Ruo v Republic (Criminal Appeal E022 of 2022)
[2025] KECA 1793 (KLR) (31 October 2025) (Judgment)

Neutral citation: [2025] KECA 1793 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL E022 OF 2022

MA WARSAME, JM MATIVO & GV ODUNGA, JJA

OCTOBER 31, 2025

BETWEEN

PETER WAWERU RUO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Naivasha (R. Mwongo J.) dated 6th May 2021 in CRA No. 1 of 2018)

JUDGMENT

1. Peter Waweru Ruo (the appellant) seeks to overturn the judgment rendered by the High Court (Mwongo, J.) on 6th May 2021 in Naivasha High Court Criminal Appeal No.1 of 2018 in which the learned Judge dismissed his appeal against conviction and sentence of life imprisonment imposed by the Naivasha Resident Magistrate in Criminal Case (S.O) No. 5 of 2016 on 25th January 2018 for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* (the Act).

2. The accusation against the appellant was that on 11th September 2016 at [Particulars Withheld] Village within Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of LNM, a girl aged two and a half years. The appellant faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Act. It was alleged that he intentionally and unlawfully caused his penis to come into contact with the vagina of LNM, a girl aged two and a half years old.

3. In support of its case, the prosecution presented 5 witnesses.

   PW1, (the complainant's mother) testified that on 11th March 2016 she was in church and at about 1.30 p.m, one Mama E called and informed her daughter (the complainant) was sick. She immediately rushed home only to find blood oozing from LNM's vagina and D (her nephew) told her that the

appellant, who is a neighbor is the one who defiled her. PW1 reported the incidence at Haraka Police Station and the police escorted her and the complainant to Engineer District Hospital where the complainant was treated. Thereafter, the police arrested the appellant. In cross- examination she admitted she did not see the appellant defile the complainant and denied having had a sexual relationship with the appellant or demanding Kshs.10,000/= from him. She denied being his lover or having had sex with him the night before the incident or smearing semen on the complainant from condoms they had used. On 11th July 2017, PW1 was recalled. It was her evidence that the complainant was born on 28th September 2013 and produced a clinic card, showing that the complainant was born on 28th August 2013.

4. PW2, (PMG, aged 10 years), is PW1's son. He was in standard three at the time of testifying. His evidence was that on the material day, while he was playing with the complainant, MW and DG, the appellant who is their neighbour gave him Kshs.50/= to buy two cakes. He went to buy them but on retuning, he did not find the appellant. PW3 told him that the appellant took the complainant to a maize plantation and defiled her. He identified the complainant in court. It was his evidence that he saw blood oozing from the complainant's genital parts. He accompanied PW1 and the complainant to the hospital and at the police station where he recorded a statement.

5. PW3, (DGW), then a Form 2 student at [Particulars Withheld] High School testified that on 11th September 2016, he was sent home for school fees and because his home is far, he went to E's home, who his is auntie at Land Mark. He testified that his cousin PW2 left him with four children, namely, Maina, W, the complainant and W. He served them with food and they went to eat from outside. Shortly, he heard the children screaming loudly but he thought they were either playing or fighting amongst themselves which was normal, hence he continued eating his food inside the house. However, WW came and told him the complainant had fallen in a ditch in the maize plantation. He went to the farm and found the appellant holding the complainant while on his knees, lying on her. He identified the complainant in court. After the appellant saw him, he ran away. PW3 followed him for about 100 metres, but he turned on him and confronted him. Afraid, PW3 ran back. He was among those who accompanied PW1 to report to the police and to the hospital.

6. PW4, Dr. Maingi Muchiri from Engineer District Hospital produced the P3 form which was prepared by Dr. Sankei on the 13th September 2016, who he knew very well and he is on leave. Upon examination, Dr. Sankei noted that the complainant hymen was freshly torn, the vaginal entrance was tender and inflamed (painful and swollen), and there was a whitish discharge.

7. PW5, CPL Joseph Kandie, attached to Haraka Police Station was the Investigating Officer. He said the incident was reported at the police station on 11th September 2016 at about 1.00 p.m. He accompanied the complainant and PW1 to the hospital where she was treated. He issued them with the P3 form which was completed. He visited the scene, and thereafter, he arrested the appellant and charged him with the offence.

