Mwenje v Republic (Criminal Appeal E040 of 2022)
[2023] KEHC 19321 (KLR) (27 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19321 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E040 OF 2022

FROO OLEL, J

JUNE 27, 2023

BETWEEN

MOSES MUREU MWENJE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) and 8(2) of the *Sexual Offences Act* No.3 of 2006. The particulars of the offence were that on the 17th day of December 2015 in Kinagop within Nyandarua County, intentionally caused his penis to penetrate the anus of PMK, a child aged 7 years.

2. On the alternative charge the appellant was charged with the offence of having an indecent act with a child contrary to Section 11(1) of the sexual offence Act no. 3 of 2006. The particulars of the offence were that on the 17th day of December 2015 within Nyandarua county intentionally caused his penis to come into contact with the anus of PMK a child aged 7 years.

3. The prosecution called five (5) witnesses in support of its case and at the close of the prosecution case the appellant was put on his defence. He gave unsworn evidence. The trial court considered the evidence put forth and convicted the appellant on the main charge of defilement. He was sentenced to serve life imprisonment.

Brief Facts

4. During trial the magistrate conducted a voire dire examination on PW1 and the court formed the opinion that the complainant PMK was not able to answer questions and therefor declared him to be a vulnerable witness. The court consequently appointed, Mr Albert Wanjohi, the children officer Nyandarua south to act as intermediary. The minor explained to him that on 17.12.2015 at about

12.00 noon he was playing with K and I outside K's parents' home, when he decided to go use his grandmother toilet to go relieve himself. He found the appellant standing by the door of his house which borders the minor's grandmother's home. The minor further explained that the accused was employed by his grandmother as a shamba boy.

5. The appellant called the minor, held him by hand and lead him inside his house. He then proceeded to placed the minor on his bed, removed the minors his long trouser and underwear, the appellant also removed the trouser he was wearing and inserted his "kasusu" into the minor's anus. The minor explained that he felt a lot of pain and cried, he requested the appellant to stop but he did not. After he was done, the appellant warned the minor not to tell anybody what had transpired. Later on, the minor met his mum who was carrying fodder to feed the cows and reported to her what had transpired. The minor was rushed to hospital that he could not identify. The minor also pointed at the accused person as the one who defiled him. In cross examination the minor stated he knew the person who defiled him, though he could not identify the cloths or shoes the assailant was putting on. The minor knew the appellant as being employed by his grandmother and when the incident occurred, he did not scream for help and there was nobody near by to rescue him.

6. PW2 DMK testified that on 07/12/2015 she was at home feeding cows. While enroute taking feeds, she met her son (PW1) with other boys. Her son reported to her that the appellant had done bad things to him on his buttocks. She took her son home and checked his buttocks to confirm if indeed what the son had said was true. She noticed that he was bleeding on the Anus. She reported the incident to PW1's grandfather, who also physically checked his grandson and confirmed that he had been defiled. They reported the incident at Kinagop police station and PW1 was taken to hospital, where PW1 was treated. she identified the P3 form and PRC form and also identified her son's immunization card, which showed that he was born on 17.10.2008. she also stated that she knew the appellant as a person employed by their neighbour.

7. In cross examination the witness confirmed that after her son had reported the incident to her, she physically checked him and indeed confirmed that he was bleeding from the Anus. She thereafter took him to hospital.

8. PW3 PMK testified that he was from Kitiri and was a farmer. On 17.12.2015 at about 2.00pm he was at the shamba, when he was called to go home. He went and meet his daughter and PW1, who was his grandson. He was told that PW1 had been defiled by another man. PW1 also confirmed that he had been defiled/sodomised by a man known as Muriu, who he knew as a person employed by one Wanjiru Gachecha. He directed them to report the incident to the police. He mobilized other person's and proceeded to the appellants house. When they reached there, they asked the appellant to open the door to his house, he did open and asked not to be beaten as he would tell the truth once taken to the police station. He was arrested and taken to Kinagop police station.

