REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 7 OF 2015

THOMAS KAVOI NZAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Kangundo Principal Magistrate's Court

Criminal (SO) Case 10 of 2017, Hon. M. Opanga, SRM on 16th October, 2017)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

THOMAS KAVOI NZAU.....ACCUSED

JUDGEMENT

1. The appellant, **Thomas Kavoi Nzau**, was charged before Kangundo Principal Magistrate's Court in Criminal (SO) Case 10 of 2017 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 particulars were that the appellant, on the 27th day of March, 2017 in Kakuyuni Location of Kangundo Sub-County within Machakos County, intentionally caused his penis to penetrate the vagina of **ENK**, a child aged 14 years. Alternatively, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same Act, the facts being that on the said day at the said place, he intentionally caused his penis to come into contact with the vagina of **ENK**, a child aged 14 years.

2. In support of the prosecution's case the prosecution called 4 witnesses.

3. The first witness, PW1, was the complainant in this case. She testified that she was 14 years old and produced her birth certificate as exhibit. According to her, she knew the Appellant as Thomas though the Appellant was not related to her. She however used to see him around the village riding a motor cycle.

4. On 27th March, 2017, the Complainant was on her way to school having been escorted by her mother, PW2, up to the road before PW2 returned home. According to her it was still dark. A motorbike passed her and then made a U-turn. The rider then stopped and asked her whose daughter she was and offered her a lift which she declined. The rider then went ahead and parked the motor bike and went after her as she was running and screaming. He caught up with her and entangled her then threatened to harm her. The assailant then carried her to a nearby bar comprising of incomplete building, forcefully removed her biker and unzipped his trouser before forcefully inserting his penis into her vagina while the Complainant struggled with him.

5. When the assailant saw a torch light being shone in their direction, he got up and fled to his motor bike. The Complainant heard PW2's voice asking where she was and told her not to move from where she was. In the company of the village headman, PW2 went where she was and asked her whether she knew the assailant and she told them that she knew him by appearance, name and voice as she used to see him

riding a motor cycle. The headman then called the Assistant Chief by phone and they went to the home of the Appellant and returned with him to the headman's home. When asked whether he knew the Complainant, the Appellant said he only knew the Complainant's elder sister, **AK**, but denied knowing the Complainant. The Complainant was then take to a clinic at Kangundo and later to the District Hospital.

6. In cross-examination by the Appellant, the Complainant stated that she did not know what time it was but she used to go to school at a few minutes to six. She however insisted that despite the darkness, she saw the Appellant well as he passed by on his motor bike even by his beards since she used to see him ride his motor bike around. According to the Complainant she even knew that the Appellant's wedding had a problem and even small children in the area knew him as Tom. She stated that she was alone on her way to school but the witnesses saw the Appellant running on foot, went and took his motor bike and rode away though she did not know its registration number.

7. PW2, **HWM**, the Complainant's mother testified that she knew the Appellant since they belonged to the same clan. On 27th March, 2017 she woke up at 3.00 am since her phone had run out of power. The Complainant then got up and informed her that it was like it was daylight. According to her the weather was cloudy as if it was going to rain. The Complainant then asked to escort her a bit since the area was a bit bushy. After escorting her she returned home as the Complainant proceeded to school which was about a kilometre away, alone. As PW2 got into the house she heard someone scream and realised that it was the Complainant's voice. She ran back to the road and searched around. She then saw one **Kilonzo** with a torch and he also told her that he heard the scream with someone saying "*usiniuwe*". Along the road they came across the Complainant's books scattered on the ground. When they called the Complainant in a loud voice, the Appellant who had left his motor bike a distance ahead and turned off its lights, heard them and fled. They were informed by the Complainant that the man had raped her and gave the name as Tom. When the village elder, PW3, arrived, they told him what had happened and he called the area Assistant Chief. After calling the Assistant Chief, PW3 called an uncle to the Appellant and asked if the Appellant was at home whereupon the said Uncle to the Appellant confirmed that the Appellant had just arrived home.

