DMOO v Republic (Criminal Appeal E020 of 2022)
[2023] KEHC 144 (KLR) (20 January 2023) (Judgment)

Neutral citation: [2023] KEHC 144 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E020 OF 2022

RE ABURILI, J

JANUARY 20, 2023

BETWEEN

DMOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgement by the Hon. S.W. Mathenge on the 20.5.2022 & subsequent sentence passed on the 31.5.2022 in the Principal Magistrate's Court in Bondo in Sexual Offence Case No. 64 of 2020)

JUDGMENT

Introduction

1. The appellant herein DMOO was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *sexual Offences Act* No.3 of 2006.

2. The particulars of the charge were that that on the 17th August 2020 at around 2000hrs in Bondo sub-county within Siaya County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MJ a girl aged 15 years old. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

3. The appellant pleaded not guilty to the charge and the matter proceeded to trial where the prosecution called 6 witnesses to prove their case. At the close of the prosecution's case, the accused was placed on his defence and he gave sworn testimony.

4. In her judgement, the trial magistrate found that the prosecution had proved its case beyond reasonable doubt and proceeded to convict the appellant and subsequently sentenced him to serve 20 years' imprisonment.

5. Aggrieved by the trial court's judgment and sentence, the appellant filed his petition of appeal raising the following grounds of appeal:

    i. That the trial court failed to observe that the sentence imposed is/was manifestly harsh and disproportionate.

    ii. That the court be pleased to consider that the ingredients forming the offence was not proved beyond reasonable doubt.

    iii. That the court be pleased to consider that the investigation tendered was shoddy.

    iv. That the court be pleased to consider any aspect or condition that shall not occasion prejudice.

    v. That the appellant hereby beseeches the superior court to indulge into the same and or be pleased to reduce the sentence proportionately as enshrined in the article 50 (2) p of the *constitution*.

    vi. That I wish to be present at the hearing of this appeal and or be supplied with trial record to enable me erect more grounds.

    vii. The parties agreed to dispose of the appeal by way of written submissions. The appellant was self-represented

The Appellant's Submissions

6. The appellant submitted that the investigations conducted by the Investigating officer were shoddy, shaddy and scanty. It was his submission that the prosecution relied on poor, contradicting and unreliable medical report as a broken hymen was not evidence of defilement on the part of the accused as it was not conclusive evidence of penetration.

7. It was further submitted that there were serious contradictions which could not be ignored especially in the testimony of PW5, the clinical officer who examined the complainant, and PW6 who took the complainant for medical examination.

8. The appellant further submitted that the trial magistrate did not consider carefully and evaluate the age of the victim as there were two assessments of age, one giving the victim's age as 12 years and the other as 14 years old. He further submitted that the medical officers were not cross-examined and re-examined.

9. The appellant further submitted that the case against him was a fabrication and as such, he ought to be acquitted. He further submitted that the evidence of Ben, the complainant's uncle who was present during the ordeal, was crucial as it could have corroborated that of the complainant.

10. It was submitted that the appellant's alibi of a land dispute between him and the complainant's family members was not considered by the trial court as the trial magistrate termed the same as weak whereas the appellant ought not to be convicted on the weakness of his defence but rather on the weight of the prosecution's case.

11. The appellant submitted that he was sentenced to a mandatory minimum sentence of 20 years imprisonment which this court has powers and discretion to quash, vary or review.

The Respondent's Submissions

12. On behalf of the Respondent State, the ODPP submitted that the offence with which the appellant was charged was proved to the required standard. On the age of the complainant, it was submitted

that the complainant's age was 15 years having been born in August 2004 and thus the age of minority was established.

13. Regarding penetration, it was submitted that the complainant gave graphic details on how she was lured into the appellant's house and violently defiled thus penetration was proved.

14. On identification, it was submitted that the appellant was well known to the complainant as they were relatives and further that they were together for several hours.

15. As regards the sentence being unconstitutional, the respondent submitted that the complainant testified that she was aged 16 years whereas her age was accessed at 15 years and thus the court ought to take her age as 16 years and sentence the appellant appropriately.

Analysis of the Evidence before trial Court

16. The role of this appellate Court of first instance is well settled. It was held in the case of *Okeno v R* (1977) EALR 32 and further by the Court of Appeal in case of *Mark Oiruri Mose v R* (2013) eKLR that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

17. PW1, the complainant testified that she was 16 years old having been born in August 2004. It was her testimony that on the 17.8.2020 at about 8pm, Otieno, the appellant, went to her grandmother's home and told her that his mother was calling the complainant but when they arrived at his house, the appellant tied her hands and threatened to kill her if she shouted.

