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Katana v Republic (Criminal Appeal 43 of 2021) [2024] KECA 393 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 393 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 43 OF 2021

M NGUGI, KI LAIBUTA & LA ACHODE, JJA

APRIL 12, 2024

BETWEEN

MICHAEL THOYA KIVURE KATANA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgement of the High Court at Malindi (W. Korir J.) dated 17th April 2019 in HCCR. APP. NO. 55 of 2018)

JUDGMENT

1. Michael Thoya Kivure Katana, alias Radhi, the appellant herein, was first arraigned in the Chief Magistrate's Court at Malindi on charges of defilement contrary to Section 8(1), as read with Section 8(3) of the *Sexual Offences Act* No.3 of 2006 (SOA), in Criminal Case No. 361 of 2013. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) SOA.

2. The particulars of the charge were that on the 18th of May 2013 in Malindi District within Kilifi County, he intentionally and unlawfully caused his penis to penetrate the vagina of R.K, a child aged 15 years. In the alternative, it was alleged that, on the same date and at the same place he committed an indecent act with the said child.

3. The appellant pleaded not guilty to the charge. He was subsequently subjected to a full trial in which the prosecution called a total of four (4) witnesses in support of their case. A summary of the case is set out below to put the matter in context.

4. The case for the prosecution was that on 18th May, 2013, A. C, also known as K (PW3), who runs a food café, sent her daughter R.K, (PW1) a 15 years old girl, to her cafe to fetch some charcoal. The key to the cafe was entrusted with the appellant. PW1 retrieved the key from the appellant and fetched the charcoal. When she returned the key, she found the appellant in his room shirtless, donning only a pair of trousers. The appellant seized her and put her on the bed. He lifted her skirt and forcibly

removed her underwear. He removed his trousers and defiled her. She felt pain and bled. The appellant ejaculated, leaving a whitish discharge visible to her.

5. The appellant then warned her not to disclose the incident to anyone and let her go. She, however, told her mother what had happened when she reached home. Together, mother and daughter reported the matter at Malindi police station and were issued with a P3 form.

6. PW2, a senior clinician at Malindi Sub-County Hospital, examined PW1 on 28th May, 2013, treated her and filled the P3 form on her behalf. Upon examination, the clinician found a ruptured hymen, although she could not determine when it was torn. She observed no vaginal injuries, tears, or lacerations. She produced the treatment sheet as exh 2, the P3 form as exh 3 and the blood-stained panties as exh 4. She observed that the bloodstains on the underwear were already dry when the P3 form was filled, but no blood test was conducted.

7. PW3, confirmed that on the evening of 18th May 2013, she sent PW1 to collect charcoal from her café. The key to the café was usually kept by the appellant. PW1 later returned home in tears and reported that the appellant had forcibly defiled her. PW3 took the minor to the appellant's house and confronted him, whereupon the appellant fled. Subsequently, PW3 reported the matter to the police at Malindi and took the minor to Malindi General Hospital for treatment. She confirmed that there were bloodstains on PW1's underwear when she examined it.

8. PW4, Corporal Fatuma Ali of Malindi Police Station, took over investigations in this case from Corporal Mwana Chengo and carried them to completion. She produced the age assessment report, exh1, in evidence.

9. The case for the defence as gleaned from the appellant's unsworn testimony was that, on 18th May, 2013, a Saturday, he went to the ginnery to look for work and finding none, he returned home. That his family had provided PW3 with a room to conduct her business in their house. She kept her tools of trade in the room and would lock it and leave the keys with the appellant when she was not using it. That on the day in question, he unlocked the door for PW1 and retreated into his room to sleep. Later, his girlfriend came to visit him. PW1 returned the keys. She informed them that her mother had sent her for charcoal, then she left with the appellant's girlfriend.

10. At about 7:00pm, PW1 and his girlfriend returned, accompanied by PW3. PW3 accused him of defiling PW1 and alleged that the minor had reported this to her. He denied the allegation, but the situation escalated when PW3 began shouting "thief, thief," prompting members of the public to come. He was thus arrested.

11. At the end of the trial, Senior Resident Magistrate Hon. C.O Nyawiri convicted the appellant on 6th June 2018 and subsequently sentenced him to 15 years' imprisonment. The appellant proceeded on appeal to the High Court and upon re-evaluation of the evidence, Hon. W. Korir J. (as he then was), dismissed the appeal in its entirety, precipitating this second appeal.