8. The appellant's defence was that on 11th September 2016, he took his daughter to a barber after which he went to a hotel to take tea and thereafter, he went to a bar where he stayed until 2.00 p.m when his cousin called him and told him that it was being alleged that he had defiled a child. His brother also called him with a similar message. He maintained that on the material day, he went to cut grass for his cows after which he slept. However, at about 5.00 p.m, people came to his home and accused him of defiling the complainant. Despite denying the offence, they took him to the police station. The police took him to hospital and on 13th September 2017, he was arraigned in court.

9. The appellant called his brother David Ngure Ruo as his witness. His evidence was that his cousin called him and told him that the appellant had defiled a child. He called the appellant and passed

the message to him, but the appellant told him he was at Yanga. But in the evening, members of the public went to the appellant's house and started beating him. The police arrived later and arrested the appellant.

10. At the conclusion of the trial, the learned Magistrate returned a verdict of guilty on the main count. There was no finding on the alternative count. After considering the appellant's mitigation, the trial Magistrate sentenced the appellant to serve life imprisonment as per the provisions of section 8 (2) of the Act.

11. The appellant appealed to the High Court at Naivasha in Criminal Appeal No. 1 of 2018 against the conviction and sentence citing the following grounds:

    (a) penetration was not proved to the required standard;

    (b) the complainant's age was not proved;

    (c) the evidence against him was uncorroborated;

    (d) the medical evidence adduced did not link him to the crime, and, (d) his defence created a reasonable doubt on the prosecution case.

12. After hearing the appeal, in the impugned judgment dated 6th May 2021, Mwongo, J. upheld the conviction. Regarding sentence, the learned Judge relying on the Supreme Court decision in Francis Karioko Muruatetu & Ano. vs. Republic [2017] eKLR, (Muruatetu one) allowed the appellant's appeal against sentence and set it aside, and ordered that the appellant will be sentenced afresh at a sentencing hearing on a later date. However, on 6th July 2021, the Supreme Court rendered its directions in Francis Karioko Muruatetu & Ano. vs. Republic and Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR, (Muruatetu two) in which it stated inter alia that:

> "(13) Further, at paragraph 71 of the judgment, the court nullified paragraphs 6.4-6.7 of the Judiciary Sentencing Policy Guidelines which were to the effect that courts must impose the death sentence in all capital offences in accordance with the law. In view of our holding in the judgment in question, those paragraphs were no longer applicable.
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> 14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.
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> 15. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

13. Following the above Supreme Court directions, on 25th February 2022, the High Court rendered its judgment on sentence in which stated:

> " 3. The court directed that a fresh sentence will be meted after a sentence hearing was fixed. The file came up for mention on 27th July, 2021 for mitigation, which did not proceed. A new date was fixed for 14th October, 2021 for mitigation. However, I was transferred from the station before then.
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> 4. Clearly, this court relied on the jurisprudence emanating from the Muruatetu 1 case (Francis Karioko Muruatetu & Another vs Republic [2017] eKLR). However, since the date of the judgment herein, the Supreme Court in Muruatetu 2 (Francis Karioko Muruatetu & Another vs Republic and Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR, categorically disallowed the application of the Muruatetu 1 Principles in defilement cases.
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> .....
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> 7. I recently came to the same conclusion in my own opinion in Naivasha HCCRA No. 40 of 2019 Paul Mwenji Komu vs Republic. There I reinstated the sentence imposed by the trial court.
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> 8. Accordingly, in this case too, the life sentence that was set aside by this court on appeal is therefore hereby reinstated."

14. The appellant is now before this Court in this second appeal challenging both his conviction and sentence. In his supplementary grounds of appeal, he faults the first appellate court for failing to appreciate that the trial Magistrate erred in failing to declare the complainant a vulnerable witness and appoint an intermediary contrary to section 31 of the Act and article 50 (7) of the *Constitution*. He submitted that this procedural error undermined the integrity of the trial and cited this Court's decision in John Kinyua Nathan vs. Republic [2017] eKLR which highlighted the procedure to be adopted by courts in compliance with section 31 of the Act while dealing with a vulnerable witness.

15. The other ground argued by the appellant is that the prosecution failed to prove penetration, a key element of the offense. It was his submission that the evidence presented by PW1 was hearsay, and the medical findings (hymenal tear and inflammation) were inconclusive and did not definitively establish sexual penetration. He questioned the testimony of PW3 claiming that it was contradictory because he said he found the appellant holding the complainant while on a kneeling position and maintained that the said witness did not say he saw the appellant defiling the complainant. He submitted that the prosecution bears the burden to prove all the elements of the offence. He contended that hymenal tears are not conclusive prove of penetration.