9. PW1 was later taken for treatment at Engineer district hospital. PW3 identified the appellant in court. In cross examination the witnesses said they found the appellant holding the ceiling of his house and requested him to come down. He also assured him that he would not be beaten.PW1 had told his mother what had transpired and accused the appellant of defiling him.

10. PW4 Dr Maingi Kanje testified that he was attached to Engineer District Hospital. He had the P3 form and PRC form with respect to PW1 who reported that he had been defiled by a person well known to him. On examination his findings were that there was tenderness on the anus with lacerations. Normal swab showed that the minor had pus cells but no spermatozoa was seen. HIV test was negative. The minor was treated and given PEP and antibiotics. He confirmed that there was penile penetration. He produced both the P3 form and PRC form as exhibits. In cross examination the witness stated that

he only examined the minor who was brought before him and did not examine the appellant who was not presented before him.

11. PW5 Peter Kirui testified that he was based at traffic headquarters Nairobi, but previously was at Kinagop police station crime office. On 17.12. 2015 he was at the police station and minuted a case at about midday. PW1 reported that he was playing with his friends when he decided to go and use a toilet near the appellants house. The appellant dragged him to his house and proceeded to sodomize him. The appellant was also a person known to the complainant as he was a farm hand employed by his grandmother. The complainant reported this incident to his mother and they came to the police station. The witness produced PW1 immunization card and it showed that PW1 was born on 17.10.2008 and was 7 years old. In cross examination the witness confirmed that they did not take the appellant for medical examination as time had lapsed. The appellant was also positively identified by PW1

12. The appellant was placed on his defence and gave unsworn evidence. He stated that he was a saved Christian and his parents live in Engineer town. He had been employed as a shamba boy and on 17.12.2015 he was in his house when he heard people coming to his house and they directed him to open his door. They beat him up and told him he would know his mistake at the police station. PW2 owed him Ksh.3000/= and had refused to give it back to him.

13. The trial magistrate considered all the evidence and sentenced the appellant to serve life imprisonment. The appellant being dissatisfied with the conviction and sentence filed his petition of appeal and raised the following grounds of appeal;

    i. That the appellant pleaded not guilt in the instant case.

    ii. The learned trial Magistrate erred in law and f acts when he convicted the appellant in a prosecution case where age was not proved.

    iii. The learned trial magistrate erred in fact and in law and fact when he convicted the appellant in the prosecution case where penetration was not proved.

    iv. The learned trial Magistrate erred in law and fact by applying the wrong standards of proof in a criminal case which was a standard of probability instead of reasonable doubt.

    v. The learned trial Magistrate erred in law and fact by convicting the appellant but did not consider the appellants defence

Appellants Submissions

14. The appellant filed undated submissions where he challenged the mandatory life sentence melted out on him by the trial court, stating that the same was not in line with recent developments in law, where it has been held that the courts can divert from the mandatory minimum sentence enshrined in the sexual offence Act No 3 of 2006. Such sentences ran afoul of provisions of Article 27 of *the constitution* of Kenya 2010. This was so held in the case of Philip Mueke Maingi & 5 others Vs Director of public Prosecutions & Attorney General.

15. Further the appellant submitted that mandatory minimum sentence did not permit the court to consider the peculiar circumstances of the case in order for the court to arrive at an appropriate decision and exercise its discretion to consider a lesser sentence in appropriate circumstances. The appellant stated that he did not benefit from a probation report (pre-sentence report) being presented. He relied on Section 4(1) and (2) of the *Probation of offenders Act*, Cap 64 laws of Kenya to support this position

and Muruatetu 1 , S Vs Malgas 2001 SA 122 SCA 1235 and Regan Otieno Okello Vs Rep Cr Appeal No 189 of 2016 {2022} eKLR.