12. The appellant filed a memorandum of appeal on 24th August 2023 and supplementary grounds of appeal dated 25th September 2023 appealing against both conviction and sentence. The appellant asserts that the learned High Court Judge erred in law:

    i. In upholding his conviction.

ii. By failing to consider that the age assessment report did not meet the requirements under Section 77 of the Act.

iii. By relying on a weak, unreliable and inconclusive medical report as the only source of corroborative evidence as proof of penetration.

iv. By failing to consider that Section 124 of the *Evidence Act* was not applicable in the circumstances of this case since the demeanor of the prosecution witnesses was not recorded in the trial proceedings in breach of Section 199 of the CPC.

v. By failing to consider that the sentence under the provisions of Section 8 (3) of the Sexual Act No. 3 of 2006 providing for a mandatory minimum sentence denies Judicial officers their legitimate Jurisdiction to exercise discretion in sentencing, to impose an appropriate sentence based on the scope of the evidence adduced on a case by case basis, in violation of Article 27 (1) (2) (4) of *the constitution* of Kenya 2010. That the sentence imposed upon the appellant is therefore, unlawful.

13. The case was disposed of by way of written submissions. The appellant, who was unrepresented, filed his submissions dated 25th September 2023. Prosecution Counsel, Hilary Isiaho, filed submissions dated 21st November 2023 on behalf of the respondent and identified the following issues for determination:

i. Whether the age of the victim was proven.

ii. Whether the appellant was properly identified.

iii. Whether the aspect of penetration was sufficiently proven.

iv. Whether the inconsistencies by prosecution witnesses were grave.

v. Whether the alibi defense was credible.

vi. Whether the sentence was excessive in the circumstances.

14. We have considered the record, the grounds of appeal and the submissions of both parties and the paramount issues that arise for determination are:

i. Whether the elements of defilement were proved beyond reasonable doubt.

ii. Whether or not the contradictions and inconsistencies in the evidence were material.

iii. Whether the sentence was excessive in the circumstances.

15. This being a second appeal, the Court is restricted under Section 361 of the Criminal Procedure Code to considering matters of law only. The confines of the Court's jurisdiction were succinctly set out by the Court of Appeal in Karingo vs R [1982] KLR 213 as follows:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja - vs- R (1956) 17 EACA 146)"

Only points of law therefore, fall for our determination in this appeal.

16. The appellant was convicted and sentenced under Section 8 (1) as read with Section 8(3) SOA which provides as follows:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) ....
>
> (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."

17. The critical ingredients that must be proved in an offence of defilement are: the age of the complainant, proof of penetration and positive identification of the assailant. (See the case of Charles Wamukoya Karani vs Republic, High Court Criminal Appeal No. 72 of 2013). These ingredients are provided for under section 8(1) of the SOA and must each be proven for a conviction to succeed. (see George Opondo Olunga vs Republic [2016] (High Court) eKLR.)

18. On whether the age of the victim was proved beyond reasonable doubt, the appellant argued that his conviction was based on an unreliable age assessment report presented by a police officer (PW4), without proper authority. That the report failed to meet the threshold in Section 77 of the *Evidence Act* since PW4 lacked medical expertise, and that its authenticity could not be verified. He pointed out the inaccuracies in age assessment methods as highlighted in E.K vs Republic (CR. APP NO.9 of 2017), indicating a potential margin of error of 2 years. Further that the appellant's conviction rested largely on the parents' estimation of the complainant's age and information from the P3 form, and that the prosecution failed to definitively prove the victim's age.

19. The appellant cited the Court of Appeal case of Sibo Makovo vs Republic, Criminal Appeal [1997] eKLR to argue against the admissibility of the age assessment report due to procedural irregularities. He also cited Ex-vs-Republic (High Court Cr. App No.9 Of 2017, Kapenguria), to highlight the unreliability of medical methodologies for age assessment. He argued that there is potential error margin of plus or minus two years.

20. In rebuttal, counsel for the respondent submitted, with regard to the age of the victim, that although the victim's birth certificate was not produced, this did not undermine the prosecution's case. Counsel referred to the case of Mwalango Chichoro Mwanjembe vs Republic (Mombasa Criminal Appeal No. 24 of 2015) to support his argument. He argued that the testimony of PW1 indicated her age, which was the same as what was assessed at Malindi General Hospital and supported by a medical assessment report. Counsel cited the cases of Denis Kinywa vs R (Criminal Appeal No. 19 of 2014), and Omar Uche vs R (Criminal Appeal No. 11 of 2015), to assert that age can be proved through various means, including documentary evidence, oral testimony, or medical assessment. That in any case, the appellant did not contest the victim's age during trial or in the first appeal.