8. According to PW2, the Complainant was a total mess with dust covering her skirt and I her socks. PW3 then went to get the Appellant who had changed his clothes since in PW2's view, his clothes ought to be dusty just as the Complainant's. According to her the Complainant recognised the Appellant when the Appellant shone his bike headlights on her. She then took the Complainant to a clinic where she was examined and treated and she was issue with a P3 form which she identified together with the lab test report.

9. Cross-examined by the Appellant, she asserted that the Complainant knew the Appellant who was residing in their village and was a motor bike rider and disclosed this to the village elder. When the Appellant was brought he denied knowing the Complainant only admitting that he knew her elder sister. According to her, since her phone's battery was down when she woke up she thought it was time to go to school. She said she knew the motor bike which the Appellant was using as being blue in colour.

10. PW3, **Paul Muia Kibati**, the village headman on 27th March, 2017 at about 4.00 am heard a knock on his door and when he asked who it was PW2 identified herself. According to him it was drizzling a bit. He got up, lit his lamp and when he got out he found PW1 whose clothes and hair were soiled with PW2. PW2 informed him that PW1 was on her way to school when Tom defiled her. PW3 then called the Assistant Chief at 4.30am who told him to go to the Appellant's home. On arrival there, he found the Appellant listening to radio and he told the Appellant to accompany him and they went back to his home where he had left PW1 and PW2. When he asked the Appellant whether he knew what had happened to the Complainant, the Appellant denied but PW1 told him to stop pretending and disclosed that the Appellant had chased her, got hold of her, carried her to a nearby building under construction near a bar.

11. Cross-examined by the Appellant, PW3 stated that the Appellant got out armed with a *rungu* and when he asked him whether he knew the Complainant, the Appellant denied and stated he only knew her elder sister. PW3 however stated that he saw the tyre marks of the motor bike on the ground since it was drizzling a bit. According to him PW1 and PW2 had stated that the Appellant had taken his motor bike and took the opposite route. According to PW3 at the junction joining the road, they found the tyre marks. It was his evidence that there was a padlock placed on the Appellant's door.

12. PW4, **Scholarstica Kathini Mweu**, the area Assistant Chief stated that she was married in the same clan as the Appellant who was her subject. On 27th March, 2017 at 4.34am, she received a phone call from PW3 who reported that he had received a report that the Complainant had been defiled. Upon going there, she found PW1, PW2 and PW3 and on asking PW1 whether she knew the culprit, PW1 stated that it was Thomas whom she met on her way to school and narrated what happened. According to PW4, the complainant's clothes were soiled as it had drizzled. In the company of PW3, they went to the Appellant's home where they found a padlock placed on the door outside but the radio was on. When they pushed the door and opened it, the Appellant came out armed with a club. PW3 then explained to the Appellant their mission and they left with the Appellant. According to PW4, PW1 told them that she knew the Appellant and called him by name but the Appellant denied knowing PW1. PW4 then escorted them to the Police Station where he handed them over for investigations and they were referred to the Hospital.

13. **Dominic Mbindyo**, a clinical officer at Kangundo District Hospital, testified as PW5. According to him, the Complainant was taken to the Hospital following history of defilement on 27th March, 2017. The Complainant was accompanied by a police officer and PW2, her mother. According to him, the Complainant who had no pant, had muddy clothes, her face had bruises and her feet was full of mud. Upon examining her, they found that her hymen was freshly torn and blood stained while her labia majora was reddish and inflamed and her vagina was foul smelling. Urine tests had lymphocytes and the high vaginal swab revealed numerous pus cells. He therefore formed the opinion that the Complainant was defiled. According to him the Complainant stated that she had been defiled by a person known to her. He filled in the P3 form, signed and dated it. He also filled in PRC form which produced as exhibit. He sent the Complainant for another laboratory and urinalysis and produced the results therefor.

