



**Kimiti v Republic (Criminal Appeal E019 of 2023)
[2025] KEHC 15128 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15128 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E019 OF 2023
AC MRIMA, J
OCTOBER 24, 2025**

BETWEEN

MICHAEL KIMITI APPELLANT

AND

REPUBLIC RESPONDENT

*(From original Conviction and Sentence in Nanyuki CM
Sexual Offences Case No E013 of 2022– V Masivo SRM)*

JUDGMENT

1. The Appellant, Michael Kimiti 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 10/03/2022 at around 2050hrs at [particulars withheld] Village in Laikipia Central Sub-county intentionally caused his penis to penetrate the vagina of M.M.M, a child aged 15 years. On 10/02/2023, he was sentenced to twenty [20] years imprisonment.
2. Being dissatisfied with the conviction and the sentence, he lodged this appeal vide a petition of appeal filed on 17/02/2023. He also filed amended grounds of appeal filed alongside his submissions. The conviction and the sentence are being challenged on the following grounds;
 - i. The learned magistrate erred by failing to note that the case was not proved beyond reasonable doubt.
 - ii. The learned magistrate erred by failing to note that he was not accorded a fair trial due to non-disclosure of important documents.
 - iii. The learned magistrate erred by failing to note that he was not accorded a fair hearing because Section 214 and 134 of the Criminal Procedure Code was not complied with.
 - iv. The learned magistrate erred by relying on evidence of a child without first warning himself.



- v. The learned magistrate erred in meting out a sentence which was harsh and excessive.
3. The appeal was canvassed by way of written submissions. In his written submissions, he argued that the trial magistrate relied on a birth certificate bearing the name of M.M. which indicated that she was born on 30/09/2007 whereas PW1 produced a different birth certificate which showed that the complainant was 13 years old having being born on 30/07/2010. The prosecution also relied on a copy of a birth certificate which was not certified and when the complainant's mother was summoned to produce a certified copy of birth certificate, she failed to do so. That the prosecution was aware that the date of birth had been tampered with as was amplified by the investigating officer and which was raised by the registrar who had demanded for an order of the court to have the birth certificate certified. That he was blackmailed in continuing with the proceedings without the certified birth certificate and without being warned or guided on the importance of certifying the birth certificate. He submitted that Section 66 of the *Evidence Act* was therefore contravened as the copy was produced. That he was unrepresented thus needed guidance rather than to be blackmailed to proceed without the certified birth certificate. Further, the birth certificate indicated the name of the mother as R.M.M. while the court identified the mother as W.M. and she testified that she was R.M.M. raising the question whether the birth certificate was genuine and whether it belonged to the complainant.
 4. Regarding penetration, he submitted that Section 124 of the *Evidence Act* was contravened as the trial court failed to record the reasons for believing the complainant on the record but only indicated in the judgment the reasons for believing her. That the judgment was delivered a year after the complainant testified hence there is no way the learned magistrate could have remembered the complainant's demeanour a year later based on the fact that trial magistrates are busy with other matters to remember one remote case. That the trial court also contravened Section 199 of the Criminal Procedure Code for he failed to put on record the demeanour of the complainant while she was testifying.
 5. Further, the complainant lacked integrity and truthfulness as she testified that she did not know her age which is key in indicating the truthfulness and integrity of a person. She testified that she did not know the colour of the cloth she wore that day only to change that she was wearing a red trouser. The investigating officer produced a black trouser raising the question as to who was telling the truth. The learned magistrate further erred for he failed to invoke Section 33 of the *Sexual Offences Act* on evidence of surrounding circumstances. That the complainant testified that he dragged her from her house into his house in front of neighbours which beats logic why she did not scream or why the neighbours did not intervene. That though the trial court invoked Section 36 of *Sexual Offences Act* that DNA was not important, the same was important to prove paternity as the complainant was found to be pregnant and paternity would have proved the case beyond reasonable doubt.
 6. He submitted that the clinical officer relied on hearsay evidence as he testified that the child was found defiled by a neighbour and none of his examination stated that the child was defiled, safe as the pregnancy which can occur through other methods. That his findings that there were epithelial cells was not conclusive proof of defilement as the trial court relied on a case which stated that epithelial cells emanate from an injury hence they could have emanated from any other injury to complainant's genital including high vaginal swab. Further, PW3 testified that he peeped through the window pane in the Appellant's house and saw him engaging in sex with the complainant. PW3 and PW1 were complainant's uncles which shows that there was a malicious motive against him. Further, no uncle would witness the ordeal and instead of interfering remain mum and this is why his testimony was in discrepancy as he testified that the window had curtain fully covering it whereas on cross examination, he testified that the window was not fully covered. Further one Nancy who also peeped through the window was not called as a witness.