21. The learned judge in the first appeal considered the evidence concerning the age of PW1 in his judgement and held that:

> "30. Although the Appellant did not question the age of the complainant, the complainant testified that her birth certificate was destroyed when their house got burned. She also

testified that a medical officer assessed her age and found that she was 15 years. That the complainant was a child was therefore established by the prosecution."

22. In the context of establishing her age, PW1 confirmed her age as assessed at Malindi General Hospital, but also provided pertinent contextual details regarding her education. She testified that she was a standard five pupil at Victory Academy, Gongoni, having gone through standard four at Sir Ali Primary School the preceding year, to lend credibility to her stated age of 15 in 2013 at the time of the offence. The P3 form and the age assessment reports both placed her age at 15 years.

23. Section 77 of the *Evidence Act* provides as follows on the admissibility of documentary evidence:

> "(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> 2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
>
> 3. When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."

24. In Com vs Republic Criminal Appeal 197 Of 2016, the Court of Appeal adverted to the provisions of Section 77 as follows:

> "We nevertheless take the view that, so as to give a proper opportunity for an accused person to challenge the contents of a document contemplated in section 77, a proper basis for production of that document by a person other than the maker needs to be laid. A proper basis would include when the maker is completely unavailable or when the maker can be availed only with great difficulty or inconvenience or at great expense."

25. In the case before us, a proper basis was not laid for the production of the age assessment report by a witness other than the maker thereof. In any case, a police officer without any other training, would not be seized of the expertise to answer questions on the contents of the report.

26. Be that as it may, there are other ways to ascertain the age of a minor in a defilement case. The Court of Appeal addressed the issue in the case of Edwin Nyambogo Onsongo vs Republic (2016) eKLR as follows:

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

27. In the case of Francis Omuroni vs Rep, Uganda Court of Appeal; Criminal Appeal No. 2 of 2000, it was held that:

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

28. Further, in the case of Gordon Otieno Nyambade vs Respondent, Criminal Appeal No E016 of 2020, the High Court at Kisumu stated that,

> " In the absence of documentary evidence, observation and common sense can assist the court in determining a minor's age. In the case of Joseph Kieti Seet vs Republic [2014] eKLR, the court therein held that a minor's age could be proved by common sense, a position this court agreed with. In the case of Evans Wamalwa Simiyu vs Republic [2019] eKLR, the court therein accepted the doctor's indication of the minor's approximate age in the P3 Form to have been the apparent age of that minor. This court fully associated itself with the said holding...."

29. We have considered that when PW1 was led through voire dire examination she stated her age to be 16 at the time she testified. In her sworn testimony she maintained that she was 15 years of age at the time of the attack the previous year. The P3 form also indicated the age of 15 years. PW1 was well known to the appellant before the attack and notably, the appellant was satisfied with the apparent age of the minor during trial and did not question it. Neither did he raise it as a ground during the first appeal. We therefore, agree with the findings of the two courts below and therefore, nothing turns on this issue.

30. With regard to identification, it was not disputed that the victim and the appellant were well known to each other as neighbours. PW3 and PW1 testified that it was PW3 who sent PW1 to fetch charcoal from the café and that for PW1 to access the room in which the charcoal was stored, she would have to get the keys from the appellant. That placed PW1 in the appellant's house at the material time, according to the prosecution. The appellant's narrative on the other hand was contrived and not credible. He stated that he started the day on 18th May, 2013 a Saturday, by going to the ginnery to look for work and, finding none, he returned home. Next, he went to find his girlfriend to give her some words of advice before he came back to the house with her.

31. The State Counsel seemed to think that the appellant was raising an alibi defence. Counsel contended that it was not credible as it was not raised during cross-examination of the victim, and no corroborating evidence was presented. He relied on the case of Victor Mwendwa Mulinge vs R [2014] eKLR to state that the burden of proving the falsity of an accused's alibi lies on the prosecution and highlighted the importance of raising it at an early stage in the trial.

32. In our view, the appellant in his circumlocutory narrative did not raise an alibi defence. Despite his explanation that he went to the ginnery to look for work, and later went to look for his girlfriend, he still placed himself at the scene of crime at the material time. He admitted that PW1 came to his house on the fateful day, while he was there, to pick the keys to her mother's café so that she could collect the charcoal her mother had sent her for. Further, that she came back later and returned the keys to him. This lent credence to PW1's testimony. The appellant did not raise the issue of his girlfriend being present in his cross examination. We therefore agree with the findings of the two courts below that the appellant was positively identified.

