Mathenge v Republic (Criminal Appeal E034 of 2023)
[2025] KEHC 9396 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9396 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E034 OF 2023

AK NDUNG'U, J

JUNE 26, 2025

BETWEEN

BENSON MUCHOKI MATHENGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No E095 of 2021– B. Mararo SPM)

JUDGMENT

1. The Accused, Benson Muchoki Mathenge, was charged with Defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 30th day of November 2021 at Riverside Village Buuri West Sub-County Meru County within the republic of Kenya caused his penis to penetrate the vagina of B.M. a child aged 11 years. He was convicted after trial and sentenced to serve 30 years imprisonment.

2. Being aggrieved by the conviction and the sentence, he lodged this appeal based on the following amended grounds;–

    i. The learned magistrate erred by failing to note that the incident took place at night thus the light used to identify him was not fully analysed.

    ii. The learned magistrate erred by failing to note that he was not given an opportunity to cross examine PW4.

    iii. The learned magistrate erred by failing to note that key witnesses were not called.

    iv. The learned magistrate erred by failing to note that PW5 was allowed to produce P3 form without his consent since he was not the maker of the document contrary to section 77(3) of the *Evidence Act*.

v. The learned magistrate erred by failing to consider that PW1 told the court that she was previously defiled by a person named as B.

vi. The learned magistrate erred by failing to find that the case against him was based on suspicion which cannot form a basis for conviction.

vii. The learned magistrate erred by convicting him to serve 30 years imprisonment without supportive evidence.

viii. The learned magistrate erred by failing to take into consideration the time spent in custody under Section 333(2) of the *Criminal Procedure Code*.

ix. The learned magistrate erred dismissing his defence without cogent reasons.

3. The appeal was canvassed by way of written submissions. In his submissions, the Appellant argued that the learned magistrate erred by failing to note that the incident took place at night thus the light used to identify him was not fully analysed. Further, the evidence of PW1 and PW4 was contradictory on the occurrences at the scene and he was not given an opportunity to cross examine PW4. That was a violation of his right under Article 50(2)(k) of *the Constitution*. He submitted that key witnesses were not called especially Mama S whom PW2 testified assisted her. That she should have been called to support her testimony.

4. That PW1 testified she had been previously defiled by someone called B and her mother supported her evidence by stating that she had a case in 2020 whereby the Appellant's friend wanted to defile the children. Therefore, the evidence of the clinical officer was doubtful because if PW1 was previously defiled, the hymen would not have been freshly broken. Further, that the investigating officer failed to visit the scene of crime to analyse the distance from the complainant's house to the place where he resided.

5. He submitted that PW5 was allowed to produce the P3 form without his consent since he was not the maker of the document which was contrary to Section 77(3) of the *Evidence Act*. That he produced the P3 form on behalf of another clinician but the P3 was not even marked as prosecution's evidence and the record did not show whether he understood the handwriting of the maker. Further, he produced the PRC form on behalf of another clinician and the record does not show whether he was given an opportunity inquire whether he objected or consented to the production of the same. That the way the trial court handled the trial prejudiced him a lot and he urged the court to resolve the irregularities in his favour. That the trial court failed to analyse the evidence tendered as a whole to determine his culpability and there was no cogent, direct, convincing and compelling evidence to warrant his conviction and the evidence fell short of the required standard.

6. In rejoinder, the Respondent's counsel submitted that contrary to the Appellant's contention, the trial magistrate in his judgement mentioned that the birth certificate was produced by PW3. That the proceedings regarding PW3 however omitted the part where PW3 produced the birth certificate but Section 382 of the *Criminal Procedure Code* was enacted in anticipation that there are bound to be errors and omission in the course of the trial. That the court even mentioned the birth certificate serial number signifying that the same was produced by the prosecution. Further, the omission in the proceedings would be an error by the court and not the prosecution which ought not to jeopardise the prosecution who discharged their burden. That even though it is assumed that the birth certificate was not produced, it did not mean that the age was not proved as the court saw that the complainant was a minor and hence conducted voir dire. The mother further testified that the complainant was born on 07/07/2010 which meant that she was 11 years at the time of the offence. He placed reliance on the case of ASK v Republic (Criminal Appeal 59 of 2021) [2023] KECA 719 and Gordon Otieno Nyambade v

Republic (2022) eKLR whereby in the latter case, it was held that observation and common sense can help the court in determining the minor's age. He submitted that age was therefore sufficiently proved.