16. Regarding sentence, the appellant argued that the mandatory life sentence imposed by the trial court was excessive and his mitigation or the circumstances of the offence were not considered. It was his submission that the Supreme Court in Muruatetu one did not bar the Court of Appeal from remitting a case to the High Court for re-sentencing and cited rule 33 of the Court of Appeal Rules, 2010 in support of his assertion. Lastly, the appellant prays that the conviction, the sentence be quashed and he be set at liberty.

17. In its submissions in opposition to the appeal, the respondent's counsel Mr. Omutelema, Senior Assistant Director of Public Prosecutions submitted that the first appellate court rightly found that all the ingredients of the offence were proved to the required standard. He argued that the presence of a hymeneal tear, tender and inflamed vaginal entrance (painful and swollen) and presence of whitish

discharge were sufficient proof of penetration. He also submitted that the complainant's age was proved to the required standard and the appellant was properly identified as the offender.

18. Regarding sentence, Mr. Omutelema submitted that the first appellate court properly held that the Supreme Court directions in Muruatetu two were clear that its decision in Muruatetu one was not applicable to mandatory minimum/maximum sentences under the *Sexual Offences Act*. Counsel also cited section 361 of the Criminal Procedure Code and the Supreme Court decision in Republic vs. Joshua Mwangi Gichuki (supra) and submitted that the appellant's appeal against sentenced lacks merit and urged this Court to uphold the sentence.

19. This is a second appeal, therefore, this Court's mandate is restricted to consideration of questions of law only by dint of section 361 (1) (a) of the Criminal Procedure Code. (See this Court's decision in Ahamad Abolfathi Mohammed & Ano. vs. Republic [2018] KECA 743 (KLR), where the two courts below have arrived at concurrent findings of fact, we are obliged to respect those outcomes unless we are satisfied that the conclusions are not supported by the evidence or are based on a perversion of the evidence. (See Karingo vs. Republic [1982] KLR 213). In M'Riungu vs. Republic [1983] KLR 455, this Court was empathic that:

> " ... an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."

20. We have reviewed the record as well as the parties' rival submissions. We find that the following issues fall for determination:

    (a) whether the learned Judge erred in failing to find that the trial court failed to declare the complainant a vulnerable witness and appoint an intermediary, as required by Section 31 of the Act and article 50 (7) of the *Constitution*;

    (b) whether the offence of defilement was proved beyond reasonable doubt;

    (c) whether the complainant was a competent witness;

    (d) whether the complainant's evidence was procured through coercion;

    (e) whether the prosecution failed to call crucial witnesses; and,

    (f) whether we can interference with the sentence imposed upon the appellant.

21. Regarding the first issue, the appellant invites this Court to find that the learned Judge erred in failing to find that the trial court erred in failing to declare the complainant a vulnerable witness and appoint an intermediary, as required by section 31 of the Act and article 50 (7) of the *Constitution*. However, this argument, attractive as it is, was not raised either before the trial court or before the first appellate court. Therefore, the High Court never rendered itself on the said issue. In Peter Kihia Mwaniki vs. Republic [2010] eKLR, this Court stated:

> " Neither the appellant nor the prosecution raised any issue concerning the delay in bringing the appellant to court. Nor was the issue raised before the superior court on the first appeal. It was in either of those courts that the issue should have been raised so that an inquiry would be made regarding the issue, when both sides would possibly call evidence on the matter...

By raising the issue at this late stage the appellant has, in a way denied the prosecution the Constitutional opportunity to explain the delay. This ground likewise has no merit."

22. On a second appeal, this Court can only entertain matters that were considered by the court being appealed from. An appeal can only lie where there has been a decision made by a lower court. If an issue was not brought up before the lower courts, and therefore not determined, then any decision made by the appellate court would not be considered a judgment on an appeal. Consequently, we are precluded from addressing the said issue.