18. PW1 testified that the appellant threw her on the bed, removed all his clothes, covered her mouth with a rope then raped her till midnight. She testified that after he finished his business of defiling her, the appellant pretended to faint on the bed and on waking up asked her what she was doing in his house then returned her to her grandmother's house.

19. The complainant testified that the appellant had threatened to kill her if she told anybody of what had happened but she still told her grandmother and the next morning, she told the village elder and subsequently, the chief who took her to the children's office then Bondo Police Station. It was her testimony that she knew the appellant prior to the incident as her grandfather and the appellant's father were brothers.

20. In cross-examination, PW1 reiterated her testimony and further stated that the appellant was drunk as he smelled of chang'aa. She stated that the appellant threatened her with a knife and that he was arrested in her mother's house where he was asking her mother for forgiveness. She further reiterated that the appellant defiled her and denied that there was a land issue between the appellant and her mother.

21. PW2, the complainant's grandmother corroborated the complainant's story on how the appellant went to her home and took the complainant who returned at midnight and informed her that she had been raped by the appellant. She further corroborated the complainant's testimony regarding taking her to the village elder the following day. PW2 stated that she was familiar with the appellant as she was married to the appellant's uncle. In cross-examination, PW2 stated that she did not witness the defilement.

22. PW3, Jane Osumba, the village elder testified that on the 18.8.2020 at about 5.30am while she was still asleep the complainant went to her home and informed her that the appellant had raped her which information she conveyed to the chief Ayub Ogolla who sent someone to pick the complainant. In

cross-examination, PW3 stated that she did not witness the defilement but was informed about it by the complainant. She denied that there was a land issue at home.

23. PW4, Ayub Ogolla, the area Assistant Chief corroborated PW3's testimony. He stated that he later arrested the appellant. In cross-examination, he testified that he relied on information from the complainant as he did not witness the incident.

24. PW5 Jared Obiero Opondo, the clinical officer at Bondo sub-county Hospital testified that the complainant was examined after alleging that she was defiled and found to have a bruised labia minora and broken hymen as well as increased pre-vaginal discharge.

25. In cross-examination, PW5 testified that he did not treat the complainant but examined her for purposes of filling a P3 form. He testified that he did not examine the appellant as he was not presented to him for examination.

26. PW6 No. 101835 P.C. Julian Otieno testified that on 23.8.2020, he was notified of the appellant who had been arrested on allegations of defiling a girl on the 17.8.2020. He testified that he carried out his investigations and charged the appellant. He further testified that he took the complainant for age assessment since she did not have a birth certificate and the report concluded that the minor was 15 years old. In cross-examination, PW6 denied hearing of any land issue between the appellant's family and that of the complainant.

27. Placed on his defence, the appellant testified that on the 21.8.2020, he received summons from the Assistant Chief and proceeded to his home but did not find him and returned at 7pm when he informed the Assistant Chief that all land issues should be handled at the land's office. He testified that the issue at hand was about land resulting from a grudge he has had with the complainant since 1992.

28. In cross-examination, the appellant testified that on the 17.8.2020 he went to work and that at 8pm, he was in his house sleeping. He further stated that the grudge was between him and Ben and not the complainant.

Determination

29. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the applicable law in this appeal. I have also considered the submissions filed by both parties. The issues for determination emanating therein are as follows:

    a. Whether the prosecution's case was proven beyond reasonable doubt and

    b. Whether the appellant's sentence was excessive and harsh.

30. In addition to the aforementioned issues for consideration, I will also consider the grounds raised in the appellant's petition.

Whether the prosecution proved its case beyond reasonable doubt

31. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The ingredients of the offence of defilement were set out in the case of *George Opondo Olunga v Republic* [2016] eKLR, where it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim. The prosecution was under a duty to establish or prove all the above elements of defilement beyond reasonable doubt.That duty or burden of proof does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the prosecution witnesses.

32. On the identity of the appellant, the complainant testified that she knew the appellant as her grandfather and the appellant's father were brothers. The complainant was firm and resolute in cross-examination that it was the appellant who defiled her. She detailed how the appellant lured her from her grandmother's house to his house where he tied and gagged her then raped her continuously until midnight.

33. PW2, the complainant's grandmother corroborated the complainant's testimony regarding the appellant's relationship saying she was married to his uncle and that he went to her house and lured the complainant from therein. I thus find that the appellant was positively identified beyond reasonable doubt.

34. Regarding the complainant's age, the testimony of the complainant was that she was 16 years old. However, when subjected to an age assessment test, the report concluded that the complainant was 15 years old. PW6 produced an age assessment report (PEx 4) that showed that the complainant was 15 years old. I thus find that the prosecution proved this element beyond reasonable doubt.

