



**Mwendwa v Republic (Criminal Appeal E033 of 2022)
[2024] KEHC 6759 (KLR) (7 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6759 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E033 OF 2022**

FR OLEL, J

JUNE 7, 2024

BETWEEN

JOHN MANZI MWENDWA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

A. Introduction

1. The Appellant herein John Manzi Mwendwa was charged with the offence of attempted defilement contrary to Section 9(1) as read with section 9(2) of the *Sexual Offence Act* No. 3 of 2006. The particulars of the offence were that on the 1st day of September 2019 at around 1900hrs in (Particulars withheld) Sub County within Kitui County, he intentionally attempted to cause his penis to penetrate the vagina of RM, a child of Nine (9) years. The accused pleaded not guilty to the charge.
2. The Prosecution called six witnesses who testified in support of their case and at the close of the Prosecution case, the Appellant was put on his defence and gave sworn testimony. Upon considering the evidence as presented, the trial court did find that the accused guilty of the offence of Attempted defilement and proceeded to convict him under section 215 of the CPC. He was thereafter sentenced to serve fifteen (15) years imprisonment.

B. Facts of the Case:

3. PW1,RMM, took voire dire and was assessed to possess sufficient intelligence and understood the meaning of Oath. She was therefore allowed to testify under oath. She stated that she was 9 years old and was a pupil in class 3 at (Particulars withheld) primary school. On 01.09.2019 at around 7.00pm she went to their neighbours' compound to look for their goats that had not returned home. On the way, she met the appellant who held her hand and pulled her to his house which was about three meters



from (Particulars withheld) (their neighbour's) house and proceeded to lock her therein. Later, he came back removed his shirt, belt and trouser and proceeded to sit on the bed where she was.

4. At that moment someone knocked on the door, and the Appellant asked who it was. She realised from the response that the said person, knocking was her mother, but she could not shout for help as the Appellant had covered her mouth with his hand. Her mother persistently knocked on the door, and eventually locked the door from outside while shouting for help. People eventually gathered outside and she was rescued, while the appellant was arrested and taken to Katse police station. Later she was taken to Kyuso sub county Hospital where she was examined. PW1 also confirmed that the appellant did not do anything to harm her apart from covering her mouth to stop her from talking, when her mother started to knock on the door.
5. PW2 PMN testified that he operates a boda boda business and on 01.09.2019 after watching 7.00pm news he got a customer and dropped him off at Kasakini. On his way back his motor cycle developed mechanical problem and went to a mechanic to help him repair the said motor cycle. The mechanic requested him to first take him to pick a debt he was owned by one of his customers and later changed his mind and told him that he would repair the motor bike the following day. When he went home he found his wife PW3 who told him that their daughter PW1 was missing and she had been looking of her without success.
6. After a while he heard noise outside and went to check on what was happening. He found that his daughter PW1 had been locked up in the appellants house, and clarified that that the accused was the mechanic who had told him that he could not repair his motor cycle until the following day. The police came to the scene and when the door to the appellants house was opened, his daughter emerged therefrom. The appellant also came out with his shirt unbuttoned and his trouser was at his feet. In cross examination PW2 confirmed that the appellants' house was approximately 150 m away from his house and that he emerged from his house naked.
7. PW3 MKM testified that on 01.09.2019 at about 7.00pm she was at her grocery shop/stand at (Particulars withheld) town. Her daughters PW1 and F requested her to allow them, take some of her stuff to the store using their wheelbarrow and did two trips after which PW1 told her that some of their goats were missing and requested to go check for them at their neighbours (Nzambi) compound. After she had left her other daughter, F told her that when they were taking the vegetables to the store, they had met the appellant, at the plot and he had assisted them to put the vegetables in the store. When she got home, she realised that PW1 was not at home and decided to go look for her. She looked all over and asked neighbours but nobody seems to have seen her.
8. In the process of searching for her daughter, she decided to go look for her at the Appellant house. The door was locked but the radio was on. She knocked on his door, but there was no answer. She went to look for him at the Katse town, did not find him and decided to go back to his house as her other daughter had told her the he was the one who assisted them push the wheelbarrow. This time the lights were on and she had him whisper. She persistently knocked on his door and he confessed that he had PW1 with him, but had not done anything to her. She started to scream and called other neighbours to come assist her. The policemen also came.
9. When the appellant eventually opened the door, she found her daughter, and the appellant who was half necked. He did not have a shirt, and his trousers had fallen down on the ground but his feet were still inside. The appellant was arrested and she took her daughter to the hospital the following day. In cross examination PW3 confirmed that she went to the appellants house three times, while looking for her daughter and had locked the house from outside. When she came the fourth time, she had heard him whisper to her daughter and that is when she started screaming for help.