23. The other ground argued by the appellant is that the ingredients of the offence of defilement were not proved to the required standard. It is an established principle of law that the prosecution must prove all the essential elements of a criminal offence beyond a reasonable doubt. Judicial decisions emphasize that even if a court suspects an offense occurred, it cannot convict without sufficient evidence demonstrating each ingredient of the crime. The prosecution bears the primary burden of proving the accused's guilt beyond a reasonable doubt. Each element defined by law as necessary to constitute a specific offense must be proven by way of evidence to the required standard. Court decisions emphasize the need for concrete evidence, not mere suspicion or conjecture. Courts look for evidence that directly links the accused to the crime.

24. If the court finds that the prosecution has failed to prove any essential ingredient of the offence, the accused is entitled to an acquittal. The criminal justice system places a high value on proving the ingredients of an offence so as to ensure that no innocent person is punished. The foregoing principles were summed up in Woolmington vs. DPP [1935] AC 462, a landmark decision in English law that established the principle of the presumption of innocence and the burden of proof in criminal cases. The case clarified that the prosecution bears the sole burden of proving the defendant's guilt beyond a reasonable doubt, and the accused does not have to prove their innocence.

25. A casual reading of section 8 (1) of the Act shows that for the prosecution to succeed in an offence under the said provision, it must prove beyond reasonable doubt that: (i) the victim is a child, (b) there must be penetration of the genital organ, but such penetration need not be complete, partial penetration will suffice; and, (c) the identity of the perpetrator must be established. It is a requirement that the three ingredients must be proved.

26. The first question is whether it was proved by way of evidence that the complainant was a child within the meaning of section 8 (1) of the Act. Proof of age is important in an offence under the Act because it forms part of the ingredients of the offence which must be proved by credible evidence. (See this Court's decision in Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR)). Section 2 of the Act defines a child as follows: "child" has the meaning assigned thereto in the *Children Act*, 2001 (No. 8 of 2001). Under the *Children Act*, a "child" is defined as any human being under the age of eighteen years. In Peter vs. Republic [2024] KECA 1124 [KLR], this Court highlighted the methods of proving age as follows:

> " 28. From the foregoing, it remains settled that the age of the victim can be proved not only by way of documentary evidence such as birth certificate, baptism card or an age assessment report, but also by way of oral evidence of the child who is considered sufficiently intelligent or even the evidence of the parents or guardians.
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> 29. ....
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> 30. There cannot be any better way to prove the age of PW1 than by the Birth Certificate, which is an official document issued by the Registrar of Births.

> The appellant did not challenge the authenticity of the Birth Certificate. To this end, we will not belabour much but conclude that PW1's age was proved beyond reasonable doubt."

27. As the record shows, on 11th July 2017 the prosecutor applied to recall PW1 to produce the complainant's clinic card in support of her date of birth. The appellant is on record informing the court that he had no objection to PW1 being recalled. PW1 informed the court that the complainant was born 28th August 2013 and produced her clinic card in support of her evidence. The appellant did not object to its production. The two courts below were satisfied that the complainant's age was proved to the required standard. When any concurrent finding of fact is assailed in a second appeal, the appellant is required to point out that it is bad in law or it was based on no evidence or it was based on misreading of the evidence or the decision is one which no Judge acting judicially could reasonably have reached. We have no reason to doubt PW1, the complainant's mother. We are persuaded that the prosecution proved by evidence that the complainant was aged two and a half years at the time of the offence, and therefore, a child within the meaning of section 8 (1) and (2) of the Act.

    We have no reason to fault the concurrent findings by the two courts below on this issue.

28. The other critical element is penetration, which is defined in section 2 of the Act to mean partial or complete insertion of the genital organs of a person into the genital organs of another person. PW1 testified that she saw blood oozing from the complainant's vagina. Similar evidence was tendered by PW2 who said that he saw blood coming out from the complainant's genital parts. PW3 found the appellant holding the complainant while on his knees. In cross-examination, he said the appellant was sleeping on the complainant. PW4 produced the P3 form on behalf of Dr. Sankei who examined the complainant and completed the P3 on 13th September 2016. His findings on examining the complainant were that her hymen was freshly broken, the vaginal entrance was tender and inflamed (i.e. painful and swollen). He produced the P3 Form as an exhibit. This evidence corroborated PW1 and PW2's evidence. We have re-evaluated this evidence and the conclusions made by the two courts below. It has not been demonstrated by evidence that the findings by the two courts below on this issue were not supported by evidence or that the decision by the two courts below is palpably wrong. This ground of appeal fails.