7. He submitted that he was not accorded a fair trial as he was not supplied with the birth certificate at the begging of the trial contravening Article 50[2][b][c] [j] of *the Constitution*. That he requested for supply of certified copy of birth certificate which was supplied after complainant had testified. That the charge sheet was amended and changed the names of the complainant and though he did not object and was given a chance to recall witnesses, the trial court failed to emphasize the need for him to recall the witnesses for him to give a firm defence since he was unrepresented and was not aware of what was going on during the trial. The change in the charge sheet involved the change of complainant's names which meant that he was involved in a case where he did not know the complainant but was blackmailed by the prosecution into proceeding with the case. Therefore, Section 214 of the Criminal Procedure Code was contravened. That the trial court erred relying on evidence of a child without warning self as a child can be susceptible of influence from third parties. He submitted that the complainant was coached.
8. On the sentence, he submitted that it was harsh and excessive and failed to consider that he was a first offender and non-aggravating nature of the offence. That the superior courts have frowned upon minimum mandatory sentences and the trial court failed to impose a non-custodial sentence as provided by the Sentencing Guidelines for a first offender. That his defence was termed as a mere denial and the trial court failed to give reasons for not believing his defence and it behoved upon the prosecution to rebut his defence after he introduced a new matter.
9. In rejoinder, counsel for the Respondent urged the court to ignore the amended grounds of appeal filed alongside the Appellant's submissions as they were filed without leave of the court hence contravening Section 350[2] of the Criminal Procedure Code. With respect to age, he submitted that the same was proved through the complainant's birth certificate that she was 15 years old at the time of the commission of the offence. In respect of penetration, he submitted that the same was proved through the complainant's evidence coupled with medical evidence and PW3, an eye witness. Regarding identification of the Appellant, he submitted that he was easily identified as they lived in the same plot and was well known to all witnesses and the complainant identified him as her defiler. On the sentence, he submitted that the trial court considered both the mitigating and aggravating factors and the court had the discretion to issue the sentence as it did. Therefore, the sentence was not only lawful but lenient in the circumstances.
10. 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.
11. This duty was set out in *Okeno v Republic* [1972] EA by the Court of Appeal as follows

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [*Pandya v Republic* [1957] EA. [336] and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. [*Shantilal M. Ruwala v R.* [1957] EA. 570]. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's 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 had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] E.A 424.”



12. Similarly, in *Kiilu & Another v Republic* [2005]1 KLR 174, the Court of Appeal stated thus:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and 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 had the advantage of hearing and seeing the witnesses”.

13. A recap of the evidence adduced at the trial court will go a long way in aiding this court in compliance with this well established legal principle.

14. That evidence was as follows. PW1 testified that he received a call from his sister W.M. who informed him that she was informed that her daughter was found with a man. He rushed to the scene where he found a crowd gathered outside the Appellant’s house where the complainant was found. The complainant was in his sister’s house. That he did not speak to the complainant. The police arrived and took the Appellant. The complainant was taken to hospital and was found to be two months pregnant. That the complainant identified the Appellant. That she was not able to speak. He testified that the complainant told him that the Appellant dragged her from their house to his house but did not narrate what happened to her thereafter. Upon been referred to his witness statement, he testified that he recorded that the Appellant had sex with the complainant as this was what the complainant told him. That according to his witness statement, the complainant told him that the Appellant forced her into sex. He identified the birth certificate showing the date of birth as 30/07/2010. He testified that the child was now 15 years old.