7. As to penetration, he submitted that the same was proved through the minor's oral evidence as she described how the Appellant covered her face, held her throat, removed her clothes and did tabia mbaya and clarified that a penis was involved and that the Appellant put something inside her and she felt pain. That even though those phrases constituted euphuisms, there were sufficient to prove that Appellant penetrated her vagina as was held in Muganga Chilejo Saha v Republic (2017) eKLR. That her evidence was also corroborated by PW4 who witnessed the ordeal and medical evidence which was tendered by PW5 who produced the P3 and PRC forms and testified that her hymen was freshly broken at the time of examination and that she had blood hence there was evidence of forced penetration.

8. As to identification, he submitted that this was a case of recognition as the victim knew the Appellant well as Baba S and that he lived in Riverside, not far from their place and that she went to school with S which strengthened her basis for identifying him as Baba S. That during cross examination, she clarified that there was light and even gave a description of the clothes he wore and during re-examination, she clarified the source of light as moonlight when PW4 opened the window.

9. As to allegation that he was denied to cross examine PW4, he submitted that it beats logic to argue that the court denied him the opportunity whilst it allowed him to cross examine other witnesses. Further, it is difficult to tell whether he waived his right to cross examine or whether he was denied the opportunity to do so. That it was unlikely that he was denied the opportunity or he was unaware of his right to cross examine noting that he had cross examined other witnesses who testified before PW4. As to whether such failure prejudiced him, he submitted that it did not noting that PW1's evidence was sufficient and was corroborated by PW2 and PW5.

10. On non-compliance with Section 77 and 33 of the *Evidence Act*, counsel submitted that PW5 was qualified as he mentioned his qualifications and the absence of the maker was explained hence laying a basis and that he worked with the makers for over 2 years. That the Appellant did not also object to the declaration that PW5 was competent to give evidence on behalf of his colleagues. He relied on myriad of cases to show that omission on production of medical evidence alone cannot absolve the perpetrator. On failure to call Mama S as a witness, he submitted that Mama S was the Appellant's wife hence not a compellable witness under Section 127 of the *Evidence Act* and the Appellant did not consent to or requested for her to be called as a witness. Further, Mama S and Mama B were not eye witness hence it would have been superfluous when it comes to the evidence that was required to convict him. That the evidence proved the elements of the charge and any omissions or errors by the trial court should not be visited upon the prosecution or the victim.

11. As to discrepancies, he submitted that the Appellant failed to submit on what discrepancies the court failed to appreciate and how they affected the three elements of the offence. He submitted that the defence did not raise any reasonable doubt as his defence of alibi was raised for the first time at the defence stage. That PW2 denied ever using her child to ask him for money and did not ask any follow up question to support his claim that Kshs.7500/- had been asked for. That he testified that a deceased neighbour informed him that money was needed which meant that at no point was he asked for money by PW1's parents. That the allegation that PW1 was defiled by B was untrue as PW2 clarified that the incidence of 2020 was an attempt and that Section 34 of the *Sexual Offences Act* abhors evidence of sexual history in a sexual offence.

12. On the sentence, he submitted that the Appellant did not demonstrate that the sentence was manifestly harsh, was illegal, or that the court considered extrinsic factors, or omitted to consider material factors. That Section 8(2) provides for a sentence of life imprisonment but he was sentenced to 30 years which

was lenient. He urged the court to correct the illegal sentence by enhancing the same which is within the court's power under Section 354(3) (b) of the *Criminal Procedure Code*.