35. On the issue of penetration, "Penetration" is defined under Section 2 of the Act to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

36. The complainant testified that the appellant defiled her. She was very detailed as to how the appellant defiled her from the start up to the finish when the appellant pretended to faint only for him to wake up and feign shock as to the complainant's presence. The complainant vividly explained the incident.

37. The complainant's testimony was corroborated by that of PW5, the clinical officer who examined her and concluded that she had been defiled. In his defence, the appellant denied defiling the complainant and stated that the charges against him were instituted as a result of a land issue.

38. The appellant further testified that a Mr. Sambu informed him while he was in the cell that his case was about land but that they would charge him with another offence. In cross-examination, he stated that the grudge was between him and B and not the complainant. The appellant did not tell the court as to who Ben was or who Mr. Sambu was, leaving the court to try and make its own conclusions as to the role played by these persons in the case against the appellant.

39. The appellant lamented that the complainant's case was not corroborated. Section 124 of the *Evidence Act* provides that:

> " Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim 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 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."

40. The evidence of the complainant on the fact of her being defiled was corroborated by that of PW2, her grandmother as well as PW5, the clinical officer who examined her. The appellant's defense in my view is an afterthought as it did not make sense.

41. The appellant submitted that his alibi defence was not considered by the court. However, the trial court and this court has considered the same but the same is wanting in substance. In any event, it is

trite that If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped

42. In the instant case, I am not persuaded, just as the trial court was not persuaded, that the appellant's alibi defence addressed significant aspects of the case against him of defiling the complainant. The appellant's alibi defense in my view amounts to a mere denial and is an afterthought.

43. In the circumstances, Iam satisfied that prosecution proved penetration beyond reasonable doubt and therefore all the statutory elements of defilement as contemplated by the Act were proved beyond reasonable doubt.

44. The appellant pleaded in his grounds of appeal that there were inconsistencies and contradictions in the evidence adduced against him hence the evidence could not sustain his conviction specifically regarding the right age of the complainant.

45. The Court of Appeal addressed itself on the issues of contradictions in the case of *Richard Munene v Republic* [2018] eKLR stated as follows:

> "It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

46. I have re-evaluated the prosecution's evidence as adduced by the witnesses and I am satisfied that they corroborated each other on what transpired. I further find no material contradictions in the evidence for the prosecution as a whole. The question of the complainant's age was settled by way of an age assessment report produced as PExhibit 4 as no birth certificate was available.

47. Accordingly, I find no material contradiction in the prosecution's case that would render the conviction of the appellant unsafe.

48. Taking all the above into consideration, I am satisfied that the prosecution proved its case against the appellant beyond reasonable doubt on the charge of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006.

Whether the appellant's sentence was excessive

49. The appellant pleaded in his grounds of appeal and submitted that his 20-year prison sentence was excessive in view of Article 50 (2) (p) of the *constitution*. Article 50 (2) (p) of the *Constitution*, 2010 provides that:

> " Every accused person has the right to fair trial, which includes the right.
>
> (p) to the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentence:"

50. In *Alister Antony Pariera v State of Maharashtra,* cited with approval in the case of *Margrate Lima Tuje v Republic* [2016] eKLR the court held that:

> " Sentencing is an important test in matters of crime. One of the prime objectives of the criminal law is the imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused in proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."

51. Section 8 (3) of the *Sexual Offences Act* provides that:

> " (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."

52. The section spells out mandatory minimum sentences but the language in the sections 8(2) and 8(3) and (4) are different in that in section 8(2), the section provides that:

> " ((2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

53. In subsection 3, the words "is liable" are used while in sub section 2, the words "shall upon conviction be sentenced to imprisonment for life" are used. The question is whether the language in subsection 3 and 4 imposes mandatory sentences of whether the court has discretion in sentencing.

54. This Court had the opportunity to discuss these sections in *Fredrick Owino Kangala v Republic* [2022] eKLR and elaborately cited other decisions on the same subject. I find no harm reproducing what I sated in the above case here as follows at paragraphs 54-63:

> " 54. Generally, the circumstances under which an appellate court interferes with the sentence by the trial court are set out in S v Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:
>
> > " "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

Equally, in *Mokela v The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> " "It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

In the case of *Ogolla s/o Owuor vs. Republic*, [1954] EACA 270, the predecessor of the Court of Appeal stated as follows on this issue:

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

Odunga J citing the above decisions had this to say in the case of *Josiah Mutua Mutunga & another v Republic* [2019] eKLR:

> "

> " "10. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case." (R - v- Shershowsky (1912) CCA 28TLR 263) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:

> > " "sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)."