16. On the second ground of appeal, the appellant submitted that the trial court did not follow the correct procedure to appoint the children's officer Nyandarua south to act as Intermediary. The court erred to allude that the child was present in court, while it was the intermediary who gave evidence as an independent witness and not as an intermediary. The law was very clear that the intermediary was not a mouth piece of a vulnerable witness. Under section 31(7) of the *Sexual offences Act*, an intermediary role was to convey the general question to a vulnerable witness and inform the court at any time the witness is stressed and if need be to request the court for recess.

17. Unfortunately, the trial court did not follow the right procedure in appointing and admitting evidence through an intermediary and thus denied him the opportunity to cross examine the victim and in effect denied him the right to fair trial guaranteed under Article 50(2) of *the constitution* of Kenya 2010. Reliance was placed on N.M VS Republic & Peter Antony Vs Republic (2020) eKLR

18. The appellant thus prayed that this appeal be allowed and the sentence be quashed.

Respondents Submissions

19. The respondent filed their submissions on 26.1.2023 and stated that they discharged the burden of proof. The age of victim was proved. He was 7 years as proved by the immunization card. PW2 witnessed blood oozing from the victim's anus and PW4 the medical doctor also examined the child and confirmed that he and been defiled and there was penile penetration. The victim also testified and told court that the appellant had penetrated his anus using his "Kasusu" and warned him not to tell anybody. The victim thereafter immediately told his mother. The evidence present was adequately corroborated and was sufficient to convict the appellant.

20. As regard the second ground of appeal the respondent submitted that the court conducted a voire dire examination on the minor and found that he was unable to speak openly before court, thus declared him a vulnerable witness. The court rightly proceed to appoint the children officer Nyandarua south to act as intermediary. Section 31(4)(b) allows the court to appoint an intermediary and under Section 31(10) the appellant right was protected as the court could not solely convict on the uncorroborated evidence of the intermediary. Reliance was placed on RMM Vs Republic (2019) Eklr & John Kinyua Nathan Vs Republic (2017) eKLR.

21. The respondent thus submitted that proper ground was laid for declaring the minor to be a vulnerable witness and the subsequently appointment of the intermediary was proper. Further to that, the evidence presented before the trial court was properly adduced through the intermediary and corroborating evidence from the other witnesses was sufficient to convict the appellant.

22. On the sentence imposed, the respondent submitted that the minor was aged 7 years and the sentence imposed was lawful. The sentencing policy too stipulated that punishment must be commensurate with the gravity of the offence. The victim was still traumatized and the sentence should not be interfered with.

23. The appellant thus prayed that this court finds that this appeal has no merit and dismiss the same with costs.

Analysis and Determination

24. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage

of seeing the witnesses and observing their demeanor See Okeno-Vrs- Republic 91972)EA 32 & Pandya Vs. Republic (1975) EA 366.

25. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala-Vrs-R (1975) EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, 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 made the advantage of hearing and seeing the witnesses.

26. In Peter's vrs Sunday Post (1958) E.A. 424 it was said that it is not the function of the first appellant court to merely scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

27. The main issues raised in this appeal by the appellant can be summarized as follows;

    a. Did the prosecution discharge the burden of proof to the required standard?

    b. Did the trial magistrate fail to follow the right procedure in appointing the intermediary and was the appellant right to fair trial infringed.

    c. Was the sentence passed harsh and/or excessive and should this court interfere with the same.

Burden of Proof

28. It is trite law that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. 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. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

29. The conceptual framework for burden of proof to be discharged by the prosecutor consists of two components i.e the burden of proof and evidential burden which duty is clearly enunciated by Fidelis in his book Modern Nigerian Law of Evidence, University of Lagos Press, Lagos (1999) 379 when he stated that;

> " The term burden of proof is used in two different sense. In the first sense, it means the burden or obligation to establish a case. This is the obligation which lies on a party to persuade court either by preponderance of evidence or beyond reasonable doubt, that the material facts which constitutes his whole case are true, and consequently to have the case established and judgment given in his favour. The other meaning of the expression burden of proof is the obligation to adduce evidence on a particular fact of issue. This evidence in some cases, must be sufficient to prove the fact or issue to justify a finding on that fact or

issue, in favour of the party on whom the burden lies. It is called the evidential burden. This is the sense in which the expression is more generally used.