13. This is a first appeal. It is the duty of this court as the first Appellate court to re-evaluate the evidence and make its own conclusions. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal laid out this duty 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. R., [1957] E. A. 336) 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. (Shantilal M. Ruwala v. R., [1957] E.A. 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 findings and conclusions; 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 Ps v. Sunday Post, [1958] E. A. 424."

14. Of necessity at this stage then is a recap of the evidence as recorded at the trial court.

15. PW1, the complainant testified that on 30/11/2021 at 9:00, they were at Karimas place cooling with Karimi and B. Kevin peed on himself and she went to the house and found that it had been opened. She told B they enter and upon entering, the door was closed. She saw someone on the seat and she asked who he was but he did not speak. He was looking at her. She testified that it was Baba S. That their home is made of timber and it was dark. B opened the window and there was light. She asked him what he was doing in their home and he wanted to hold B and she told him to stop. He held her and B on the throat and told them that their life was in danger. He covered her face with a cushion, removed her clothes and did tabia Mbaya. That she was wearing skirt, stocking and panty and he did bad things to her. He penetrated the penis (sic) she used to pee with. He put something inside and she felt pain. That someone called B did this to her previously. That B went out to tell her mother and she did not scream as he told them he will strangle them. No one rescued her and as B mother was coming, he went out of the gate. She told Mama B and Mama B told her to tell Mama S as she feared to tell her mother. Mama S told her mother and she was taken to police station and to hospital. She testified that Baba S lived at Riverside which was not far. S was her friend as she knew her in grade 3.

16. On cross examination, she testified that he was in his house at 9:00 pm. That she found him behind the seat. That it was dark and there was light and she saw him with a black trouser and black shirt. Her neck was not injured and that Karimi was in their house. That she got injured and she bled. That she told mama S after 1 day and that she could not move and her mom came later. That other people in the plot were not there and that he went to their plot.

17. On re-examination, she testified that they left at 8:00pm and saw him when the window was opened by B. That there was moonlight.

18. PW2 was the complainant's mother, she testified that on 01/12/2021, she had gone to hospital. That previously, she came in the evening and went to Mama S who asked her if M had told her anything. She said that PW1 had gone to her house and said that Baba S removed her clothes and slept with her. That he wanted to rape her while on the seat. She testified that her wooden house was 1 roomed, had a sofa, 2 doors and a window. She returned at 2:00pm and the child told her what happened. That she said Baba S covered her face and did bad things from where she pees. She did not check her but she

went to police station and they were referred to hospital. That she was there when the appellant was arrested hiding in his house. That she did not know him well and that they had no issues.

19. She testified on cross examination that she was not in the house during the act. Mama S was not a witness but she helped her. That her clothes were blooded but she changed. That she had a case in 2020 whereby his friend wanted to defile the children. That she did not ask for Kshs.7500 and had not used her child for business and had never looked for him. That one can see when you open the window.

20. PW3 the investigating officer testified on how the matter was reported, the child was taken to hospital and that the Appellant was arrested at his house at Riverside. The child identified the culprit the next day. She testified on cross examination that she did not visit the crime scene.

21. PW4 in her unsworn testimony testified that that they went to the complainant's house where the Appellant blocked the complainant's mouth and told her to get her pants. When he saw her mother, he fled. That he lay her on the chair, removed her dress and trouser. He was raping her and that the complainant said he raped her. That she saw him and saw him raping her in her private parts. That she did not see what he was using and had laid her on the chair. That Baba S ran away.