15. He testified on cross examination that his sister told him that the child was found in the Appellant’s house.

16. PW2, the complainant was declared a vulnerable witness after the court conducted an inquiry and found that she unable to speak well. She was sworn and she testified with the assistance of her mother, R.M.M. who was her intermediary. She testified that ‘nilishikwa’ and she could see the person who did that to her in court. She pointed at the Appellant. She testified that the Appellant dragged her to his house, undressed her while on the bed and then ‘akanifanyia tabia mbaya’ and when asked where tabia mbaya was done, she pointed at her vagina. That she did not know the colour of clothes she was wearing that day. That she was wearing a red trouser and after he did that to her, someone knocked on the door and after the ordeal, they went to hospital. She repeated that ‘akanifanyia tabia mbaya’ and they were lying down. That when the door opened, she saw purity. When asked what she was given, she testified that she was given ‘pesa moja’. She identified a piece of cloth and the black trouser as hers and the Kshs. 100/- that she was given by the Appellant. She identified the Appellant as the person who defiled her.

17. On cross examination, she testified that she has never greeted him by hand. That there were neighbours present when he dragged her and that she did not scream for help. That he was the first person to do that to her.

18. PW3 testified that on the material day, he went to his sister’s home and while bathing, someone knocked on the door. He opened and Emma informed him that the Appellant had called the



complainant to his house. He knocked on the Appellant's door but it was locked. He thus went to the window and the window was fully covered with the curtain. He peeped through and saw the girl lying on the bed with her legs open and her clothes were removed. He called Nancy who also peeped and confirmed. Nancy called the landlady who knocked on the door but the Appellant refused to open the door. The landlady insisted and he opened and the landlady took the girl out. The police were called and they arrested him. He testified that when he peeped, he saw the Appellant lying on the complainant having sex. the Appellant was familiar to him as he was a co-worker and a neighbour to his sister.

19. On cross examination, he testified that the house had a curtain but the curtain was not fully covering the window.
20. PW4, the clinician testified on behalf of Fidelis who was on leave. He testified that he was familiar with her handwriting and signature having worked with her for a period of three years. He testified that the defilement happened severally. His findings were that external genitalia was normal, there was a whitish discharge, the hymen was broken but not freshly broken, there was pain on left elbow and on high vaginal swab, epithelial cells were seen, no spermatozoa were seen, HIV and VDRL tests were negative and the pregnancy test was positive. The ultra sound showed 7 weeks and 4 days and the conclusion was that based on the history and examination, the complainant was defiled. He produced the P3 and PRC forms as Pexhibit 1[a] and [b] respectively, ultra sound and lab results as Pexhibit2.
21. PW5, PC Anne Nyambura testified that she was informed of this case and they rushed to the scene where they found several tenants surrounding a house who said that the occupant had defiled a child. They accessed the house and arrested the Appellant. The child was mentally challenged and she narrated that she was defiled by the Appellant and she showed them Kshs.100/- which the Appellant gave her. She was escorted to the hospital and she was found to be pregnant. The Appellant had locked himself inside the house while the child was outside.
22. On cross examination, she testified that the Appellant locked himself inside the house after the neighbours found him defiling the complainant.
23. PW6 the investigating officer testified that they responded to a distress call and they rushed to the scene and found tenants gathered around the Appellant's house. The complainant appeared to be mentally challenged and she accused the Appellant of defiling her. The Appellant had locked himself inside the house and he opened when the police officers identified themselves. They escorted the complainant to hospital. He produced a pink top as Pexhibit4, black trouser as pexhibit5, Kshs. 100 note as Pexhibit6, investigation diary as Pexhibit 7 and birth certificate as Pexhibit3. He testified that the child was 14 years old.
24. On cross examination by the Appellant, he testified that the Appellant was alone in the house.
25. In his unsworn defence, the Appellant testified that on material day, he went to work and returned home at 7:30am. His wife had travelled to visit her relatives. He had a knock on the door. The knock persisted and when he opened, the people introduced themselves as police. They entered his house for a search and scattered his clothes on the bed. They asked him to accompany them to police station as they were doing investigations. They brought a girl named Sadia and asked him if he was familiar with the girl and he denied. They claimed that the girl was found in his house by the landlord. That he was issued with a paper and a pen to admit that he was found with the girl but he denied. They started beating him to admit and confess. That he did not know where the police got the clothes and money they produced.
26. That was the totality of the evidence before the trial court. I have had occasion to consider the evidence as recorded at trial. In doing so, I have taken cognizance that I neither saw nor heard the witnesses



testify and have given due allowance for that fact. I have taken into account the submissions made. I have had due regard to the case law cited and the applicable statutory provisions. Of determination is whether the prosecution proved its case against the Appellant to the required legal threshold; beyond reasonable doubt.

