



**Kipkorir v Republic (Criminal Appeal E056 of 2022)
[2024] KECA 745 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KECA 745 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL E056 OF 2022
S OLE KANTAI, FA OCHIENG & WK KORIR, JJA
JUNE 21, 2024**

BETWEEN

JOEL KIPKORIR APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Eldoret
(C. W. Githua, J.) dated 7th June 2017 in H.C.C.R.A. No. 30 of 2015)*

JUDGMENT

1. This is an appeal from the judgment of the High Court of Kenya at Eldoret, presided over by C.W. Githua, J. The appellant was accused of defilement, which is contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. At the end of the trial, the appellant was found guilty of the offence and was subsequently convicted and sentenced to 30 years in prison.
2. The particulars of the offence were that on 17th August 2012 at Nandi County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of R.C. (name withheld), a child aged 15 years.
3. In the alternative, the appellant was charged with the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
4. The prosecution's case before the trial court was supported by the evidence of five prosecution witnesses. According to the complainant, she was on her way home from the shop when she met the appellant who told her that he wanted to have sex with her. The appellant took her to his home where he asked her to lie down and remove her clothes. The appellant also removed his clothes, and inserted his penis into her vagina.



5. The complainant did not tell anyone, including her parents about what had happened. The complainant revealed the information when her teacher realized that she was pregnant, and she accused the appellant of being responsible.
6. The doctor who testified informed the court that the complainant was six months pregnant at the time of examination and that the sexual act between the complainant and the appellant was consensual.
7. PW4 was given money by the appellant to take to the complainant.
8. The investigating officer testified that the appellant offered the complainant money in exchange for sex.
9. The appellant in his unsworn testimony denied committing the offence. He told the court that schools were closed in August and therefore, he could not have sent money to the complainant during sports day. He informed the court that the complainant missed her period in September while the alleged offence was in August hence the pregnancy could not have been as a result of his actions. He claimed that the complainant and PW4 discussed how to frame him since they were neighbours.
10. The trial court held that the age of the complainant had been proved through the immunization card which showed that she was born in 1998.
11. The court further held that the complainant was found to be pregnant after the appellant had taken her to his house and had sex with her. This evidence was not controverted. Therefore, the complainant was defiled as she was 15 years old. The court held that the complainant was defiled by the appellant who even gave her money.
12. The court believed the complainant's testimony to be truthful as she had given a consistent account of what had happened and maintained the same during cross-examination.
13. The court held that the appellant's defence did not displace the prosecution's case which proved beyond reasonable doubt that the appellant had committed the offence. Consequently, the appellant was found guilty and convicted.
14. In mitigation, the appellant urged the court to be lenient.
15. The court while sentencing the appellant noted that the appellant was in a position to take care of the minor as his teacher, but he betrayed that trust and used his position and resources to lure and defile her.
16. Aggrieved, the appellant appealed to the High Court on the grounds that:
 - a) The charge sheet was defective.
 - b. The court relied on inconsistent evidence which did not prove all the elements of the offence of defilement.
 - c. The court did not consider the appellant's defence.
 - d. The findings of facts were not supported by the evidence on record."
17. The learned Judge held that in as much as the words 'unlawfully' and 'intentionally' are not used under Section 8 of the *Sexual Offences Act*, the practice has been that the words are merely used to depict the mens rea of the person accused of having committed the offence. Therefore, even though the words need not be included in the particulars supporting a charge for defilement, the inclusion of the said words does not in any way change the nature and character of the offence of defilement or render a charge defective.