22. PW5 the clinical officer testified that he had PRC form filled by Dr Bayon Moses who was on transfer and had worked with him for 2 years. That on genetalia examination, hymen was freshly broken, laceration/bruises on labia and vagina. Bruises 6.9 and 3 o'clock and vaginal canal was swollen with some blood. No spermatozoa seen, nothing seen on urinalysis, HIV was negative, VDRL was negative. He produced the PRC form as Pexhibit3. He also produced the P3 form on behalf of Dr. Kirimi who was on other official duties. He testified that the P3 form had similar findings as the PRC form. He prayed to be declared competent and the court declared him competent under Section 77 of the *Evidence Act*. That the remarks in the P3 form was forced vagina penetration and he produced the P3 form as Pexhibit2. He testified that there was evidence of penetration.

23. On cross examination, he testified that there were fresh bruises and fresh blood and that the blood was in her genital and the hymen was freshly broken.

24. In his unsworn testimony, the Appellant testified that he ran a hotel and on the material day, he woke up at 5:00am. That he works with his wife and his wife reported at 8:00 and they worked till 10:00am. On 07/12/21, he left the hotel at 10:00pm and got home at 10:30pm and at 10:50pm, someone knocked at the door and wife opened. P and M entered his bedroom. He questioned and he was told he would know. He was taken to court and he denied and that the child said someone called B had defiled her though he did not know the OB number. That PW2 said she was at home at 8:00pm and the incident happened at 8:00p.m. That the investigating officer did not conduct investigation. That the mother used the child to extort him and that a deceased's neighbour informed him that they wanted Kshs.7,500/-. That PW4 claimed to be 7 years whereas she was 5 years old.

25. I have had occasion to consider the evidence as recorded at the trial court. 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 applicable law and submissions made as well as case law cited.

26. The issues for determination crystalize to 3;

    a. Whether the age of the victim was proved.

    b. Whether penetration was proved.

    c. Whether the Appellant was satisfactorily identified as the perpetrator of the act.

27. This court is alive to the duty of the prosecution to prove its case. The burden of proof always lies with the prosecution and it does not shift (See Okethi v Okale v Republic (1965) E.A.555. It is incumbent upon the prosecution to discharge that responsibility to the required degree by establishing the allegations levelled against an accused person. In the case of Republic v Davis Muriuki Kinyua [2021] e KLR the court had this to say;

> " ...It is a cardinal principle of Criminal Law that one who claims must prove, every allegation due to that accusations to convince the Court that the claims are true. These findings were in consonant with the guidelines set out in R. T. Bhatt v R {1957} EA 332; with a rider that,
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> > "a primafacie case does not mean a case proved beyond any reasonable doubt since at this stage, the Court has not heard the evidence for the defence." (See Uganda v Mulwo Aramathan CR Case No. 103 of 2008).

28. The court further stated that;

> " ...The court is cognizant of the fact that the burden of proof in criminal cases lies with the prosecution. The standard of prove is beyond reasonable doubt. The phrase and burden of proof of beyond reasonable doubt was explicitly captured in the case of Miller –VS- Minister of Pensions (1947) 2ALL ER 372-373 by none other than Lord Denning who stated as follows:-
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> > "It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. If the evidence is so strong against a man as to leave only a remorse possibility in his favour which can be dismissed with the sentence of course it is possible the case is proved beyond reasonable doubt, but nothing of short of that will suffice."

29. Proof of age is important in a sexual offense. In Kaingu Kasomo vs. 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."

30. The prosecution relied on a birth certificate of the complainant in prove of age. This birth certificate is on record and marked PEXH1. It appears from the record that there was an omission on the part of the court in recording that the birth certificate was produced. I Note however that the same was identified properly during trial by PW1 and PW2. The Appellant did not raise the issue of the age of PW1 in his cross examination or in his defence. Am persuaded that the anomaly in the record of the court in the production of the birth certificate is one curable under Section 382 of the *Criminal Procedure Code* as the omission does not occasion a failure of justice.

31. More importantly prove of age can be achieved otherwise than in the production of a birth certificate or medical evidence. Where the actual age of the victim is not proved, 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 vs. 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*."