14. On 27th March, 2017 at 7.30 am, PW6, **PC Albert Nyabondo**, was at the report office at Kakumini Police Post which was under Kangundo Police Station, when the Complainant, accompanied by her mother, PW2, PW3 and PW4 went to his office. According to him, the Complainant's uniform was mud stained and she reported that while on her way to school, she met the Appellant on motor bike and narrated what happened. According to PW6, it had rained that night. According to him, the tyre marks were trailed to the Appellant's home where they got him and he was arrested. PW6 the rearrested the Appellant and took him to Kangundo Hospital. He later visited the scene and confirmed what the Complainant had reported. He produced the complainant's clothing which were all mud stained as exhibits. He also took

the Appellant's inner wear which had sperms on it which he produced as exhibit.

15. In cross-examination, by the Appellant, PW6 reiterated that the Appellant was taken to the station by PW3 and PW4 and that both the Complainant and the Appellant were taken to the Hospital after the Appellant was identified by the Complainant. PW6 confirmed that when he went to the Appellant's home, he saw fresh tyre marks of the motor cycle.

16. At the close of the prosecution case, the appellant was placed on his defence and he opted to give sworn evidence in which he denied that he defiled the Complainant. According to him, PW3 went to his home and found him in bed so there is no way he could have defiled the Complainant.

17. The Appellant called his mother, **Agnes Nduku Nzau**, who testified as DW2. According to her, the Appellant was arrested at home early in the morning after PW3 woke him up. Though her house was near the Appellant's, she was not informed of what was going on and he learnt of the matter at 8.00 am when the Appellant went to inform her and the Appellant's father about the matter. According to her knowledge, the Appellant was home on the evening before he was arrested so she failed to understand how he could have defiled a girl in the morning.

18. In cross-examination DW2 stated that though the Appellant used to operate a *boda boda*, he had since stopped operating the same the previous month. According to her since they lived in the same compound, she knew when the Appellant would leave and return. It was her evidence that on 27th the Appellant left at 6.30 am because he took the key to his house to DW2. She stated that the village elder, PW3, went for the Appellant at about 7.00 am when the children were going to school.

19. DW3, **Agnes Kataa Muteti**, the accused wife testified that on 27th May, 2017, she was sleeping at 6.00 am when she heard people calling him outside. The Appellant got out and left and she did not know who called him or where the Appellant went to.

20. In cross-examination, DW3 stated that the previous day, the Appellant returned home at 6.00 pm. She admitted that the Appellant was employed as a motor cycle operator though she did not know who owned the said motor cycle. It was her evidence that they lived in the same home with her mother in law, DW2, and an uncle and that the Appellant's sisters were at home when the Appellant returned and that they slept at 8.00pm. She however did not know the family that sued the Appellant.

21. In her judgement, the learned trial magistrate found that from the birth certificate it was clear that the Complainant who was born on 11 th April, 2002 was aged 14 years at the time of the alleged offence which took place on 27th march, 2017 a month before the Complainant celebrated her 15th birthday. From the evidence adduced, the learned trial magistrate was satisfied that the Complainant identified the Appellant well as the person who committed the heinous act against her. She found that the Appellant did not explain how his inner wear had sperms on it that morning. She found DW2 and DW3 not truthful at all since their evidence as to how the Appellant left that morning was conflicting. From the evidence PW2, PW3 and PW5 regarding the state in which the Complainant's clothes were, as well as the medical examination, the learned trial magistrate found that the Complainant had been defiled. She therefore found that the prosecution had successfully proved their case against the Appellant, on the main count to the required standards, convicted him and sentenced him to serve 20 years imprisonment.

22. In his submissions the Appellant stated that the evidence adduced was that of a single identifying witness. It was submitted that from the evidence it was clear that the incident occurred at a dark hour of the night hence it was difficult to make positive identification. According to the Appellant, since the motor bike lights were facing in front it was not possible for the Complainant to identify the Appellant through the said lights. He therefore submitted that the prevailing conditions were not conducive for proper identification.