30. The enormous task of proof beyond reasonable doubt by way of directing or circumstantial evidence rests with the prosecution and the fact the accused is put on his defence does not shift that burden and standard of proof in any way.

31. Section 8 (1) and (2) of the *Sexual Offences Act* provides as follows:

(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 between the age of eleven years or less shall upon conviction be sentenced to life imprisonment.

32. The ingredients for the offence of defilement can be summarized as follows;

a. Age of the victim (must be a minor),

b. penetration and

c. proper identification of the perpetrator.

(see Wamukoya Karani Vs. Republic Criminal Appeal No 72 of 2013 and George Opondo Olunga vs. Republic [2016] eKLR)

a. Was the Age of the complainant proved?

33. PW2 was the mother of the minor. She testified that the minor was 7 years old, having been born on 17.10.2008. She identified his immunization card as MFI-1. The investigating officer PW5 later produced the immunization card into evidence as Exhibit 2. As held in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR

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

34. The documentary evidence produced sufficiently established that age of the child.

b. Was Penetration proved

35. Section 2 of the *sexual offences Act* defines penetration as follows;

> Penetration; "means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

36. PW1 testified through the intermediary, the children officer Nyandarua south. PW1 testified that he knew the appellant as a farm hand. On the material day he was playing with his friends, when he decided to use the toilet within the grandmother's compound. He met the appellant who was standing next to the toilet. The appellant held him by hand, took him to his house where he proceeded to removed the complainant's trouser and underwear and thereafter defiled the complainant. The witness stated that,

"That Moses removed his "Kasusu" and inserted it into his anus. That he felt pain and cried. That he told Moses to stop but Moses did not stop."

37. PW 1 evidence was corroborated by the evidence of his mother PW2, who met him soon thereafter. PW1 reported to her what had transpired. She physically checked her son and indeed noticed that he was bleeding from his Anus. PW1 was taken to hospital on the same day and the medical evidence produced by PW4 Dr Maingi indeed confirmed that PW1 had an injury on his Anus. The doctor on examination found that the Anus was tender and also had lacerations. He confirmed that there had been penile penetration. This aspect of the charge too was proved.

c. Positive identification of the Perpetrator

38. PW1 knew the appellant very well and called him by his name Moses, and in cross examination described him as the man who was employed by his grandmother. He also pointed at the accused as the person who defiled him, while in court. PW2, also testified that PW1 told her that it was," Moses" who had defiled him. PW3 testified that PW1 was his grandchild and he had been sodomized by a man called. "Muiru". The said man had been employed by Wanjiru Gachecha, (presumably PW3 wife). This was a case of recognition and thus the identification was free from error. The identification of the appellant as the perpetrator was thus free from error; See Wamunga vrs Republic (1989) KLR 424

39. All the ingredients of the offence were therefore fully established by the prosecution and the burden of proof properly discharged contrary to the appellants submissions. There was a clear demonstration of what transpired and the chain of events too was not broken. PW1 reported this incident immediately it happened to his mother and was taken to hospital the same date and the injuries noted and confirmed by PW4. PW2 also saw physically examined the complainant and indeed saw that he was injured on the Anus and was bleeding. PW1 to PW3 also knew the appellant personally as a person working within their home. The appellant was also arrested immediately after the incident was reported. The appellant's grounds of appeal challenging burden of proof are thus not merited.

B. Did the trial magistrate fail to follow the right procedure in appointing the intermediary and was the appellant right to fair trial infringed.