18. The learned Judge held that there was no merit in the complaint that the appellant's defence was not considered by the trial court. Pages 26-28 of the trial court judgment show that the appellant's defence was analyzed and found to be untruthful.
19. The learned Judge held that the birth certificate produced in evidence indicated that the complainant was 14 years 7½ months at the time of the alleged offence. The complainant's evidence that she was lured and defiled by the appellant until she became pregnant was corroborated by the evidence of the clinical officer who examined her on 16th October 2012. The complainant knew the appellant very well before the incident as they were neighbours, and they had engaged in sexual relations before the material date. These claims were not contested and the identity of the appellant was not in question.
20. The learned Judge held that from the foregoing, the charge of defilement had been proved against the appellant beyond any reasonable doubt.
21. The learned Judge was satisfied from the evidence on record that the appellant was properly convicted. This was even though the trial court erred in stating that the complainant was lured into a house instead of a sugarcane plantation; and also referred to an immunization card which was not produced in evidence, instead of a birth certificate, as these errors could not have affected the validity of the decision, nor did they occasion any prejudice on the appellant. The errors were curable under Section 382 of the Criminal Procedure Code.
22. Citing the case of *Macharia v Republic* [2003] KLR 115 and Section 8(3) of the *Sexual Offences Act*, the learned Judge held that sentencing is at the discretion of the court. In this instance, the sentence imposed against the appellant was not harsh or manifestly excessive given that the appellant was a teacher and he ought to have been at the forefront in protecting minors instead of molesting them, given his position in society.
23. Consequently, the appellant's appeal was dismissed in its entirety.
24. Dissatisfied, the appellant lodged the present appeal. He raised the following amended grounds of appeal to wit that:
25. When the appeal came up for hearing on 7th February 2024, the appellant was in person while the state was represented by Ms. Oduor, learned senior principal prosecution counsel. Parties relied on their respective written submissions which the appellant briefly highlighted.
26. The appellant submitted that the charge sheet was defective as it contained two OB numbers because he was arrested before a report Page 7 of 27 was made. He contended that the use of the words "unlawful" and "intentional" were added to the charge sheet thus rendering it fatally defective as those words apply only to rape cases.
27. The appellant claimed that the trial court was biased against him and therefore discriminatory. He asserted that the court failed to make conclusions on some issues; and instead, it relied on Section 124 of the *Evidence Act* in asserting that the complainant was telling the truth.
28. The appellant further submitted that he was arrested on 21st October 2012, was convicted in 2015, and was in custody for the most part during the trial. He prayed that his sentence run from the date of his arrest.
29. In his written submissions, the appellant submitted that the charge sheet was defective as it did not comply with the provisions of Section 135 of the Criminal Procedure Code. His further opinion was that the trial was unsafe as the magistrate was biased, contrary to Articles 27, 35(1)(a) & (b) and 50(2)



(b), (j), (k) & (3) of *the Constitution*. The appellant also expressed the opinion that court did not comply with Section 169 of the Criminal Procedure Code.

The appellant relied on the case of *Albanus Mwasia Mutua v Republic* [2004] eKLR in support of this argument.

30. The appellant contended that the pregnancy was not proven and that therefore, in as much as his conviction was based on the said pregnancy it was not safe.
31. The appellant further submitted that the age of the complainant was not proven. The birth certificate produced in court was described by the appellant as not credible.
32. In opposition to the appeal, Ms. Oduor submitted that a sentence should not run from the date of arrest and that the 30 years imposed were commensurate to the offence committed.
33. The respondent submitted that all the ingredients of the offence of defilement were proved by the evidence tendered. The age of the complainant was ascertained by the birth certificate which indicated that she was born on 28th January 1998. The complainant gave a consistent narration of how the appellant had inserted his penis in her vagina, and the evidence was corroborated by medical evidence through the testimony of the clinical officer. Further, the appellant was not a stranger to the complainant. They were neighbours, and he was well known to her. He was a teacher in a neighbouring school. The two had engaged in sexual activities severally and therefore, the complainant was able to recognize the appellant as the person implicated in the case.
34. The respondent was of the view that the use of the words ‘unlawfully’ and ‘intentionally’ in the particulars of the charge sheet was not fatally defective since the said inclusion did not change the nature and character of the offence. The two words are only used to depict the mens rea of the appellant and does not in any way occasion a miscarriage of justice to the appellant.
35. The respondent submitted that the appellant was allowed to test the veracity of the prosecution witnesses. However, the respondent believes that the appellant did not controvert the evidence of the complainant and PW4 who were the key witnesses. He is said to have failed to corroborate his alibi defence, by clarifying that he was at school and not at the scene at the material time.
36. The respondent was of the view that the sentence meted against the appellant was reasonable and commensurate to the magnitude of the offence committed. Being a teacher, the appellant had an obligation to take care of minors but he took advantage of his position and resources and molested the complainant sexually.