27. 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.
28. 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.
29. In addressing this issue, the got is well alive to the degree of prove required, which is beyond reasonable doubt, and the fact that the burden lay on the prosecution to prove its case to that degree. In the case of *Republic v Wilson Learpora* [2007] eKLR, L. Kimaru, J stated in Obiter at page 3 thus: -

“In criminal cases, it is the duty of the prosecution to establish the guilt of an accused person to the required standard of proof beyond reasonable doubt. An accused person is under no obligation to prove his innocence. His duty is only restricted to raising reasonable doubt on the prosecution’s case. The onus of proving a criminal case is always on the prosecution and does not shift to an accused person. This court is required to evaluate the evidence that was adduced by the prosecution witnesses and o the defence offered by the accused so as to reach its own determination whether or not the prosecution has established the guilt of the accused in this”
30. Proof of age is important in a sexual offense. In *Kaingu Kasomo v 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.”
31. In the present appeal, the Appellant position is that age of the complainant was not proved to the required standard on account that the birth certificate that was produced was a copy which was not certified and though he consented to its production, he was blackmailed to do so. Additionally, the trial magistrate relied on a birth certificate which indicated that she was born on 30/09/2007 whereas PW1 produced a different birth certificate which showed that the complainant was 13 years old having being born on 30/07/2010. That prosecution was aware that the date of birth had been tampered with as was amplified by the investigating officer and which was raised by the registrar who had demanded for an order of the court to have the birth certificate certified. Further, the birth certificate indicated the name of the mother as R.M.M. while the court identified the mother as W.M. and she testified that she was R.M.M. raising the question whether the birth certificate was genuine and whether it belonged to the complainant.
32. The trial court while finding that age was proved to the required standard relied on a copy of birth certificate that was produced by PW6 which showed that she was born on 30/09/2007 hence she was 15 years old at the time of the commission of the offence. The court relied on the case of *Cliff Odhiambo Oburu v Republic* [2017] eKLR where the court held that though the prosecution failed to produce the original birth certificate and uncertified copy of the birth certificate was produced, it was produced



without the objection from the Appellant and the Appellant did not challenge the said copy and found that age was proved.

33. In the instant case, the Appellant consented to the copy being produced. He informed the court that he was not contesting the birth certificate.
34. It also noted that PW1 testified that the complainant's mother was W.M. The birth certificate bore the name of R.M.M. The mother acted as an intermediary and she stated that her name was R.M.M. PW1 also identified a birth certificate bearing the date of birth as 30/07/2010. The date of birth on the copy of the birth certificate that was produced as exhibit was 30/09/2007.
35. From the evidence, I note the birth certificate, though produced with the consent of the Appellant, had discrepancies which render it unreliable in conclusively proving the age of the complainant.
36. It is trite law however that, where the actual age of the victim is not proved, it has been held that the apparent age of the victim shall suffice. The Court of Appeal in Jackson Mwanzia Musembi v Republic [2017] eKLR quoted with approval its earlier decision in Evans Wamalwa Simiyu v R. [2016] eKLR and 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*.”

37. Further, in Thomas Mwambu Wenyi v Republic [2017] eKLR the Court of Appeal cited with approval Francis Omuromi v Uganda, Court of Appeal Criminal Appeal No.2 of 2000 which 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....”

38. In Evans Wamalwa Simiyu [supra] the Court of Appeal 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.

39. 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. Here, PW1, complainant's uncle testified that she was 15 years old. PW4 testified that the complainant was 15 years



old and the P3 form he produced indicated that the estimated age was 15 years and the investigating officer testified that she was 14 years old.