32. Further, in Thomas Mwambu Wenyi v Republic (2017) eKLR the Court of Appeal cited with approval the decision in Francis Omuromi Vs. 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...."

33. In our instant appeal, it is confirmed from the record that the trial magistrate on observing the minor found it appropriate to conduct a voir dire examination on her signifying that the witness was of tender age. The fact is also confirmed by PW2 the mother that the minor was 11 years old. Am satisfied that the age of the minor was proved.

34. As regards the question whether PW1 was penetrated in her genetalia, she described how the perpetrator removed her clothes and did bad things to her. That the said person penetrated her using his penis. She felt pain. She did not scream as the person had warned them that she would strangle them. She was in company of B (PW4).

35. In her testimony, PW4 testified that she saw the assailant remove PW1's clothes and lay her on a chair. He saw him rape her.

36. PW5 a clinical officer produced the P3 form and a Post rape care form on behalf of a clinical officer by the name Bayon Moses whom he had worked with for 2 years. The record shows no explanation of whether he was familiar with his handwriting and signature nor was there any attempt to explain that the availability of that witness was hampered by reasons that would render his procurement to cause undue delay in the matter or be at great expense. Upon the prosecution counsel applying that the witness produces the documents on behalf of his colleague, the court proceeded to declare the witness competent so to do yet a proper basis as envisaged in law had not been established.

37. The circumstances within which PW5 produced the medical forms on behalf of the officer who filled them yet again demonstrates an unwelcome pattern exhibiting a casual attitude by prosecutors and, at times, trial courts in the production and admission of this otherwise very important evidence in cases of this nature. Yet the law on the matter is clear on what requirements ought to be met.

38. The provisions of Section 33 of the *Evidence Act* clearly allows for the production of documents/expert evidence if the makers cannot be found or whose attendance cannot be procured without an amount of delay or expense. The prosecution or any party who wishes to rely on such evidence are required to get another expert witness from the same field and who is familiar with the handwriting and signature of the author of the document to tender the evidence.

39. Section 77(1) of the *Evidence Act* provides as follows:-

> " In criminal proceedings any document purporting to be 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. The provisions of Subsection 2 of the same provision makes a presumption that the said document is genuine and the signature thereof is authentic.

This provision therefore gives the trial court discretion to admit such documents as evidence subject to compliance with Section 33 of the *Evidence Act*.

40. In Sibo Makovo V. Republic, Criminal Appeal [1997] eKLR, the Court of Appeal addressing the legal requirement stated as follows;

> " The P3 form was filled in by the Medical Officer, Naivasha District, was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in section 33 of the *Evidence Act* (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called."

41. What may have been very strong evidence in support of the prosecution's case falls by the way side owing to the infraction.

42. I may add for good measure that, even where the expert witness is presented and meets the legal criteria, an accused person should not be treated as a passive onlooker in the matter. The constitutional edict on a fair hearing would demand that the view of the Accused person on the matter be sought and considered with of course the final verdict lying with the court. In the matter herein the record does not show that the trial court gave a fleeting thought to that aspect of the matter.

43. That said, it is trite law that defilement or rape can be proved by other evidence other than medical evidence. In Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa) the Court of Appeal stated;

> " the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."
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> This is in line with section 124 of the *Evidence Act* which states that; "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

44. As noted earlier PW1 gave evidence in detail about how the assailant inserted his penis in her genetalia. She felt pain. This evidence was corroborated by PW4. This evidence meets the criteria set by the court in the case of Julius Kioko Kivuva =vs= Republic (Machakos HCCRA No. 60 of 2014) where the court stated that evidence of sensory details such as what a victim heard, saw, felt and even smelled is relevant to prove the element of penetration. In our case, the Complainant to provided vivid details of the sequence of how the defilement ordeal took place and her evidence was corroborated by PW4. Penetration was proved.