Even though Section 8(3) of the *Sexual Offences Act* provides for a sentence of not less than 20 years, the respondent submitted that the hands of a judicial officer are not tied; they have discretion, and every case is to be determined depending on the attendant circumstances or its peculiar nature. The respondent also urged that the sentence of the trial court be upheld.
37. This is a second appeal. Section 361(1) of the Criminal Procedure Code enjoins us to consider only questions of law. In the case of *Karani v Republic* [2010] 1 KLR 73 the court stated thus:
38. We have carefully considered the record of appeal, the written submissions by both parties, the authorities cited, and the law. The issues for determination are whether or not the charge sheet was fatally defective; and whether or not the ingredients of the offence of defilement were proved beyond reasonable doubt.
39. The issue of unproved pregnancy, and the issue that the court relied on shoddy investigations were not raised before the first appellate court. The said issues are founded, in the first instance, on matters of



fact, which would require verification from the evidence or other material which were placed before the trial court. In effect, the said issues are not, in the strict sense, matters of law which could therefore be raised at any stage of the case.

40. An appeal cannot arise out of something upon which the court appealed from had not rendered a decision unless the appellant can demonstrate that he had raised the said issue, but the court had failed to determine it. In the case of *John Kariuki Gikonyo v Republic* [2019] eKLR, the court held that:

“Similarly from the grounds of appeal and the submissions by counsel for the appellant the question of whether the amended charge sheet was signed by a qualified person and whether the charge sheet was fatally defective for failure to describe the property was also not raised before the two courts below. Though the appellant was represented by counsel, no mention of this was made before the first appellate court nor has any explanation been given for such failure. We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her” This Court when faced with a similar issue in *Alfayo Gombe Okello v. Republic* [2010] eKLR *Criminal Appeal No. 203 of 2009*; held as follows: “...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.” Page 11 of 20 [18] In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal.”

41. We are of the considered opinion that this court sitting as a second appellate 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 court, and therefore not determined, then any decision made by the appellate court would not be considered a judgment on an appeal.
42. The appellant contended that he was not accorded a fair trial as is enshrined in Article 50 of *the Constitution*. He alleged that the trial magistrate was biased against him. However, the appellant did not demonstrate in what manner the trial magistrate was biased or how his rights were violated in the process. It is trite that he who alleges must prove. As there was no proof in support of this assertion, we find that this ground of appeal must fail.
43. It is trite that an accused person is entitled to not only be charged with an offence recognized under the law but also to be furnished with all the necessary details of the offence, to enable him appreciate the nature of the charge(s) against him and to enable him to prepare an appropriate defence. It follows, therefore, that a charge sheet that was deficient in substance would prejudice an accused person’s right to a fair trial as provided for in Article 50(2)(b) of *the Constitution*. This was the rationale behind Section 134 of the Criminal Procedure Code. The Section provides that:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with



such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

44. Whether an anomaly can render a charge sheet defective was determined in the case of *Isaac Omambia v Republic* [1995] eKLR, where the court considered the necessary ingredients in a charge sheet as follows:

“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.”

45. In determining whether a charge sheet was defective or not, this Court in the case of *Sigilani v Republic* [2004] 2 KLR, 480 stated that:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable the accused to prepare his defence.”

46. Having perused the charge sheet in this case, we note that the appellant was charged with; “defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, No. 3 of 2006”. The charge sheet contained the statement of the offence that the appellant was charged with. The said offence is known in law. The charge sheet also contained the particulars of the offence. The appellant was alleged to have inserted his penis into the vagina of the complainant, a child aged 15 years, on 17th August 2012 at Kapcheplanget village in Nandi County. The charge sheet was not deficient in substance, and it could not therefore prejudice the appellant.

47. In the case of *Peter Nguni Mwangi v Republic* [2014] eKLR, the court stated that:

“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in *YONGO v R*, [198] eKLR that:

“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- i. when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charged offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
- ii. when for such reason it does not accord with the evidence given at the trial.”