40. Following the quoted decisions above, it therefore follows that the apparent age according to the evidence adduced in the lower court places the complainant in the age bracket of 14-15 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*.
41. As regards to proof of penetration, the Appellant attacked the credibility of the complainant and medical evidence. He also submitted that trial court erred for failing to record the demeanour of the complainant on record but only mentioned her demeanour in his judgment. That PW3 who claimed to have witnessed the ordeal contradicted himself when he testified that he peeped through the window though the window was covered with a curtain but on cross examination he testified that the window was not fully covered. He further argued that DNA test ought to have been conducted to determine paternity and to prove the case beyond reasonable doubt.
42. The complainant was detailed on what transpired on that day. She informed the court that the Appellant did 'tabia Mbaya' while on bed and when asked where he did that, she pointed at her vagina. She was examined and the medical report revealed that there was presence of epithelial cells, hymen was old broken and that she was 7 weeks pregnant. The complainant testified that it is only the Appellant who had done this to her. The trial court while finding that penetration was proved stated that her evidence could be relied upon without corroboration pursuant to Section 124 of the *Evidence Act* for reasons that the child made very clear pronouncements in her testimony how the Appellant dragged her to his house and did tabia mbaya in her vagina. Further, PW1 evidence went unchallenged that the child informed her that the Appellant had sex with her and PW3 corroborated her evidence. Further, there was presence of epithelial cells.
43. I also have no doubt that penetration was proved taking the evidence on record in its totality. Complainant's evidence was corroborated by PW3 who was an eye witness and further by the medical evidence. Even though PW3 was complainant's uncle, there was no bad blood that was alluded between him and the Appellant during cross examination and during the Appellant's defence. Further, there is no way the court would have forgotten the complainant's demeanour as he observed her while testifying. It is also to be noted that Section 124 of the *Evidence Act* does not state that the trial magistrate must record the demeanour of the complainant on record. Section 199 of the Criminal Procedure Code also does not state that it is mandatory that the court must record the demeanour during the trial. The said section states;

“When a magistrate has recorded the evidence of a witness, he shall also record such remarks [if any] as he thinks material respecting the demeanour of the witness whilst under examination.”

44. The court in *KGY v Republic* [2020] KEHC 7813 [KLR] held that;

“Section 199 states that a magistrate shall in addition to recording evidence also record such remarks, if any, as he thinks material respecting the demeanour of a witness. It is clear from the wording of the provision that the recording of remarks respecting the demeanour of a witness is discretionary and not mandatory. As such it cannot be said that there was a miscarriage of justice or that the trial was a nullity because the learned Magistrate in the present case made no remarks respecting the demeanour of the witnesses.”



45. As to failure to conduct a DNA test to prove paternity, it is trite law that the fact of rape or defilement is not proved by DNA test but by evidence as it was held in *Fappyton Mutuku Ngui v Republic* [2014] eKLR where the Court of Appeal held that;

“The appellant’s second major ground was that there was no tangible medical evidence adduced to link him with the defilement of PW2. He also argued that a DNA examination was not conducted to link him to the defilement. In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2’s testimony which was trustworthy as to the person who had defiled her.”

46. In *Aml v Republic* [2012] eKLR [Mombasa], this Court upheld the view that:

“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

47. On the question of the identity of the Appellant as the perpetrator of the act, the Appellant was well known to PW2 and PW3. PW3 testified that he Appellant was his co-worker and his sister’s neighbour. The Appellant was found in the house with the complainant. The complainant was categorical that it was the Appellant who did ‘tabia mbaya’ to her as when asked in court who did that to her, she pointed out the Appellant. Identity of the Appellant posed no difficulty and am satisfied he was identified as the perpetrator of the act.

48. As to the contention that his rights were violated as he was supplied with the birth certificate after the complainant had testified, this issue is moot, this court having already pronounced itself on the propriety of that piece of evidence.

49. The Appellant challenges the sentence of 20 years imprisonment meted out on him stating that the same was harsh and excessive. 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.”

50. The charge therefore carries a minimum sentence of 20 years imprisonment. In sentencing the Appellant, the trial magistrate considered his mitigation and aggravating factors. It is trite law that sentencing is a discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. [see *Ogolla S/o Owuor v R* {1954} EACA 270].

51. The Appellant did not demonstrate any of the above factors. Further, it is worthy of note that the Supreme court has now laid to rest the controversy on the legality of the mandatory minimum sentences provided in the *sexual offences Act* in its 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]* where 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.....

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”.

52. From the foregoing, it is my finding that this appeal lacks merit on all fronts and it is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF OCTOBER 2025.

A.K. NDUNG’U

JUDGE