45. This leads to the question whether the Appellant was properly identified as the perpetrator of the Act. This court is alive to the onerous duty on the part of a court in establishing identification of a suspect when conditions of identification are difficult. The Court of Appeal put it clearly in Wamunga v Republic (1989)KLR 426 thus;

> "It is trite law that where the only evidence against a defendant is evidence of identification or 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 conviction"

46. PW1 told the court that she saw the Appellant when PW4 opened a window. She clarified in re-examination that there was moonlight. This evidence is corroborated by PW4. From their evidence, it is clear they knew the Appellant before. Theirs was evidence of recognition of someone who was their neighbor and PW1 indeed confirmed that the Appellant's daughter, S, was her friend. Through the ordeal, PW1 had sufficient occasion to see and recognize the Appellant even though the conditions of identification through moonlight were difficult. PW4 was also present throughout the incident hence having ample time to recognize the Appellant.

47. The Court of Appeal in Benedicto Kwarula Ingosi v Republic [2014] Eklr faced with similar circumstances rendered itself as follows;

> "On recognition, although the evidence of identification should be tested with great care especially when it is known that the conditions favouring a correct identification may be difficult (See Abdullah bin Wendo & Another v R (1953) Vol XX 166 and Cleophas Otieno Wamunga v R Criminal Appeal No. 20 of 1989) the evidence of the complainant was given in graphic detail. He described each of the persons who attacked him by name and gave details of the weapon each of the assailants was armed with. He gave details of the role played by each assailant and the injuries each of the assailants inflicted on him. There was moonlight enabling the complainant to observe and recognize the assailants who were people he knew because he had previously interacted with them. Recognition is in law the best form of identification because it is more reassuring – See Anjononi v R [1980] KLR 59".

48. Am satisfied the Appellant was positively identified as the perpetrator of the act in question.

49. With respect to sentence, Section (2) of the *Sexual offences Act* prescribes that a person who defiles a minor who is 11 years and below is liable to life imprisonment. This is a minimum sentence that was a subject of interest recently as will be seen shortly.

50. The Appellant was sentenced to fifteen (30) years imprisonment which was an illegal sentence in view of the applicable provision of the law.

51. 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. (Ogolla S/o Owuor v R {1954} EACA 270).

52. As noted earlier, the sentence imposed was illegal as the law provides for a minimum of life imprisonment for the offence.

53. The Supreme Court in Muruautetu 2 and lately 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). addressing itself to sentences in the *Sexual Offences Act* 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. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.
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> 67. This is why, even in the Muruatetu case, this Court was keen to still defer to the Legislature as the proper body mandated to legislate. While the courts have the mandate to interpret the law and where necessary strike out a law for being unconstitutional, this mandate does not extend to legislation or repeal of statutory provisions. In that regard, we echo with approval the words of the High Court in the case of Trusted Society of Human Rights v Attorney-General and others, High Court Petition No 229 of 2012; [2012] eKLR, at paragraphs 63-64 where it held as follows:
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> > "Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, *the Constitution*, regarding the necessity of separating the Governmental functions. *The Constitution* consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two."
> >
> > We reiterate the above exposition of the law and the answer to the two questions under consideration is that, unless a proper case is filed and the matter escalated to us in the manner stated above, a declaration of unconstitutionality cannot be made in the manner the Court of Appeal did in the present case.
> >
> > G. Conclusion
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> > 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. (emphasis added). We reiterate that the Court

of Appeal had no jurisdiction to interfere with that sentence.

54. The state has sought enhancement of the sentence to comply with the law. I take into account, however, that much as this court has the jurisdiction to enhance the sentence, no notice of enhancement was served on the Appellant which hampers him from addressing the issue in the appeal. Making a determination on the question without hearing the Appellant out would be against the tenets of a fair trial, would prejudice him and resultantly occasion a failure of justice. I will not disturb the sentence.

55. With the result that the appeal herein lacks merit and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JUNE 2025.

A.K. NDUNG'U

JUDGE