48. In the present case, the words “intentionally” and “unlawfully” were used in the particulars of the offence and the appellant was of the view that the said words should not have been used as this was



not a rape case. The question to be determined then, is whether the inclusions were prejudicial to the appellant. In the case of Peter Sabem Leitu v R, Cr. App No. 482 of 2007}} (UR) the court held that:

“The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant.”

49. Section 382 of the Criminal Procedure Code provides that:

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

50. In the case of JMA v Republic [2009] KLR 671, the court observed that not all defects in a charge sheet will render invalid, a conviction rendered thereunder. Over time, the test of determining whether a charge is fatally defective, has been established, both in our jurisdiction and other jurisdictions. In that regard, the Supreme Court of India in Willie (William) Slaney v State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391], held that:

51. In the case of Isaac Nyoro Kimita & another v Republic [2014] eKLR the court stated thus:

“In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants “jointly” defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term “jointly” in the particulars of the charge?”

52. In the case of John Irungu v Republic [2016] this Court observed that:

“The Code contemplates that there may be variations, so long as there is substantial compliance with the rules. In the same vein section 382 of the Code focuses, not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice.”

53. In the case of Benard Ombuna v Republic [2019] eKLR the court held that:

“In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of



the charges preferred against him and as a result, he was not able to put up an appropriate defence”.

54. From our perusal of the record, we hold the considered view that the appellant cannot be said to have misunderstood the nature of the charges against him. It is clear from his defence and submissions that he understood that he was being accused of having committed the offence of defilement, against the complainant. In our view, the inclusion of the words “unlawful” and intentional” did not render the charge sheet fatally defective. In so finding, we are guided by the decision in the case of Willie (William) Slaney v State of Madhya Pradesh (supra), where the court held:

“We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent.”

55. Similarly, in the case of Samuel Kilonzo Musau v Republic [2014] eKLR the court held that:

“As will be readily apparent, section 8(1) is the offence section; it creates the offence of defilement constituted by committing an act which causes penetration with a child. Section 8(2) is the punishment section and prescribes life imprisonment when the child defiled is aged eleven years or less. The charge would have been properly framed if it charged the appellant with defilement contrary to section (8) (1) as read with sections 8(2) because section 137 of the Criminal Procedure Code requires the statement of the offence to describe the offence in ordinary language and if the offence is one created by enactment, it shall contain a reference to the section of the enactment creating the offence.

In this case, the statement of offence, though lumping section 8(1) and (2) together, contained the ingredients of the offence and the prescribed punishment. The irregularity was one that was, in our view, curable under section 382 of the Criminal Procedure Code. That provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice.”

56. We are also persuaded by the decision in the case of Thomas Aluga Ndegwa v Republic [2018] eKLR where the court stated that:

“We respectfully agree with the reasoning of the first appellate court. While the charge sheet may not have been drafted in the most elegant of terms, it is clear that the appellant understood the charge against him and participated in the trial. For similar reasons, we find that the appellant’s right to a fair hearing under Article 50 (2)(b) of *the Constitution* was not violated.”

57. Therefore, we find that the error in the charge sheet did not occasion a failure of justice.

58. Section 8(1) of the *Sexual Offences Act* provides that:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

59. Under the *Sexual Offences Act*, the elements of the offence of defilement are: the victim must be a minor; there must be penetration of the genital organ, but such penetration need not be complete or absolute. Partial penetration will suffice, and the identity of the perpetrator must be established. For



the offence of defilement to be established, the prosecution must prove each of the above ingredients. In the case of *Charles Karani v Republic*, Criminal Appeal No. 72 of 2013, the court stated that:

“The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration, and positive identification of the assailant.”

60. It is trite that the onus of proof of the age of the complainant resides with the prosecution. Under Section 8(1) of the *Sexual Offences Act*, a person is deemed to have committed defilement if he or she does an act that causes penetration with a child. Under Section 2(1) of the *Sexual Offences Act*, the definition of a child is the one assigned in the *Children Act*. This entails any human being of less than 18 years.