10. PW4 MM confirmed that on the said 01.09.2019 at about 7.00pm his sisters brought home mums groceries and left/returned to where she was selling her vegetables at Katse town. PW3 came home at about 7.30pm and asked where PW1 was and he informed her that she had brought the goods at about 7.00pm and left. PW3 got worried and went to look for PW1 within the neighbourhood. At about 9.00pm he heard screams and recognised that the person screaming was his mum, PW3. He went outside and found her outside the appellant's house, which was about 100m from their house. Her screams had also attracted other neighbours and the police, who came and when the appellant opened the door to his house, his sister came out followed by the appellant. The appellant was arrested and escorted to Katse police station.
11. PW5, Pc Stephen Kumoluat Murkuk of Mumoni police station testified that on 01.09.2019 at about 7.00pm he heard somebody screaming and rushed outside to find out what was going on. He saw a group of people had surrounded the appellant's house and PW3 was screaming and saying that the appellant was with her daughter inside the house. When the door was opened, he saw PW1 inside the house and the appellant to, who was half necked. He was topless and only had a trouser. He advised the appellant to stay inside the house and called for reinforcements from his colleagues who arrived shortly thereafter, they calmed down the crowd and arrested the appellant. In cross examination he confirmed that he saw PW1 inside the appellants house and had only participated in his arrested and was not the investigating officer.
12. PW6 Ruth Mutua a clinical officer working at Kyuso District Hospital confirmed that she examined PW1 on 02.09.2019 and did not find any physical injuries and her external genitalia was normal. She had no vaginal discharge and her hymen was intact. She produced the P3 form, outpatient card and treatment notes as exhibits. At this point PW3 was recalled and produced PW1 birth certificate (S/NO 0393121) confirming that she was born on 28.10.2010.
13. The Appellant was placed on his defence and confirmed that he resides at Mumoni, Katse and was a mechanic repairing motor cycles. On 01.09.2019 he had just arrived home from the chemist where he had gone to buy drugs for a persistent headache. At about 9.00pm he heard PW3 knock on the door and started to scream. The policemen come and they instructed him to open the door. He was arrested and escorted to Mumoni police station. He insisted that he was framed by PW1 father, (PW2) over a debt he owned him of Kshs.3,500/= and he had refused to settle the same. He denied being with PW1 in his house and saw her outside the house with her mother (PW3) when he came out of his house as directed by the police.
14. The trial Magistrate considered the evidence tendered and did find that the prosecution had proved their case beyond reasonable doubt and proceeded to convict and sentence the Appellant to serve fifteen (15) years imprisonment. The Appellant being dissatisfied with the said conviction and sentence filed his petition of appeal and raised the following grounds of Appeal;
 - a. That the learned trial Magistrate erred in law and facts in finding that the case was shrouded with inconsistencies and contradictory testimony.
 - b. That the learned trial Magistrate still erred in law and in facts by convicting me in a case that was not proved beyond reasonable doubt.
 - c. That the trial magistrate erred in law and in facts by convicting me in a case that was not corroborated.
 - d. That the trial magistrate failed to consider the appellants mitigating factors as provided for under the sentencing guidelines policy 2015.



C. Appellants Submissions

15. The appellant submitted that the evidence of PW1 to PW3 were all inconsistent and contradictory. It had not been demonstrated that he had removed the complainant's cloths or pants nor was there any evidence that he had tried to insert his penis in the PW1 vagina. There was also inconsistency as to the time PW1 brought home the grocery from PW3 shop and as to exactly who opened his door, whether it was PW3 or the police. These inconsistencies in the evidence were not minor or trivial and discredited the witnesses' as being unreliable. Reliance was placed in the case of *Elizabeth Waithieni Gatimu Vrs Republic (2015) eklr* & *Joseph Chirchir Kabute Vs Republic (2019) eklr* where it was held that an accused person should benefit from any doubt raised in the prosecution evidence which would make it unsafe to convict on the evidence presented.
16. The appellant further submitted that the prosecution did not prove beyond reasonable doubt that he intended to commit the offence of attempted defilement. As stated in *Peter Ndoli Adisa Vrs Republic (2018) eklr*, the prosecution needed prove all ingredients of the offence of defilement except penetration. The prosecution had failed to prove actus rea as he had not attempted to penetrate the complainant and this was also confirmed by the medical evidence which confirmed that the child's genitalia was normal without any injuries. The trial magistrate therefore ought to have acquitted him.
17. The trial magistrate was also faulted for failing to corroborate the evidence of PW1, who was a minor aged 9 years as required under section 124 of the *Evidence Act*. No independent evidence was presented connecting him or tending to connect him with the alleged crime he was said to have committed and those who purported to do so, presented contradictory evidence which could not be relied on. Finally the trial magistrate had also failed to consider the mitigating circumstances before sentencing him as mandatorily required under the Judiciary sentencing policy guidelines. The sentence of 15 years was manifestly harsh and given the circumstances of the case he prayed for the same to be reviewed.

