounters with. She thus knew him well and there is no possibility of error in the identification of the Appellant. A look at the evidence would readily show that the identification parade was an unnecessary and superfluous exercise since an identification parade is only suitable in circumstances where a suspect was not known to the witness before.

49. It is however noteworthy that the identification parade was conducted after his re-arrest after escaping lawful custody. His identification was not in dispute at the time he was arrested together with the complainant in the house. As submitted by the Respondent's counsel, the subsequent identification parade was only done to augment his identity after his second arrest.

50. I have taken into account the defence evidence put up by the Appellant at trial. The evidence is contradictory and vague. He admits arrest at a home where he had been called for work. He denies knowing the complainant before stating that he only came to know her in court and he had never seen her before. In cross examination, he admits seeing the complainant where he was arrested. He does not explain who the complainant was in the house where he was allegedly called for work. He names Jediel Kirimi as the person who had called him for work. He does not call him as a witness. This line of defence was never put to the witnesses during cross examination. Its introduction at the defence stage is clearly an afterthought.

51. The Appellant conveniently avoids any mention of what was happening in the 2 years between his arrest and his re-arrest after his alleged release on bail. If one was to believe him, certainly he would have gone back to the police station to establish the position of his case and demand refund of his cash bail. His assertion on release on bail is certainly a lie and I do not find him worthy of belief.

52. Evaluating the evidence on identification, am satisfied that the evidence of PW1 and PW2 was sufficient in identifying the Appellant as the perpetrator of the act complained of.

53. On the sentence, the Appellant was sentenced to 15 years imprisonment. Section 8(3) of the *Sexual Offences Act* provides;

> "(3)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."

54. The charge therefore carries a minimum sentence of 20 years imprisonment and the Appellant was sentenced to 15 years. In sentencing the Appellant, the trial magistrate considered his mitigation and developing jurisprudence on mandatory minimum sentences.

55. The Appellant was sentenced to 15years imprisonment. That sentence was lower than that provided in law. It was therefore upon the Appellant to demonstrate that the sentence was manifestly excessive, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. The court in Shadrack Kipkoech Kogo vs R Eldoret Criminal Appeal No. 253 of 2003 laid a clear basis upon which an Appellate court can interfere with the sentence passed by a trial court. The Appellant has not demonstrated any of those factors. The trial court while sentencing him considered his mitigation and did not consider extraneous matter nor did it fail to consider relevant matters..

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

> "We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A

judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law.....

68. Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.

57. A look at the sentencing proceedings and the sentence itself in the matter clearly shows that the trial court was in error to fault the minimum sentence set in law. This is a clear invite to the court to interfere with the sentence by way of enhancement of the sentence. I note however that the state did not seek enhancement and in any event no notice of enhancement was served on the Appellant. While this court has the jurisdiction to order enhancement of the sentence, and in view of the foregoing sentiments, I will let the matter lie.

58. With the result that the appeal herein is without merit and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF MAY 2025.

A.K. NDUNG'U

JUDGE