33. On the element of penetration, the appellant submitted that medical evidence was not conclusive. He contended that PW2, the senior clinical officer, found no injuries, tears, or lacerations on the victim's genitalia to align with penetration as defined under Section 2 of the SOA. He raised doubts regarding the victim's sexual history, questioning whether she had prior sexual experience, and argued that there were inconsistencies such as absence of spermatozoa in the high vaginal swab, despite the victim alleging that he ejaculated. He cited the case of Ndungu Kimani vs Rep (1982) eKLR to state that contradictions in the victim's testimony cast doubt on her credibility. He argued that the victim's testimony contradicted the medical evidence, particularly regarding the age of the injuries and referred to the case of P.K.W vs Rep (2012) eKLR to emphasize the importance of accurate assessment of penetration in cases involving minors.

34. For the respondent, the State Counsel submitted on penetration that, while medical evidence did not show tears or lacerations on the genitalia, it confirmed partial hymen breakage, consistent with the victim's testimony. That the victim's detailed account, supported by circumstantial evidence and medical corroboration, sufficiently proved penetration. He relied on the case of Kassim Ali vs Republic (Cr. App No. 84 of 2005, Mombasa) to argue that medical examination to support the fact of rape is not decisive, since rape can be proved by the oral evidence of the victim, or by circumstantial evidence.

35. PW1 testified that, when the appellant held her and put her on his bed, he lifted her skirt and forcibly removed her underwear. He removed his trousers and had sexual intercourse with her. She felt pain and bled. When she arrived back home in tears and narrated to PW3 what had happened, PW3 confirmed that PW1's underwear had bloodstains when she examined it. PW2, the senior clinician at Malindi Sub-County Hospital, examined the minor on 28th May, 2013, ten days after the attack and filled the P3 form on her behalf. She found a ruptured hymen even though, due to passage of time, she could not determine when it was torn.

36. Whether PW1 had prior sexual experience is of no consequence as long as it was already established that she was a minor. The appellant invited us to find that there were inconsistencies in the prosecution case since PW1 testified that the appellant ejaculated, and yet there were no spermatozoa in the high vaginal swab. We decline to draw such a conclusion since the swab was done ten days after the attack. In any case, the emission of seed is not a prerequisite for a finding of penetration. From the foregoing, we find no reason to depart from the findings of fact arrived at by the two courts below, on the issue of penetration.

37. The appellant next submitted that there were inconsistencies between the testimony of PW1 and the medical evidence. That the medical evidence showed an old hymen rupture contrary to PW1's claim, and that this undermined the prosecution's credibility and raised doubts about the truthfulness of PW1, particularly regarding her prior sexual experiences and the severity of her injuries. To buttress his argument, he cited the case of P.K.W vs Republic (2012) EKLR.

38. In rebuttal, the State Counsel argued for the respondent that such inconsistencies did not discredit the entirety of the victim's evidence. He relied on the case of Alex Kapunga & 3 others vs R (CR Appeal No. 252 of 2005, Court of Appeal Tanzania) to underscore that discrepancies in a witness's testimony do not automatically make them unreliable.

39. In his judgement on the first appeal, the learned Judge stated that:

> "31.The evidence of the prosecution witnesses clearly established the events of that day. It shows that the Appellant forced himself on the complainant. The Appellant actually confirmed in his defence that he met the complainant in his house. There may be some

inconsistencies in the prosecution case but those inconsistences do not change the core evidence of how the Appellant attacked and defiled the complainant in his house.

40. In the case of Philip Chaka Watu vs Republic [2016] eKLR; Criminal Appeal NO. 29 of 2015 (Mombasa), the Court of Appeal held that:

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

41. Inconsistencies and discrepancies were defined by the Court of Appeal of Nigeria in the case of David Ojeabuo vs Federal Republic of Nigeria [2014] LPELR-22555(CA), as follows:

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

42. However, it is essential to analyze the nature and significance of the inconsistencies as stated in David Ojeabuo (supra). Contradictions occur when one piece of evidence states the opposite of another piece of evidence on material facts, while discrepancies involve differences in detail without fundamentally altering the substance of the testimony.

43. In the case of Willis Ochieng Odero vs Republic [2006] eKLR, the Court of Appeal observed thus on contradictions in the prosecution evidence:

> "As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that per se is not a ground for quashing the conviction in view of the provisions of section 382 of the Criminal Procedure Code."

In Njuki vs Rep 2002 1 KLR 77, the Court said the following in respect of discrepancies in the evidence of witnesses:

> "In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused... however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."

44. We have considered the apparent inconsistencies and discrepancies in the prosecution evidence and find that they do not materially undermine the core evidence establishing the offence. Instead, they reflect the inherent imperfections of human memory and perception. We deem them inconsequential and find no reason to depart from the findings of the two courts below.