D. Respondents Submissions

18. The respondent opposed this appeal and submitted that indeed the charges were proved beyond reasonable doubt and it was indeed established/demonstrated that the appellant had taken steps to defile the minor but did not succeed. PW1 narrated how she met the appellant who pulled her to his house and locked her therein. He later came back and removed his shirt, belt and trouser, but before anything could happen someone knocked on the door and it happened to be PW1's mother. PW1 wanted to alert her mum of her presence therein, but the appellant blocked her mouth using his hand. Fortunately, the PW3 raised alarm and eventually PW1 was rescued and the appellant was arrested. Were it not for this timely intervention, the appellant would have completed the offence and the fact that the appellant did not remove PW1 cloths did not negate the fact that he had planned to defile PW1.
19. While placing reliance on the decision of *Kabue Karuoya Vrs Republic (2016) eklr*, the respondent pointed out that the evidence proved that the appellant had the intention to commit a crime, prepared to or sought to commit a crime and specifically had taken steps in the course of such conduct to commit the offence but fortunately was arrested before he could do so. It was clear therefore that the appellant did not complete the offence of defilement because he was caught red handed and was rightly found guilty for attempting to commit the offence
20. The appellant was also positively identified by the victim, by name as a person who was well known to her. PW2 to PW4 also knew the appellant as a neighbour and a local mechanic operating a garage within Katse town. The appellant never denied this fact and further during defence hearing, he admitted to knowing the victim, her mother and as to being at the scene on the material night. There was therefore no chance of this case being a case of mistaken identity. The age of the minor too was proved by



production of the Birth certificate. The offence was therefore sufficiently proved and the appellant rightly convicted.

21. The respondent urged the court to dismiss the appeal on conviction, but on sentence conceded that the same could be reviewed based on and taking cognizance of emerging jurisprudence on courts discretion on sentencing and nature of offence the appellant attempted to commit.

E. Analysis and Determination:

22. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See *Okeno-Vrs- Republic 91972)EA 32 & Pandya Vs. Republic (1975) EA 366*.

23. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion See ; *Shantilal M. Ruwala-Vrs-R (1975) EA 57*. Where it was stated that;

“Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, it must make its own findings and draw its own conclusions only then can it decide whether the magistrate’s findings should be supported in doing so, it should make allowance for the fact that the trial Court has made the advantage of hearing and seeing the witnesses.”

24. Also, in *Peter’s vrs Sunday Post (1958) E.A. 424* it was held that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

25. The appellant raised four (4) grounds of appeal which this court has considered together with the submissions filed. The issues raised can be synthesized as followed.

- a. Whether the burden of proof was effectively discharged by the prosecution.
- b. Whether the appellant was convicted based on inconsistent and uncorroborated evidence.
- c. Whether the sentence passed was harsh and excessive.

(i) Whether the burden of proof was effectively discharged by the prosecution.

26. Section 9(1) and (2) of the sexual offence Act. No 3 of 2006 provides as follows;

1. A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
2. A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

27. Further Section 388 of the Penal Code defines “attempt” as follows;

- (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention



by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

- (2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.
- (3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence"

28. An attempt to commit an offence was defined by the Court of Appeal in the case of Francis Mutuku Nzangi v Republic [2013] eKLR thus:

“Our understanding of this provisions [section 388 of the Penal code] is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible.”

29. The definition of “Inchoate crimes” was also discerned in Moses Kabue Karuoya Vrs Republic (2016) Eklr Mativo J . The court held that:

“In the case of Benard K. Chege vs Republic this court had the occasions to the address its mind and define in detail ingredients of incomplete offences also described as inchoate offences. Inchoate crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of inchoate crimes are criminal conspiracy, criminal solicitation, and attempt to commit a crime, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime. An inchoate crime offense requires that the accused have the specific intent to commit the underlying crime. An inchoate crime may be found when the substantive crime failed due to arrest, impossibility, or an accident preventing the crime from taking place.