40. The appellant did submit the magistrate did not follow the right procedure to appoint an intermediary. He also faulted the court for allowing the intermediary to give evidence as if he was an independent witness and not as an intermediary. The law was very clear that an intermediary is not the mouth piece of the vulnerable witness and under section 31(7) of the *Sexual offences Act*, their role was simply to convey the general question to a vulnerable witness and inform the court at any time the witness was stressed and/or to request for a reassess when the witness need one.

41. It was the appellant's submission that the court did not follow up the right procedure in appointing and admitting evidence through the intermediary. The intermediary gave his own evidence, albeitly on behalf of the complainant and thus he was denied a fair hearing. The appellant relied on the citation of Peter Anthony Vs Republic {2020} eKLR, where it was held that where the right procedure was not used in appointing the intermediary and the appellant could not cross examine the victim, that denied him the right to fair hearing guaranteed under Article 50{2} of *the constitution* of Kenya 2010.

42. The appellant further submitted that in instances where the complaint was fully unable to testify, it was mandatory for the trial court to record reasons as to why the complainant should testify through the intermediary and its observation of that inability of the complainant to speak on his/her own behalf. He relied on NM Vrs Republic {supra} to support this line of submissions.

43. Section 31 of the *Sexual offences Act* No 3 of 2006 provided as follows;

> Sec 31(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, any declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is:-
>
> a. The alleged victim in the proceedings pending before the court;
>
> b. A child
>
> c. A person with mental disability
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> Section 31(2) .....
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> Section 31(3) .....
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> Section 31(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5) direct such witness be protected by one or more of the following measures:-
>
> a. Allowing such witness to give evidence under the protective cover of a witness protection box;
>
> b. Directing that the witness shall give evidence through an intermediary;
>
> c. Directing that the proceedings may not take place in open court;
>
> d. Prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainants family;
>
> e. Any other measure which the court deems just and appropriate.
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> Section 31(5) .....
>
> Section 31(6) .....
>
> Section 31(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may: -
>
> a. Convey the general purport of any question to the relevant witness;
>
> b. Inform the court at any time that the witness is fatigued or stressed; and
>
> c. Request the court for a recess
>
> Section31(8).....
>
> Section 31(9).....
>
> Section 31(10) A court shall not convict an accused person charged with an offence under this

Act solely on the uncorroborated evidence of an intermediary.

44. The court 02.03.2016, undertook voire dire examination on the minor (PW1). The court noted that the witness was timid and was not able to answer the questions put forth to him by the court, hence he was declared a vulnerable witness. The court in its discretion appointed the children's officer Nyandarua south to act as an intermediary. To this extent the court did properly exercise its powers as provided under section 31(1), (2), (4) and (5) of the *Sexual offences Act* No 3of 2006 and it cannot be said that the court did not follow the right procedure while doing so. The proceedings show otherwise and reasons as to why an intermediary had to be appointed was also recorded in the proceeding above referred to.

45. The appellant further alleged that court proceeding alluded to the fact that PW1 was in court and that the intermediary was giving evidence as an independent witness and not as an intermediary. This was in direct contravention of provisions of Section 31(7) of the *Sexual offences Act* No 3 of 2006.The court proceedings of 02.06.2016 especially as regards the evidence of PW1 show that the proceedings were taken by way of "reported speech" it seems that the intermediary was reporting what he was being told by the minor and the court record captured verbatim what the minor was telling the intermediary. The court at the end of the examination in chief also noted that, "the subject points to the accused person as the person who defiled him".

46. From the proceedings it is clear that the minor was present in court and answered questions posed to him through the intermediary. He was also able to point and identify the appellant in court as the person who defiled him. This clearly shows that PW1 was in court and participated in the proceedings and was cross examined. The intermediary cannot be expected to convey the general question to a vulnerable witness and not inform court of the answered given. He has to do both in order for the court to record the evidence of the minor. There was therefore nothing untoward or illegal which the intermediary and/or the court undertook in these proceedings which violated the appellants rights as enshrined under Article 50(2) of *the Constitution* of Kenya 2010.