The learned Judge further referred to the Court of Appeal decision in *Bernard Kimani Gacheru v Republic* [2002] eKLR where it was restated 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."

In *Shadrack Kipchoge Kogo v Republic* Eldoret Criminal Appeal No. 253 of 2003 the Court stated:

> " "Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.

Section 8(1), (2), (3) and (4) of the *Sexual Offences Act* 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) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(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.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

In the same case of *Josiah Mutua Mutunga & another v Republic* at Machakos High Court, the Court observed, comparing the wordings in the provisions of section 8 of the *Sexual Offences Act* on sentence and stated that:

> " "It is true true that section 8(3) and (4) of the *Sexual Offences Act* applies the phrase is liable upon conviction to imprisonment for a term of not less than twenty years and fifteen years respectively. Sir Henry Webb C.J. in Kichanjele S/O Ndamungu v Republic (1941) 8 EACA 64 had this to say on the proper construction of the words "liable to":
>
> "The wording used throughout the code is "shall be liable to" but a consideration of the various sections shows in our judgment, that the use of the words "shall be liable to" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated." [emphasis added]

In *Opoya v Uganda* [1967] EA 752 Sir Clement DeLestang V.P. stated:

> " "It seems to us beyond argument that the words "shall be liable to" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."

A similar position was accepted in D W M vs. Republic (supra) where the Court held that:

> " "As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the *Sexual Offences Act* that the offender "Shall be liable to imprisonment for life" means that imprisonment for life was the maximum sentence for an

offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

In this case, the relevant provisions use the phrases "is liable, upon conviction to..." and "not less than" in the same breath. As correctly observed by Odunga J in the Josiah Mutua Mutunga & another v Republic case, the two provisions suffer from the malady of poor legal draftsmanship since the two phrases imply, in legal terms, diametrically opposed positions. This is so because in criminal law, where there is an ambiguity in phraseology of sentencing, the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence, as was concisely put by Mativo J it in *Elizabeth Waithiegeni Gatimu v Republic* [2015] eKLR that:

> " "The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea."

This court is in agreement therefore that the twin subsections must be read as if the sentences provided are the maximum sentences. For that reason, and taking into account the circumstances of this case, I hold the view that the use of the words "is liable upon conviction" in section 11(1) of the *Sexual Offences Act* gives room for the exercise of judicial discretion in sentencing."

55. Just like in the above decision, I have no doubt in my mind that Sexual Offences by their very nature are heinous and traumatizing to the victims especially the minors. It is a dehumanizing offence which brings indignity to the victim of the offence. It leaves stigma on the victims. This is the reason why the sentences provided for in law are harsh and appear in nearly all cases, to be mandatory minimums in nature. This position was appreciated in *Tito Kariuki Ngugi v Republic* [2008] e KLR where it was stated that:

> " The appeal against sentence has also no merit. The Appellant...caused her trauma which she will have to live with for the rest of her life."

56. In my humble view, the sentence imposed upon the appellant by the trial court was the maximum sentence. Taking into account my observations and the fact that the appellant was a first offender and appreciating what the Court of Appeal in *Charo Ngumbao Gugudu v Republi*c [2011] eKLR, had to say regarding imposition of maximum sentences that:

> " It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender aged about 22 at the time of the offence. It is true that the complainant suffered serious injuries....."

57. I find the twenty year imprisonment meted on the appellant to be excessive in the circumstances and calls for interference. I set aside the twenty years' imprisonment meted on the appellant and substitute it with a prison term of Five (10) years to be calculated from the date of arrest of the appellant on 15/11/2018, in view of the fact that the appellant was granted bond but he never raised it until the

trial was concluded. This is in line with the provisions of section 333(2) of the *Criminal Procedure Code* which provides that:

> "(2) Subject to the provisions of section 38 of the Penal Code, every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody." See Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR and Bethwel Wilson Kibor v Republic [2009] eKLR.

58. In the end, I find the appeal against conviction to be devoid of merit. I dismiss it and uphold the appellant's conviction. I allow the appeal against sentence. I set aside the sentence of twenty years' imprisonment imposed on the appellant and substitute it with a prison term of ten (10) years to be calculated from the date of his arrest on 21/8/2020 in line with section 33(2) of the *Criminal Procedure Code* as the appellant was in custody during the trial.

59. Orders accordingly. File closed

DATED, SIGNED AND DELIVERED AT SIAYA THIS 20TH DAY OF JANUARY, 2023.

R.E. ABURILI

JUDGE