61. In the case of *Kaingu Elias Kasomo v Republic*, Criminal Appeal No. 504 of 2010, the court emphasized the importance of proving the age of the victim of defilement, as the sentence imposed upon conviction depends on the victim’s age.

62. In this case, a birth certificate was adduced in evidence indicating that the complainant was born on 28th January 1998. This indicates that the complainant was about 14 years, and 7 months at the time of the incident. The P3 form indicated that she was 15 years. The appellant did not object to the production of these documents in evidence during the trial. In the case of *Francis Omuron v Uganda*, Cr. Appeal No. 2 of 2000, the Court of Appeal of Uganda 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 parent or guardian, and by observation and common sense.”

63. PW2 also corroborated the evidence of the complainant’s age as stated in the birth certificate. In the case of *Richard Wabome Chege v Republic*, Criminal Appeal No 61 of 2014, the court held that:

“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself.”

64. In the circumstances, we find that the age of the complainant was satisfactorily proven beyond reasonable doubt.

65. The evidence of the complainant concerning the incident was found by the trial court to meet the threshold of Section 124 of the *Evidence Act*. Be that as it may, the evidence was further corroborated by the evidence of PW4 who had been given money by the appellant to take to the complainant, and the clinical officer who stated that the complainant had been pregnant but had also suffered a miscarriage.

66. In the circumstances, we find that the evidence was sufficient to prove penetration.

67. The appellant was well-known to the complainant as they were neighbours. This was a case of recognition. The complainant was able to recognize the appellant as material day was not the first time



they had engaged in sexual activities. In the case of *Cleophas Otieno Wamunga v Republic* [1989] eKLR, this Court while dealing with the complexities of an identification of an assailant stated:

“It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction”.

68. As regards the appellant’s defence, the appellant gave an unsworn testimony and chose not to call any witnesses. The court proceeded to analyze the said evidence. We find that the court extensively considered the appellant’s defence.

69. From the foregoing, we find no reason to make a finding that is inconsistent with the first two courts on matters of facts. We are satisfied that the appellant’s conviction was safe.

70. Section 8(3) of the *Sexual Offences Act* Provides:

“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.”

71. It is trite that a sentence is passed at the discretion of the judicial officer, provided that the exercise of such discretion is anchored on the statutory provision relevant to the offence. In this instance, the trial court had the discretion to sentence the appellant to any term as long as it was not below 20 years, as that was the understanding of the law at the material time. The court sentenced the appellant to 30 years imprisonment. The High Court upheld this sentence due to the gravity of the circumstances of the case.

72. In the case of *Christopher Ochieng v Republic* [2018] eKLR stated thus:

“In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. Needless to say, pursuant to the Supreme Court’s decision in *Francis Karioko Muruatetu & another v Republic* (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years’ imprisonment from the date of sentence by the trial court.”

73. In our view, what renders a sentence unconstitutional is the fact that the prescribed mandatory sentence completely precludes the court from exercising any discretion, regardless of whether or not the circumstances so require.

74. The current jurisprudence on the issue of mandatory sentences is that it is unconstitutional, as it deprives the court of the mandate to exercise its discretion in such a manner as to do justice in a way that imposes a sentence that is appropriate to the circumstances of the particular case which is at hand.

75. In the light of the current jurisprudence on sentencing, and after giving due consideration to the circumstances in which the offence was committed, we take note of the facts that the appellant was a teacher who had an obligation to protect the complainant, due to his position in society. The appellant failed to do so. Instead, he took advantage of her innocence to defile her over and over until she became pregnant. In the said circumstances we hold the considered view that the children and the



society is safer when the appellant is kept behind bars. Therefore, there is no basis upon which we are persuaded that justice can be enhanced if we were to intervene, by ordering that the sentence be reduced. If anything, justice is best served by sustaining the sentence, as we now hereby do.

76. Accordingly, we uphold the appellant's conviction and sentence.

The appeal lacks merit and it is dismissed in its entirety.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024.

S. ole KANTAI

JUDGE OF APPEAL

.....

F. OCHIENG

JUDGE OF APPEAL

.....

W. KORIR

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