47. The appellants contention that the intermediary gave his own evidence, albeit on behalf of the complainant therefore has no basis nor was he prejudiced in any manner by the way the evidence was taken before the trial court. There is therefore no merit in this ground of appeal.

C. Was the sentence passed harsh and should this court interfere with the same.

48. The appellant was sentenced to serve life imprisonment as is mandatorily provided for under section 8(2) of the *Sexual offences Act* No 3 of 2006.The Appellant urged the court to reconsider the sentence imposed as it was harsh, excessive.

49. The provision of section 8(2) of the *Sexual Offences Act* No 3 2006 and legislation that was in force before commencement of *the Constitution* of Kenya 2010 must be considered with adaptation, qualification and exception when it comes to the mandatory minimum sentence and in particular when the said sentences do not take into account the dignity of the individual as mandated under Article 27 of *the Constitution* and as appreciated in the Francis Muruatetu case.& In Maingi & 5 others Vs. Director of Public Prosecution & Another (Petition No.E117 of 2021) (2022) KEHC 13118 (KLR)

50. This court does appreciate the gravity and nature of the offence committed and does not condone offences against minors and vulnerable persons. This was appreciated by Madan J as he was then in Yasmin Vs. Mohammed (1973) EA 370 –

> " The High Court is specially endowed with jurisdiction to safeguard interest of infants, as the court is the parent of all infants. The welfare of the infant is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infant in Kenya of whatever community tribe, sect fall within the ambit of guardianship of Infant Act and the court is charged with the sacred duty to ensure that their interest remain paramount and can duly preserve."

51. In the case R Vs. Scott (2005) NSWCCA 152 Howle J. Grove & Baar JJ then stated –

> " There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and then must be a reasonable proportionately between the sentence passed in the circumstance of the crime committed...one of the purposes of punishment is to ensure that the offender is adequately punished... a further purpose of punishment is to denounce the conduct of the offender."

52. In this case the appellant unlawfully violated an innocent child who was obviously in need of care and protection. This court notes that the trial magistrate took into consideration the appellant's mitigation and noted that he should have known better instead of engaging in this heinous crime.

53. In the particular circumstance of this case, the trial magistrate correctly exercised his discretion while sentencing the appellant. But there was need for the trial court to further consider the judiciary sentencing policy guidelines especially section 23.7 thereof to note that there were no aggravating circumstances and therefore he would have further considered a more rehabilitative sentence and punishment which is proportional to circumstances of the crime. The appellant was also taken for age assessment and it was determined that he was 18 years old. A life sentence is an over kill and is disproportionate to the crime committed.

Conclusion

54. Having considered all factors in this case, considering the gravity of the offence against an innocent minor and Appellants mitigation and also bearing in mind the persuasive finding in. In Maingi & 5 others Vs. Director of Public Prosecution & Another (Petition No.E117 of 2021) (2022) KEHC 13118 (KLR) as well as the dicta in Francis Muruatetu case and the judiciary sentencing policy I do hereby set aside the sentence of life imposed on the Appellant in Engineer Senior Principal Magistrate court Criminal Case SOA No.E1134 of 2015 vide judgment / sentence dated 21st April 2017 and substitute it with a sentence of Fifteen (15) years imprisonment.

55. The appellant was arraigned in court on 21st December 2015 and was held in custody until 21st April 2017 when he was sentenced. He spent One year and four months in custody. Pursuant to provisions of Section 333(2) of the criminal procedure code, I do direct that this period he spent in remand be included in tabulating his sentence. The sentence of fifteen (15) years will run from 21st December 20215.

56. For avoidance of doubt the appeal on conviction is dismissed.

57. Right to Appeal 14 days.

Judgement accordingly

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 27TH DAY OF JUNE 2023.

RAYOLA FRANCIS OLEL

JUDGE

Delivered on the virtual platform, Teams this 27th day of June 2023

In the presence of;

Appellant

.....For O.D.P.P

.....Court Assistant