23. According to the Appellant there was no evidence of penile penetration since the Appellant was not examined in order to crystallise the finding that the defilement was by the appellant and nobody else. The appellant also took issue with the fact that neither the motor bike nor his soiled. he also submitted that there were contradictions in the evidence of PW3 and PW4 as to how he was arrested.

24. According to the Appellant he gave unshakeable evidence which was supported by DW2 and DW3. Based on recent developments in jurisprudence he submitted that the court ought to substitute the 20 years term of imprisonment with 10 years effective from the date of his sentence by the trial court.

25. On the part of the Respondent, it was submitted by **Miss Mogoi**, learned prosecution counsel, that the evidence was clear and pointed to the Appellant without any iota of doubt that he committed the offence. According to learned counsel, the trial court analysed the evidence led by the prosecution and the defence and was satisfied that it led to the irresistible conclusion that the Appellant committed the offence. To the respondent, the decision was well reasoned and was supported by evidence which was consistent, direct, clear and without any doubt that the Appellant committed the offence with which he was charged.

26. As regards the sentence, it was submitted that the same was within the law hence there is no need to interfere therewith.

Determination

27. The prosecution's case in summary was that on 27th March, 2017, in the early hours of the morning the Complainant was going to school when the Appellant who was on a motor bike passed her, stopped head of her, made a U-turn and asked to give her a lift to school after inquiring about her identity. When the Complainant declined, the Appellant chased her, got hold of her and took her to an unfinished building where he defiled her. However, he was interrupted in the process by PW2, the Complainant's mother who had just escorted the Complainant and heard the Complainant scream. The Appellant then took off boarded his motor cycle and drove off. After the Complainant revealed the identity of her assailant, PW2 reported the matter to PW3 who relayed the information to PW4 and the Appellant was then arrested from his house. At the time of his arrest, a padlock was found outside his door and the radio was on.

28. Upon being examined by PW5, it was confirmed that the Complainant had been freshly defiled. There was evidence that the tyre marks of the motor cycle were traced to the Appellant's house since it had drizzled and that sperms were seen on his innerwear.

29. In his defence, the Appellant stated that he was home and was unaware of the incident. His witness, DW2, who was his mother testified that he used to know when the Appellant left the home and when he would return. On this day he left at 6.30 am after handing over his keys to DW2. DW3, the Appellant's wife, on the other hand testified that she was with the Appellant from the previous evening till the morning when the Appellant was arrested.

30. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court 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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 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 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 had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

31. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.**
>
> **2. 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; 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.**

32. Section 8 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.***
>
> ***(5) It is a defence to a charge under this section if -***
>
> > ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
> >
> > ***(b) the accused reasonably believed that the child was over the age of eighteen years.***
>
> ***(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.***
>
> ***(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.***
>
> ***(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.***

33. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013,** where it was stated that:

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

34. In the case of **Kaingu Elias Kasomo vs. Republic** Malindi the Court of Appeal in criminal appeal No. 504 of 2010 stated as follows:

> **"Age of the victim of the 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."**

35. The importance of proving the age of the complainant in sexual offences was emphasized in **Alfayo Gombe Okello vs. Republic (2010) eKLR** where the Court stated that:

> **"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)…proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."**

36. In **Dominic Kibet vs. Republic Criminal Appeal No. 155 of 2011** it was held that:

> **"…while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof."**

37. In this case, there was ample evidence in form of the Complainant's birth certificate that the Complainant was 14 years of age. In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

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

38. Accordingly, the Complainant was a child as defined under the ***Children Act***.

39. As regards penetration, section 2 of the ***Sexual Offences Act*** defines "penetration" as:

> ***the partial or complete insertion of the genital organs of a person into the genital organs of another person.***

40. Therefore, for the offence of defilement to be proved evidence must show that the appellant inserted his penis into the vagina of the complainant. While it is not sufficient that the said organs came into contact, partial insertion however suffices for the purposes of penetration as the said insertion need not be complete.