29. The other important ingredient of the offence is whether the appellant was properly identified as the offender. It is very important in criminal proceedings that a witness makes a positive identification of the person they claim was the perpetrator. Because of the fallibility of human observation, evidence of identification is approached with some caution. It is not enough for the identifying witness to be honest. The reliability of his/her observation must also be tested as was stated in R. Turnbull [1977] Q. B. 224, a landmark legal case in England concerning the reliability of eyewitness identification evidence. The case established guidelines for Judges when dealing with identification evidence, particularly when the prosecution relies solely or substantially on the correctness of one or more identifications. The witnesses' observations should be tested against proximity of the persons, or the visibility, or the state of the light, or the angle of the observation, or prior opportunity or opportunities of observation or the details of any such prior observation or the absence or the presence of noticeable physical or facial features, marks or peculiarities, or the clothing or other articles such as glasses, crutches or bag, etc, connected with the person observed, and so on.

30. PW2 testified that the appellant, who is their neighbour gave him Kshs.50/= to go and buy two cakes. PW3's evidence was that after learning that the appellant had taken the complainant to a maize plantation, he went to the ditch where he found the appellant holding the complainant while on his knees, lying on her. He identified the appellant in court. It was his evidence that after the appellant saw him, he ran away. PW3 followed him for about 100 metres, but the appellant turned on him and

confronted him, afraid, PW3 ran back. This incident happened during day time. It is clear he gave PW2 Kshs.50/= to go and buy cakes. He was a neighbour. Clearly, PW2 and PW3 knew the appellant. This fact was proved beyond doubt. Therefore, theirs was evidence of recognition which is more reliable than evidence of identification.

31. We are persuaded that the evidence of recognition tendered by PW2 and PW3 was credible and reliable. Credibility focuses on whether a witness or piece of evidence is believable. A credible witness is one who comes across as honest and whose testimony is consistent and aligns with other evidence. Reliability, on the other hand, focuses on whether the evidence is accurate and trustworthy. We are persuaded that the evidence tendered by these two witnesses is reliable and consistent with the facts and circumstances of the case. Therefore, we are satisfied that the appellant's identification was free from error. Therefore, this ground of appeal fails.

32. Regarding sentence, as stated in the earlier cited excerpts, the trial Judge cited Muruatetu one and set aside the sentence of life imprisonment. While the case was pending sentencing, the Supreme Court rendered the directions in Muruatetu two in which it clarified that Muruatetu one did not apply to offences under the *Sexual Offences Act* and that the sentences prescribed by the said Act are lawful.

33. The appellant is now inviting us to find that the mandatory life sentence imposed by the trial court is excessive and that the first appellate court did not consider his mitigation or the circumstances of the offense. It was his submission that the Supreme Court in Muruatetu one did not bar the Court of Appeal from remitting a case to the High Court for re- sentencing. He cited rule 33 (b) of the Court of Appeal Rules which permits this Court to remit proceedings to the superior court with such directions as may be appropriate in support of his assertion. Lastly, the appellant prays that the conviction and the sentence be quashed and he be at liberty.

34. It is important for us to underscore that the Supreme Court affirmed the lawfulness of life imprisonment prescribed under the *Sexual Offences Act* in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) when it stated:

> "(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...
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> (62) Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below...
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> (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."

35. The appellant complains that his mitigation was not considered. As the Supreme Court held in Muruatetu one, albeit in the context of murder, mandatory minimum/maximum sentences deprive courts the discretion to impose an appropriate sentence taking into account the circumstances of the offence. However, in Muruatetu two, the Supreme Court stated that Muruatetu one does not apply to sentences prescribed under the *Sexual Offences Act*. Therefore, the appellant's argument, compelling as it is will not assist his plea for two reasons. One, Supreme Court decisions are binding to all courts in Kenya as decreed in article 163 (7) of the *Constitution*. Two, in view of the Supreme Court directions in Muruatetu two, courts have no discretion to interfere with sentences in sexual offences. Even if the courts below considered the mitigation, no matter how compelling it may have been, it is deprived the discretion to impose any other sentence other that the sentence prescribed in the statute. The upshot is that, until the law is changed or the Supreme Court rules differently, our hands are tied. We cannot interfere with the sentence.

36. Arising from the conclusions arrived at on each and every issue discussed above, the inevitable conclusion is that this appeal is without merit and the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF OCTOBER, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR