KENYA LAW
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Nduta v Republic (Criminal Appeal E145 of 2023) [2025] KECA 1157 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1157 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E145 OF 2023

PO KIAGE, WK KORIR & JM NGUGI, JJA

JUNE 20, 2025

BETWEEN

DUNCAN KARANJA NDUTA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal against the judgment of the High Court at Nairobi (C.W. Githua, J.) dated 24th February 2022inHCCRA No. 247 of 2019)

JUDGMENT

1. The appellant, Duncan Karanja Nduta, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*, 2006. The particulars of the charge were that on 14th September 2015 at Kawangware area within Nairobi County, Karanja defiled W.R.W., a girl aged 13 years. Although he denied the charge, after the full trial, he was found guilty, convicted and sentenced to 20 years' imprisonment. The High Court affirmed his conviction and sentence. The appellant unbowed approaches this Court on a second appeal.

2. In his amended memorandum of appeal filed together with his submissions, the appellant is only challenging the sentence, a fact he also confirmed at the hearing. His only ground of appeal is that the mandatory sentence of 20 years imprisonment was harsh, excessive, and inappropriate in the circumstances of this case.

3. When this matter came up for hearing on 11th March 2025, the appellant was virtually present from Kamiti Maximum Prison, whereas learned counsel Ms. Vitsengwa was in attendance for the respondent. The appellant and Ms. Vitsengwa mainly relied on their written submissions, accompanied by brief oral highlights.

4. In his submissions, the appellant urged this Court to sentence him to a lesser and lenient term to allow him to rehabilitate, reintegrate into society, and realise his human dignity. The appellant submitted

that since life expectancy in Kenya is 68 years, the sentence of 20 years handed down to him at the age of 25 years is excessive and denies him the opportunity of enjoying his youth. He referred to Evans Wanjala Wanyonyi v Republic [2019] eKLR to urge that a mandatory minimum sentence should not bind this Court. He also cited Ali Abdalla Mwanza v Republic [2018] eKLR to persuade us to strike a balance between advancing the interests of the public and allowing him an opportunity to rehabilitate. Additionally, he relied on Wanongo v Republic [2023] KECA 1538 (KLR) and other decisions of this Court to urge that we set aside the 20 years' imprisonment. In his oral arguments, the appellant submitted that he has acquired welding skills while in custody and argued that he will be a change agent and use the skills to create employment, benefitting society at large. In the alternative, the appellant prayed that we remit the matter to the trial court for resentencing.

5. Ms. Vitsengwa, on the other hand, relied on submissions dated 10th March 2025 to oppose the appeal. Counsel submitted that this Court was barred by section 361(1) of the *Criminal Procedure Code* (CPC) from considering the severity of sentence as severity of sentence is a matter of fact. To buttress this submission, counsel referred to the Supreme Court holding in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR), which outlined the scope of this Court's jurisdiction on appeal against sentences. Ms. Vitsengwa urged that the constitutionality of the sentence, being raised for the first time before this Court and introduced by way of submissions, was not available for our consideration. Counsel beseeched us to find no merit in the appeal and dismiss it.

6. We have reviewed the record, the submissions, and the authorities cited by the parties. As correctly pointed out by Ms. Vitsengwa, section 361(1) of the CPC explicitly bars this Court, on a second appeal, from entertaining matters of fact, and the severity of sentence is indeed a matter of fact. It is only where the trial court had no jurisdiction to pass the sentence or where the High Court enhanced the sentence that this Court can step in and make the necessary correction. The provision is couched as follows:

> " 361. Second Appeals
>
> 1. A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section -
>
>   a. on a matter of fact, and severity of sentence is a matter of fact; or
>
>   b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

7. In this case, it is clear that the High Court did not enhance the sentence so as to warrant our interference. Also, the appellant has not argued that the trial court acted in excess of its jurisdiction when passing the sentence.

8. The appellant has pleaded with us to vacate the sentence of 20 years' imprisonment, arguing that this Court is not bound by the mandatory sentences provided in the *Sexual Offences Act*, 2006. Firstly, the appellant's argument does not pass muster as it has arisen for the first time before this Court and does not therefore fall for our consideration as the issue was never raised before the High Court. Secondly, the appellant's argument that this Court is not bound by the minimum sentences in the *Sexual Offences*

Act, 2006 does not hold water as was held by the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (supra) when it stated that:

> "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. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed."

9. The above dictum binds us. In the circumstances, we have no authority to disturb the prison term of 20 years as meted out by the trial court and affirmed by the High Court. Despite the appellant passionately arguing his case of a reformed man whose lessons and skills will benefit society, the appeal must fail for the reasons already stated. The appeal is therefore dismissed.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2025.

P. O. KIAGE

JUDGE OF APPEAL

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W. KORIR

JUDGE OF APPEAL

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JOEL NGUGI

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.