Strictly inchoate crimes are a unique class of criminal offences in the sense that they criminalize acts that precede harmful conduct but do not necessarily inflict harmful consequences in and of themselves. It can thus be appreciated that it could extend the criminal law too far to reach behind those acts and criminalize behaviour that precedes those acts. Every inchoate crime or offense must have the mens rea of intent or recklessness, but most typically intent. Specific intent may be inferred from circumstances. It may be proven by the doctrine of “dangerous proximity”, and the presence of a “substantial step in a course of conduct”. The dividing line between legal and illegal conduct is whether there is a “substantial step” towards committing a specific crime. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intentions by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is said to attempt or to prepare to commit the



offence. The essential ingredients of an attempt to commit an offence have been laid down in the following words: -

“In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An ‘attempt’ is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury and the moral guilt of the offender is the same as of he had succeeded”

Thus, for there to be an attempt to commit an offence by a person, that person must:-

- a. Intend to commit the offence;
- b. Begin to put his intention to commit the offence into execution by means which are adopted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;
- c. Do some overt act which manifests his intentions, that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence,

But in fact, he does not commit the whole offence. For the offence of or attempting to commit an offence to be proved, the prosecutor must prove each of those three elements beyond doubt.

In the same case the learned Judge further stated that;

“... The act relied upon as constituting the attempt to commit an offence must be an act immediately, not merely remotely, connected with the contemplated offence. This was enunciated in the case *Williams, Ex Parte The Minister for Justice and A-G*. The act must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is necessary that the accused should have done his best or taken the last steps towards the intended offence. There can be an attempt to commit an offence where the failure to complete the commission of it is due to ineptitude, inefficiency or insufficient means on the part of the accused person. In fact, that the person, having done something which amounts to an attempt then voluntarily desists from continuing the attempt, does not relieve him from the criminal responsibility for the attempt which he made before desisting.....”

30. To prove the offence of attempted defilement, the prosecution had to prove all the ingredient of the offence of defilement except penetration. PW3 did produce the birth certificate of PW1 and indeed it was proved that the complainant was born on 28.10.2010 and, and was aged 9 years at the time the offence was committed. Secondly PW1 to Pw4, all knew the appellant as their neighbor, who resided barely 100m from their house and secondly as a mechanic repairing motor cycle with Katse centre, where both PW2 and PW3 conducted their business. PW3 had been informed by her other daughter Faith, that as they were returning vegetables to the store, they met Manzi (the appellant) at the plot and he assisted them to put her wares in the store.
31. Relying on motherly instincts PW3 repeatedly went to the appellants house on the material evening to search for her daughter. Eventually when she confirmed that her daughter was therein, she raised alarm, locked his house from outside and sought help from neighbours. lo and behold, when eventually when the appellant opened the door of his house, he was found in company of PW1. This fact too was



confirmed by PW5, the arresting officer, who was also present at the scene. The appellant was therefore positively identified by all the said witnesses as a person known to them and there was no doubt or mistake as to his identity as the perpetrator of the offence.

32. Finally, it was proved by evidence, that the appellant pulled PW1 to his house as she went to look for their goats at about 7p.m, locked her in his house, went about his business including postponing repairs to PW2 motor cycle, went back and locked himself with PW1 in the said house before proceeding to remove his shirt, belt and trouser only to be interrupted by PW3 incessant knocking on the door. When eventually he opened the door to his house, the appellant was still topless as confirmed by PW1 to PW5. It is obvious that the appellant had nefarious intention and mens rea to defile the minor but by God's design he did not succeed. His action showed that he prepared and took substantial step in the course of his actions to commit the offence of defilement.

(ii) _ Whether the appellant was convicted based on inconsistent and uncorroborated evidence

33. The appellant submitted that the evidence of PW1 to PW3 were inconsistent and did not demonstrate that he removed PW1 cloths and/or pants nor did they demonstrate that he inserted his penis in her vagina. The evidence presented too was not clear as to who opened his door, whether it was PW3 or the police. He faulted the trial court for relying on untruthful evidence to convict him, which was an error.
34. In Philip Nzaka Water-Vrs-Republic CA Criminal Appeal No. 29 of 2015 while relying in the decision of Dickson Elia Nsamba shapwater & Anor Vs- Republic CA App No. 92 of 2007 the Court of Appeal of Tanzania address the issue of discrepancies in evidence and conclude as follows

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out one sentence and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradiction are minor or whether they go to the root of the matter.”

35. Further in Joseph Maina Mwangi vs Republic (2000) Eklr it was held that;

“In any trial there are bound to be discrepancies. An appellate court in considering these discrepancies must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.”