41. In this case there was evidence that the genitals of the complainant came into contact with those of the appellant. Both the evidence of the complainant and PW5 clearly prove that there was penetration. According to the Complainant, the Appellant then carried her to a nearby bar comprising of incomplete building, forcefully removed her biker and unzipped his trouser before forcefully inserting his penis into her vagina. Upon being examined by PW5, it was found that her hymen was freshly torn and blood stained while her labia majora was reddish and inflamed and her vagina was foul smelling. Urine tests had lymphocytes and the high vaginal swab revealed numerous pus cells. It is therefore clear that the act of penetration was proved beyond reasonable doubt.

42. As for the identity of the Appellant, it is true that the incident occurred when it was still dark. However, this was a case of recognition as opposed to identification. In another case, **R vs. Turnbull (1976) 3 ALL E.R 549** the Court held:

> **"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

43. In **Ajononi & another vs. Republic [1980] KLR 59,** it was held that:

> **"…recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."**

44. In **Peter Musau Mwanzia vs. Republic [2008] eKLR**, the Court of Appeal expressed itself as follows:

> **"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition."**

45. In this case, the circumstances were that the Complainant knew the Appellant well as she used to see him riding a motor cycle in the village. She not only knew him by appearance but also knew his name. the Appellant passed her made a U-turn and went where she was. The Appellant even talked to her wanting to know who her parents were and even offered to give her a lift. After that the Complainant started running but the Appellant caught up with her and threatened to harm her. In those circumstances, it is clear that not only did the Complainant recognise the Appellant by his physical appearance, the two even talked.

46. Apart from that when PW3 went to the Appellant's home he found a padlock outside his door. According to DW2, the appellant had left at 6.30am but was arrested at 7.00am. From the evidence of DW2, it would seem that at the approximate time that the offence was being committed, the Appellant was not at home but returned home soon thereafter. While the Appellant mentioned that he was in his house he never mentioned the presence of DW3 who claimed she was with the Appellant throughout from the previous evening till the time the Appellant was arrested hence contradicting the evidence of DW2. DW3 however confirmed that the Appellant was operating a motor cycle. Fresh tyre marks were however traced to his house.

47. While all these are circumstantial evidence I find that the inculpatory facts against the appellant are incompatible with his innocence and are incapable of explanation upon any other reasonable hypotheses than that of his guilt. I am unable to find the existence of other existing circumstances which weaken the chain of circumstances relied on by the prosecution. The chain of the circumstances is clear that the Complainant recognized the Appellant as her assailant. The Appellant left his house at about the same time that the offence was being committed and returned home soon thereafter. The tyre marks of a motor cycle was traced to his home and the Complainant's assailant was on a motor cycle. Some sperm like substances were seen on his underwear which the Appellant neither denied not offered any explanation therefor. Accordingly, the facts adduced by the prosecution do justify the drawing of the inference of guilt to the exclusion of any other reasonable hypothesis of innocence as regards the identity of the Appellant as the Complainant's assailant.

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

> ***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.***

49. What the said section provides for is a *prima facie* mandatory minimum sentence. The learned trial magistrate while taking cue from the said provision stated that the offence carries a penalty of not less than twenty (20) years imprisonment and sentenced him to the said period. I however associate myself with the opinion of the Court of Appeal in **Jared Koita Injiri vs. Republic [2019] eKLR** where it held that:

> **"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by *section 8 (1)* of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic* *(supra)*, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."**

50. In the same vein I set aside the sentence imposed upon the appellant herein and substitute therefore a sentence of 15 years' imprisonment. The Appellant was arrested on 27th March, 2017 and was released on bond on 28th April, 2017. Pursuant to section 333(2) of the ***Criminal Procedure Code*** that period will be taken into account in computing the period served. Save for that, his sentence will run from 16th October, 2017.

51. Judgement accordingly.

Judgement read, signed and delivered in open court at Machakos this 26th day of February, 2020.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey