REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 39 OF 2018

DANIEL RAPEI SAIKONG.....APPELLANT

VERSUS

REPULIC.....RESPONDENT

(Appeal from original conviction and sentence, (Hon M. Kasera,PM), delivered on 30th October, 2018

in the Chief Magistrate's Court at Kajiado in Criminal Case No. 2014 of 2015,

Republic v Daniel Rapei Saikong)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act, No. 3 of 2006. Particulars were that on diverse dates between 2013 and November, 2015, at [particulars withheld] Location in Kajiado Central Sub County, within Kajiado County, he intentionally caused his private organ to penetrate the private organ of NK, a girl aged 14 years.

2. He faced a second count of indecent act with a child contrary to section 11A of the same Act. particulars being that on diverse dates between 2013 and November 2015 at [particulars withheld] location in Kajiado Central Sub county within Kajiado County he intentionally and unlawfully caused his genital organ to come into contact with the genital organ of **NK**, a girl aged 14 years.

3. The appellant pleaded not guilty to both counts and after a trial in which the prosecution called 5 witnesses and the evidence of the appellant, he was convicted and sentenced to 23 years imprisonment.

4. The appellant was aggrieved with both conviction and sentence, and lodged a petition of appeal dated 4th January, 2019 and raised the following grounds, namely:

> **I. That the Trial Magistrate erred in law and fact regarding the evidence and convicting him on the basis of extraneous matters.**
>
> **II. That the trial court erred in law and fact by meting out an excessive sentence.**
>
> **III. That the trial court erred in law and fact by failing to consider the sentence vis a vis the offence the appellant was alleged to have committed.**

5. The appellant filed amended grounds of appeal dated and filed on 24th September, 2019. namely:

> **1. That the trial Magistrate erred in law and fact in convicting him on a fatally defective charge;**
>
> **2. That the trial court erred in law and fact in convicting him on a non-existent offence;**
>
> **3. That the trial court erred in law and fact in failing to follow the laid down procedure in plea taking;**
>
> **4. That the trial court erred in law and fact by conducting a flawed trial that failed to accord with his right to information guaranteed under Article 50(1) (2) (b) of the Constitution;**

5. That the trial court erred in law and fact by failing to accord the appellant the right to fair trial in terms of Articles 25 (c) and 50(2) (c) and (j);

6. That the trial court erred in law and fact by failing to consider the imperative importance of a voire dire on the crucial prosecution witness;

7. That the trial court erred in law and fact by failing to appreciate that essential witness never testified and there was no watertight case;

8. That the trial court erred in law and fact by failing to observe that the prosecution relied on unreliable and discredited witnesses;

9. That the trial court erred in law and fact by overlooking the prosecution's insufficient evidence that there was no penile penetration of the complainant's genitalia and disguised positive identification as conclusively connecting him with the offence;

10. That the trial court erred in law and fact by relying on the uncorroborated prosecution evidence with vitiated marked exhibits;

11. That the trial court erred in law and fact by conducting a trial that contradicted the charge thus rendering it a nullity;

12. That the trial court erred in law and fact by failing to appreciate the inconsistences in the prosecution's case;

13. That the trial court erred in law and fact by misdirecting itself and failing to caution itself thus prejudiced its findings by failing to comply with Section 124 of the evidence Act;

14. That the trial court erred in law and fact by failing to consider the appellants' alibi defence;

15. That the trial court erred in law and fact by convicting him and imposing an excessive sentence in violation of Article 50(2) (p);

16. That the trial court erred in law and fact by failing to take into account the fact that there was a grudge between his family and that of the complainant.

6. During the hearing of the appeal, the appellant who was un represented, relied on his written submissions filed together with the amended grounds of appeal and urged this court to allow his appeal, quash the conviction and set aside the sentence.

7. In the written submissions, the appellant argued that the offence he was charged with was non-existent. He contended that he was charged under section 8(1) (3) which does not create an offence like the one he was charged with. He relied on ***Fappyton Mutuku Ngui v Republic*** criminal appeal No. 296 of 2010 (**Machakos**) to support this argument.

8. The appellant further argued that being charged under section 8(1)(3) occasioned him a miscarriage of justice. He relied on ***Henry O. Edwin v Republic*** Criminal Appeal No. 645 of 2010, where the Court of Appeal held that the principle of law governing charge sheets is that an accused should be charged with an offence known in law; that the offence should be disclosed and stated in clear and unambiguous manner so that the accused is able to plead to a specific charge that he can understand and that will enable him to prepare his defence.

9. The appellant also submitted that the charge he faced and for which he was convicted, was not "unlawful" since it was not so stated in the particulars of the offence and, therefore, his conviction was a nullity. He relied on ***Peris Wairimu Gichuru v Republic*** Criminal Appeal No. 352 of 2004, **(Nyeri),** for the submission that the charge that was read to the appellant was defective in that charge it should have state that the act of sexual intercourse was "unlawful"

10. He also relied on section 134 of the Criminal Procedure Code to argue that the section requires in mandatory terms, that a charge should contain sufficient particulars necessary for giving reasonable information on the nature of the offence charged. The appellant therefore argued that the plea taking was un procedural and relied on ***Adan v Republic*** **[1973] EA** on the procedure to be followed in plea taking.

11. According to the appellant, a plea must be unequivocal. He relied on ***John Muendo Musau v Republic*** [2013] eKLR (Criminal Appeal No. 365 of 2011) for the submission that if an accused wishes to change plea and he says in mitigation anything that negates any of the ingredients of the offence, that amounts to change of plea which he could do at any time. He argued that the trial court did not take into account the aspect of plea taking.

12. The appellant further submitted that his right to information was violated; that he was subjected to unfair trial and that although the trial court ordered that he be supplied with witness statements, none was supplied by the time his trial commenced. He relied on ***Republic v Daniel Chege Magutho*** [2014] eKLR to content that his trial caused a miscarriage of justice.

13. It was his further submission that he was not given documents such as the birth certificate, treatment notes, discharge summary, PRC and P3 forms. He relied on ***Republic v Francis Muniu Kariuki*** [2017] eKLR on the importance of giving an accused person reasonable facilities to prepare for his defence. In the appellant's view, this right was violated.

14. Next, the appellant argued that the trial court did not conduct ***voire dire*** examination on PW1. He relied on section 19(1) of the Oaths and Statutory Declarations Act regarding when the court should conduct ***voire dire***. He appellant blamed the trial court for assuming that PW1 already knew the essence of the oath. He relied on ***Onserio v Republic*** [1985] KLR 615 for the submission that where a witness appears to be a child, the court should inquire whether the child is capable of understanding the nature of the oath and whether he is possessed of sufficient intelligence to justify reception of evidence of such a witness even when not given on oath.

15. The appellant further argued that the prosecution did not call essential witnesses and blamed the trial court for relying on unreliable witnesses. He relied on ***Donald Mahiwa Achilwa & 2 Others v Republic*** [2007] eKLR for the submission that the law obliges the prosecution to call necessary witnesses to establish its case even though some of those witnesses' evidence may be adverse to it.

16. He pointed out that in ***Mohammed v Republic*** [2008] 1 KLR, the court stated that in sexual offences the courts may not be hamstrung with the requirement of corroboration. He however submitted that PW1 contradicted herself that the relationship between her and the appellant started in 2013 to 2015, yet the evidence of PW4 was that he had not been employed in that particular school by 2013.

17. Regarding penetration, the appellant argued that this ingredient was not proved beyond reasonable doubt. He relied on ***Geoffrey Kioji v Republic,*** Criminal Appeal No.270 of 2010 for this submission.

18. According to the appellant, there was no evidence linking him to the victim and relied on the ***South African Case of James Azwindini Nedsamba and the state,*** case No. 911 of 2011 by the **SCA** on the issue. The appellant further argued that the age of the victim was not proved and the prosecution as well as the court relied on vitiated exhibits. By way of example, the appellant argued that the prosecution relied on a farfetched birth certificate.

19. In his view the laps of time between when the report was made and preparation of the Birth Certificate was intended to hide a mischief. He also faulted the P3 form on grounds that PW1 was treated by a doctor 5 months before the doctor was employed. The appellant further argued that there were material contradictions among prosecution witnesses and the fact that his ***alibi*** defence was not considered.

20. Regarding sentence, the appellant contended that the trial court meted out an excessive sentence than permitted in law. he therefore urged the court to allow the appeal.

21. Mr. Meroka, learned Principal Prosecution counsel, opposed the appeal, supported the conviction and sentence. According to counsel, the prosecution proved its case against the appellant beyond reasonable doubt. He submitted that the prosecution proved age of the victim, penetration and identity of the perpetrator.

22. On age, Mr. Meroka submitted that a Birth Certificate was produced to confirm that the victim was 13 years old. On penetration, he submitted that the P3 and PRC forms confirmed that ingredient. He also argued that there was evidence that the minor miscarried, thus establishing penetration. Regarding identity of the perpetrator, counsel argued that the appellant was a teacher at the victims' school and was known to her. On the argument that a ***voire dire*** examination was not conducted on PW1, Mr. Meroka submitted that it was not necessary to conduct ***voire dire*** examination since the victim was 13 years old and, therefore, intelligent enough to testify without the necessity of a ***voire dire*** examination.

23. On sentence, he argued that the law provides for a minimum sentence of 20 years which can be enhanced to life imprisonment. In his view, the sentence of 23 years was a lawful sentence. He urged the court to dismiss the appeal, uphold conviction and affirm the sentence.

24. I have considered this appeal; submissions by both the appellant; those on behalf of the respondent and the authorities relied on. This being a first appeal, this court has a duty to reevaluate, reassess and reconsider the evidence on record afresh and make its own conclusion on that evidence giving reasons for it. In doing so, the court should bear in mind that it did not see witnesses testify and give due allowance for that.

25. In ***Kiilu& Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

> **"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. 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."**

26. PW1, the victim and a form 1 student at [particulars withheld] Secondary School testified that she was born on 10th November, 2001; that in 2013, she was in class 6 at Esoit primary school when the appellant who was a teacher at the school, asked to have a relationship with her. They became friends and continued with the relationship until the third term of 2015 when she conceived while in class 8. when her mother knew about it, she asked her who was responsible for the pregnancy and she informed her that it was the appellant. She fell sick and miscarried. She told the court that they used to have intercourse between 2013 and 2015; that the appellant was her first boyfriend and that he was the first person she had had intercourse with. She testified that she was taken to Kajiado District Hospital where a P3 form was filled.

27. In cross examination, the witness told the court that the appellant was employed by PTA in 2013; that he was her teacher from 2013 to 2015; that they would have intercourse on her bed at her home and that the appellant would go to her room at night without the knowledge of her parents.

28. PW2, NKE, mother to PW1, testified that in 2015, she noticed that PW1 was pregnant. She inquired from her the person who was

responsible for the pregnancy and she informed her that it was the appellant. She called and asked the appellant why he had impregnated her daughter, but the appellant told her that he would take care of the baby. When PW1 became sick and miscarried, the appellant disappeared. She reported the matter to the police and took PW1 to hospital where she was admitted. She went to the school and informed the head teacher what had happened.

29. In cross-examination, she told the court that she interrogated the appellant in the presence of the head teacher; that she called the appellant to her house where he agreed to take care of the child, but he left the school he was teaching after PW1 fell sick and that was why she reported the matter to the police.

30. PW3, Dr. Chesoni Kevin of Kajiado County Referral Hospital, testified that he was employed in the public hospital in June, 2015; that he treated the complainant, a 13 year old on 16th January, 2015; that HN was normal T/A the victim had had a delivery uterus well contracted, breasts wer active, vagina minimum hokia (bloodcyteor delivery), age of the injury was 10 months, heasen penis, no prior medication after examination. He assessed the degree of injury as harm. He told the court that he also examined the man who was generally well kempt H/N was normal T.A. was normal age of injury was 10 hours.

31. In cross-examination, he told the court that he conducted examination on 10th November, 2015 while date of defilement was 10 months earlier. He admitted that he had not produced treatment notes.

32. PW4, JM, a teacher at [particulars withheld] primary school, testified that he was teaching at [particulars withheld] Primary School in 2015; that the appellant was employed at the school; was teaching mathematics in class 8 and that PW1 was the appellant's pupil in class 8. He told the court that he had an accident in March, 2015 and proceeded on leave but when he came back, he found that PW1 and another girl were pregnant. He called a staff meeting and asked the teachers whether they had noticed that the girls were expectant. PW1 told him that it was the appellant who had impregnated her. He called one Kambu Kurito and asked him what was wrong with the complainant since she appeared sickly. He also called Chief Raphael Pampei, a step brother to the appellant and informed him what the appellant had done. The appellant had deserted his job. The complainant fell sick and was taken to Kajiado hospital where she was admitted.

33. In cross-examination, the witness told the court that the appellant was employed at the school in 2014 after completing form 4, but taught for a short time; that the complainant was then 13 years old and, according to the witness, it was PW1 who told him that the appellant was responsible for the pregnancy.

34. PW5 PC No. 40164 Lekakimon, a police officer attached to Ilassit police patrol base, testified that on 13th November, 2015 while on duty, he received a report from KT, father to PW1, that his daughter had been defiled by the appellant while a pupil at [particulars withheld] Primary School. The appellant had by then stopped working at the school and was now teaching at a Primary School in Makueni County. He went to the appellant's school on 14th November, 2015 in the company of the complainant's brother and arrested the appellant after he was identified to him by the complainant's brother. He the appellant him to Police Post. He took the complainant to hospital after which he charged the appellant. In cross-examination, the witness told the court that it was the complainant's father, who made a report on 13th November, 2015.

35. When put on his defence, the appellant gave a sworn testimony and told the court that he taught at [particulars withheld] Primary School from January 2014 2014 up to November, 2014 and that he used to operate from his home. He told the court that he was in court because he had been charged with defilement; that the victim became pregnant in 2015 and that he was arrested in November, 2015.

36. In cross-examination, the appellant stated that he taught between January, 2014 and November, 2014. He admitted that he taught mathematics and science in PW1's class. He testified that they were two male teachers at the school but did not know why PW1 picked on him as the one who defiled her. He stated that there was no issue between PW1 and him but that there was an issue between his father and PW1's father; that it was PW2 who called him on phone and informed him about PW1's pregnancy; that he told PW2 that he wanted a DNA test done and that he would take responsibility if the DNA test turned positive.

37. After considering the above evidence, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt, convicted the appellant and sentenced him to 23 years prompting this appeal.

38. The appellant has raised a number of grounds in challenging his conviction and sentence. He argued that the prosecution did not prove its case beyond reasonable doubt, that is that the prosecution did not prove the ingredients of the offence.

39. The charge against the appellant being one of defilement, the prosecution was bound to prove three ingredients. First; that the victim was a minor; that there was penetration and that the appellant was the perpetrator.

40. On age, PW1 told the court that she was born on 10th January, 2001 and that she was 15 years at the time of her testimony. PW2 on her part told the court that PW1, the victim, was 15 years old. She however did not state when PW1 was born. PW3, the Doctor, only made reference to the age of PW1 stating that he treated a 13 year old, while PW4 also stated that she was 13 years while at the school. PW5, the police officer who arrested the appellant and escorted both PW1 and the appellant to hospital, produced PW1's Birth Certificate on her age.

41. The victim stated in her testimony stated that she was born on 10th January 2001 and made reference to the Birth certificate which confirms that she was born on 10th January, 2001 and which was produced as PEX1.

42. There is no question as to the age of PW1. She testified on when she was born. Pw2 also said she was 15 years at the time. PW4, the head teacher of the school also stated that she was 13 years then. The Birth Certificate also indicates that she was born on 10th January 2001. I have no doubt that the age was proved.

43. The appellant has taken issue with the date of registration arguing that it was a mischief. The Birth Certificate shows the date of registration as 11th December 2014. I do not see any problem with this date. By that time the incident had not been reported to the police. I do not agree with the appellant that there was mischief in obtaining the certificate.

44. In any case, it is not the Birth certificate only that proves the date of birth. It is one of the means of proving the date. Date of birth can be proved by other evidence including that of PW1, PW2 and PW4 who testified that she was 13 years then. The issue of age in the case of the appellant, would be material regarding sentence. He has not alleged that PW1 was older than the age given to make any meaningful difference. I am satisfied that the prosecution proved this ingredient beyond reasonable doubt and I have no reason to fault the trial court on this.

45. The next ingredient that the prosecution was required to prove was penetration. The appellant argued that there was no proof of this ingredient beyond reasonable doubt. The prosecution on its part submitted that this ingredient was proved as required.

46. I have gone thought the record of the trial court and the evidence of the prosecution witnesses. PW1 told the court that she had prolonged relationship with the appellant between 2013 and 2015 and that she became pregnant as a result of that relationship, but miscarried. PW2 also told the court that PW1 became pregnant but miscarried after she fell sick. PW3 confirmed that PW1 had a delivery uterus that was well contracted and her breasts were active. PW4, the head teacher of the school where PW1 was a pupil, also told the court that when he came back from leave, he noticed that PW1 and another pupil were expectant i. She fell ill and was taken to hospital.

47. From the evidence of these witnesses, there was cogent evidence that PW1 had had sexual intercourse leading to pregnancy. Pregnancy is a fact which can be observed visually and in this regard, the evidence of PW1, PW2 and PW4 supported the fact that she was pregnant. PW3, the doctor who examined her, also confirmed that she had had a pregnancy. PW1 could not have become pregnant without sexual intercourse and, therefore the aspect of penetration was indeed proved.

48. On who the perpetrator was, the prosecution stated that it was the appellant. The appellant on his part argued that it was not proved beyond reasonable doubt that he was responsible. The appellant was a teacher at the school where PW1 was a pupil. He also taught PW1 mathematics and science subjects. This is a fact admitted by both the appellant and PW1. PW4 the head teacher also confirmed this fact.

49. PW1 told the court that the appellant approached her and asked to have a relationship with her. They became friends. Unknown to her parents, the appellant would go to PW1's house in the evening and they would have sexual intercourse on her bed.

50. The fact of the matter as borne by the evidence on record is that the appellant was known to PW1. PW2 also told the court that PW1 informed her that it was the appellant who was responsible for the pregnancy; a fact PW1 also told PW4. However, it was the appellant's argument that there were two male teachers at the school and he did not know why PW1 picked on him. The appellant further argued that there was no medical evidence to connect him to the offence.

51. As courts have variously held, it is possible to prove the offence of defilement whether there is medical evidence or not. That is, other evidence would be sufficient to prove the offence of defilement if believable. This was the holding in ***Mohammed v Republic*** (Supra) that:

> "**In cases of victims of sexual offence, the court is not to be hamstring with the requirement of corroboration where it is satisfied on the truthfulness of the witness."**

52. Further, in ***Geoffrey Kioji v Republic*** Criminal Appeal No.270 of 2010, it was held that:

> "[**E]ven without medical evidence linking the accused to the defilement, the court may still convict if there is evidence beyond reasonable doubt that defilement was perpetrated by the accused**."

53. The above authorities in essence emphasize on the proviso to section 124 of the Evidence Act. The section provides:

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

54. I have considered the evidence on record in this regard and reanalyzed it. I am satisfied that PW1 knew the person who defiled and impregnated her. The appellant did not say why he thought PW1 framed him. He told the court that he had no issue with PW1 but that his father and PW1's father had issues without elaborating what the issues were, if any.

55. The appellant also argued that he was not at the school in 2013 when the victim said their relationship began. He however admitted that he was at the school between January 2014 and November, 2014 and left on 22nd December, 2014. This, in my view, is not far from the period of his intimate relationship with PW1. The fact that PW1 mentioned 2013 as the year their relationship began was not a serious contradiction that would make PW1's testimony unbelievable.

56. Regarding the appellant's contention that there were contradictions in the prosecution evidence, it is important to understand really what

a contradiction is. In ***David Ojeabuo v Federal Republic of Nigeria*****[2014]LPELR-22555(CA),** The Court of Appeal of Nigeria defined contradiction thus:

> **"[C]ontradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."**

57. In ***Njuki v Republic*** **[2002] 1 KLR 77,** the court also held with regard to discrepancies:

> **"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused… however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."**

58. And in **Philip Nzaka Watu v Republic [2016] eKLR,** the Court of Appeal again held:

> **"It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."**

59. What emerges from the above decisions is that there will always be contradictions or discrepancies in the evidence involving many witnesses. The court should however consider the weight or gravity of the contradictions or inconsistencies and determine whether such contradictions or inconsistencies have material bearing on the prosecution case. In the present appeal I do not think inconsistencies if any, were so material as to affect the prosecution's case. I am satisfied that thye appellant was the person wo defiled PW1. As to the length of time taken to report the case, that is immaterial in our criminal justice system.

60. The appellant further argued that the trial court did not conduct a **voire dire** examination on PW1 to determine whether she was intelligent enough and understood the necessity of telling the truth. This argument cannot be sustained. PW1 was in class 13 years old and in school. The appellant was teaching her mathematics and science subjects. He knew that she understood what was going on when he approached her for a relationship. He cannot turn arroungd and argue that she may have not been intelligent and that there should have been a voire dire examination. I do not agree with him that the trial court was in error in this respect.

61. Finally, the appellant argued that the trial court imposed a sentence that was more than allowed by law. Mr. Meroka on his part argued that the sentence was lawful. Section 8(3) 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.

62. As correctly submitted by Mr. Meroka, the law provides for a minimum sentence of twenty years, which may however be enhanced to life imprisonment. The trial court imposed a sentence of twenty three years which the appellant has faulted.

63. The appellant was given a chance to mitigate but chose not to. The trial court observed that the appellant took advantage of PW1 as his pupil and defiled her on different occasions under the guise of a relationship, thus imposed that sentence.

64. I have considered the trial court's sentiments before imposing sentence. The appellant was in a relationship with a child which the law does not permit. That did not justify enhancement of the sentence from the minimum sentence of twenty years to twenty three years. In any case, it is no longer the case that courts impose mandatory maximum or minimum sentences following the Supreme Court decision in ***Francis Karioko Muruatetu & Others*** Supreme Court Petition No. 15 of 2015,[2017] eKLR.

65. In that case, the Supreme Court held with regard to section 204 which provides for a mandatory sentence:

> **"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."**

66. The record shows that the appellant was granted bond which was however cancelled on 1st March 2016. He was remanded until he was sentenced on 30th October 2018. That period was also not taken into account as required by section 333(2) of the Criminal Procedure Code. That was an error on the part of the trial court.

67. On the basis of what I have stated above, I am persuaded that the trial court was in error in imposing a severe and harsh sentence and

failing to take into account the period the appellant spent in remand awaiting trial. I am therefore inclined to interfere with the sentence.

68. Having considered the appeal submissions and the authorities relied on; reanalyzed and reevaluated the evidence on record, I do not find merit in the appeal against conviction. I dismiss the appeal and uphold the conviction. Regarding sentence and considering the age of the appellant who had just completed form four, I am satisfied that the sentence imposed was harsh and excessive.

69. Consequently, I allow the appeal against sentence and quash the sentence of twenty-three years imposed against the appellant. In place therefor, the appellant is hereby sentenced to 10 years imprisonment. The sentence will run from 1st of March 2016.

Dated, signed and delivered at Kajiado this 30th day of April, 2020.

E. C MWITA

JUDGE