36. In the case of Twehangane Alfred vs Uganda (Cr.App.No.139 of 2001(2003) UGCA it was held that it is not every contradiction that warrants rejection of evidence. The court delivered itself thus:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

37. The evidence adduced looked at in totality does not point out to the evidence adduced being deliberately untruthful. The inconsistencies pointed out as to whether PW3 or PW5 opened the door are minor and does not affect the overall consistency of the evidence tendered. Secondly no witness presented any evidence about the appellant undressing PW1 or inserting his penis in her vagina. The same is not part of the evidence on record and is irrelevant.



38. The appellant also alleged that, PW1 evidence as a minor, was not corroborated as required under Section 124 of the *Evidence Act*, and that he was wrongly convicted based on her evidence. In *Oloo Vrs Republic* (2009) KLR, the court of Appeal held that;

“In our view, corroboration of evidence of a child of tender years is only necessary where such a child gives unsworn evidence (See *Johnson Muiruri Vrs Republic* (1983) KLR.....

..... In law evidence of a child given on oath after voire dire examination requires no corroboration in law but the court must warn itself that it should in practice not base a conviction on it without finding corroboration of it.”

39. The trial court did not convict the appellant based on the evidence of PW1 alone. The appellant was found red handed having detained PW1 in his house by PW3 and it was her timely intervention and call for help stopped the appellant on his trucks before he could complete the nefarious intention that he has set to do, which was to defile PW1. PW2, PW3 PW4 and PW5 also confirmed that the appellant was with PW1 in his house and when he eventually opened the door, he was found topless and only had his trousers on. Considering that the appellant detained a neighbor’s young daughter after 7pm at night and put lights off, while removing his cloths can only lead to one conclusion, that he intended to defile the minor. The other witnesses evidence sufficiently corroborated PW1 evidence and this ground of appeal therefore fails.

40. Looking at all the evidence tendered, and weighing it with the appellants evidence in defence, the trial magistrate cannot be faulted in any manner in convicting the appellant as his guilt was established beyond all reasonable doubt.

(iii) Whether the sentence passed was harsh and excessive.

41. With regard as to whether the sentence passed on the appellant was appropriate or not, this Court is guided by the principles in the Court of Appeal case of *Bernard Kimani Gacheru vs. Republic* [2002] eKLR where it was stated as follows:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, 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 some wrong material, or acted on a 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.”

42. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in its entirety so as to arrive at appropriate sentence. The Court of Appeal *Thomas Mwambu Wenyi Vs Republic* (2017) eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira Vs State of Mahareshra* at paragraph 70-71 where the court held the following on sentencing:

“Sentencing is an important task in the matter 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 straight jacket formula for sentencing an accused person on proof of crime.



The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. 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

43. The trial magistrate upon convicting of the appellant, allowed the appellant to mitigation, she considered the social inquiry report and proceeded to sentence the appellant to serve of fifteen (15) years imprisonment. The respondent did concede to this aspect of the appeal and stated that based on the current jurisprudence on sentencing, this court could reconsider the same.
43. While the trial court stated that the appellant was not remorseful, from the record it is clear that the appellant pleaded for mercy and also urged the court to consider the period he had spent in custody during trial which as per the record is a period of about one year and five months (17 months). Unfortunately, this was not considered by the trial court and the same constitutes an error, which must be corrected.
43. This court does appreciate the gravity and nature of the offence committed and does not condone offences against minors and vulnerable persons. This was also appreciated by Madan J as he was then in *Yasmin Vs. Mohammed* (1973) EA 370 –

“The High Court is specially endowed with jurisdiction to safeguard interest of infants, as the court is the parent of all infants. The welfare of the infant is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infant in Kenya of whatever community tribe, sect fall within the ambit of guardianship of Infant Act and the court is charged with the sacred duty to ensure that their interest remain paramount and can duly preserve.”

43. Also In the case *R Vs. Scott* (2005) NSWCCA 152 Howle J. Grove & Baar JJ then stated –

“There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and then must be a reasonable proportionately between the sentence passed in the circumstance of the crime committed...one of the purposes of punishment is to ensure that the offender is adequately punished... a further purpose of punishment is to denounce the conduct of the offender.”

Disposition

43. The upshot is that the appeal as against conviction lacks merit and the same is dismissed. The appeal as against the sentence melted out by Hon M Nasimiyu (PM) on 18.02.2021 is hereby allowed. The same is set aside and reduced to eight (8) years to run from 01.09.2019 when the appellant was arrested.
44. Right of Appeal 14 days.
45. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 7TH DAY OF JUNE, 2024.



FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 7TH DAY OF JUNE, 2024.

In the presence of;

Appellant present from Kitui Prison

Mr. Mwaniki for O.D.P.P

Sam Court Assistant