45. Lastly, on the question as to whether the sentence was harsh and excessive in the circumstances of this case, the appellant argued that the mitigation he presented during the trial held little weight due to the mandatory nature of the sentencing provisions under the law, where the only valid punishment available was a 15-years imprisonment. This, he argued undermined the judicial discretion necessary to consider individual circumstances and render appropriate judgment, thereby violating constitutional principles of fair trial.

46. The appellant cited the case of S-vs-Mchunu and Another (Ar24/11) (2012) Zarzphc6 Kwa Zulu Natal, to assert that mandatory sentences limit the courts' sentencing function and undermine judicial independence and S-vs-Toms 1990 (2) Sa 802 (A) and S-vs-Mofokeng 1999 Sacr. 502 (W) to emphasize that mandatory sentences disregard individual circumstances and impede rehabilitation efforts, especially for juvenile offenders. The appellant contended that the inflexible nature of mandatory sentencing contradicts international standards and Sentencing Guidelines Policy 2016 objectives. He urged the Court to declare the mandatory minimum sentence unconstitutional and called for a review of the *Sexual Offences Act* to ensure alignment with constitutional principles and international standards.

47. In rebuttal, the State Counsel stated that the trial court exercised discretion appropriately considering the victim's age and circumstances, and that the 15-year sentence was below the statutory minimum, but was justified based on the court's assessment of the case. Counsel urged us to find that the appeal lacks merit and dismiss it altogether, since appellate courts may only intervene if the sentence is clearly excessive, overlooked essential factors, or was based on erroneous principles.

48. During the first appeal, the learned Judge considered the sentence and held as follows:-

...(35) The sentence imposed is the minimum sentence provided for the offence for which the Appellant was convicted. His appeal on sentence also fails. The end result is that the Appellant's appeal fails in its entirety and the same is dismissed."

49. The principles guiding interference with sentencing by the appellate Court were properly set out by the predecessor of the Court of Appeal in Ogolla s/o Owuor vs Republic, [1954] EACA 270 as follows:

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

50. The Court of Appeal in Bernard Kimani Gacheru vs Republic [2002] eKLR restated the principle and stated that:

> " 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 states is shown to exist."

51. On mandatory sentences however, The Kenya Judiciary Sentencing Policy Guidelines, 2016 state inter alia that:

> "Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders."

52. In the Supreme Court decision of Francis Karioko Muruatetu & Another vs Republic [2017] eKLR, Petition No. 15 and 16 of 2015, the Court expressed itself thus on mandatory sentences:

> "…If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict."

53. The above rendition offers a poignant reflection on the weighty responsibility that accompanies judicial sentencing. It emphasizes the profound impact on individual lives and the society at large. Judges must, therefore, wield their discretion with utmost care, guided by principles of justice, fairness, and proportionality. Each sentence must be thoughtfully crafted to ensure that justice is served without undue harshness or leniency, thus upholding the integrity of the legal system and safeguarding constitutional rights. Failure to do so risks perpetuating injustice and eroding public trust.

54. In this case, the appellant contended that the imposition of the mandatory minimum sentence diminished judicial discretion, thereby violating principles of fair trial. This argument was rebutted by the State counsel's assertion that the trial court appropriately exercised discretion and took into account relevant factors such as the victim's age and the appellant's mitigation.

55. The Muruatetu decision (supra), highlights the importance of considering mitigating circumstances in sentencing but does not explicitly preclude the imposition of statutory minimum sentence. Instead, it underscores the need for substantive consideration of individual circumstances before sentencing.

56. In the case at hand, the court considered the appellant's mitigation, particularly that he was the sole provider for his family and was intending to get married. We, however, note that he betrayed a position of trust and authority. He took advantage of a vulnerable minor who was a neighbor's child. The severity of the crime cannot therefore be understated.

57. The appellant was sentenced under Section 8(3) of the SOA which mandates a minimum sentence of twenty years for the offence of defilement of a child aged between twelve and fifteen years. It is however evident that the judicial officer did exercise discretion to impose a sentence of fifteen years, taking into account the circumstances of the case, including the gravity of the offence and the appellant's mitigation.

58. Upon considering the entire record of appeal, we are satisfied that the two courts below acted with due consideration and prudence in passing and upholding the sentence. They balanced the interests of justice including the principles of proportionality and fairness. We are thus not persuaded that the sentence of 15 years imprisonment was harsh or excessive in the circumstances of this case and therefore, decline to interfere with it.

59. In the end, we find no merit in the appeal on conviction or on sentence and hereby dismiss it in its entirety.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2024.

MUMBI NGUGI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR