REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 65 OF 2014

GABRIEL MWAKA MUSAU……APPELLANT

-VERSUS-

REPUBLIC……RESPONDENT

[Appeal from original conviction and sentence in Machakos Chief Magistrate's Court in Criminal Case No. 1675 of 2012 delivered on 4/4/2014 by Hon P. M. Mugure, RM]

JUDGMENT

1. The appellant was charged with the offense of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, having allegedly lured DM a girl aged 15 years to a lodging on the night of 03/12/12 by deceiving her that he was going to give her accommodation for the night after she had missed matatu transport to her home. The appellant was found guilty of the charge, convicted and sentenced to imprisonment for 25 years.

2. The appellant filed the following **amended grounds of appeal and** prayed that his appeal be allowed; his conviction and sentence be set aside.

> **1. The charges of the defilement c/sec 8(1) as read with sec 8(3) of the Sexual Offences Act No. 3 of 2006 with an alternative charge of Indecent Act section 11(1) of the Sexual Offences Act No. 3 of 2006 were never proved beyond reasonable doubt.**
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> **2. The subordinate court erred in law when he convicted me on the basis of contradicted evidence.**
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> **3. The subordinate court erred in law when he relied on evidence that was conducted, prosecuted by unqualified police officer below the rank of assistant inspector c/ sec 85(2) of the CPC.**
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> **4. The subordinate court erred in law and failed to understand that the medical officer had exonerated me from the crime of penetration.**
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> **5. The subordinate court erred in law when he misled himself and failed to understand that the said complainant did not scream during the alleged offence.**
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> **6. The subordinate erred in law when he failed to understand that the crucial witnesses were never called.**
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> **7. The subordinate erred when he failed to put into account my alibi and plausible defense and also my defense witnesses before rejecting it, in accordance to the requirement of the law in c/sec 169 (i) CPC**

THE EVIDENCE

3. In accordance with ***Okeno v. R*** [1972] EA. 32 the Court as a first appellate court shall re-evaluate the evidence and draw its own conclusion before considering whether the trial court decision is to be upheld or not.

4. **PW1** was the complainant **D M** aged 17 years who the appellant was alleged to have defiled. A ***voire dire*** examination was conducted and it was ascertained that the complainant understood the nature of an oath. She was sworn and gave testimony that on the material date 03/12/12, she had come from High school – [particulars withheld] School and was travelling to her sister's house in Nairobi. She stated that there was a matatu strike and the matatu she took dropped her at Athi River at about 3 p.m. In the course of her travels, PW1 states that she did not find a vehicle at Kathiani stage- Machakos where she had alighted at 9 p.m. The complainant admitted that she was stranded and approached a watchman at [particulars withheld]. From her testimony, it appears that the complainant stayed with the watchman until 11 p.m. when a man with a briefcase containing a bible came where she was. She identified the briefcase and bible as MFI 1 and MFI2

respectively.

The Complainant told the court that the man introduced himself as a pastor and told the complainant that he would offer her a place to sleep to which the watchmen refused. She stated that the watchman later relented after the appellant persisted and she followed him to a place where he paid for a room and defiled her. She stated that she was unable to go out because the appellant had taken her bag and shoes. The complainant further stated that she was able to escape from the room and report the matter to the police who accompanied her to the lodge-Vienna Lodge, Katoloni and found the appellant sleeping there. She testified that though the appellant had initially refused to open the room, they managed to gain access and arrested him. PW1 identified the P3 form from when she was taken to hospital marked MFI3, her biker and pant MFI4 and two pants found with the appellant marked MFI5. On cross-examination, the complainant reiterated her testimony stating that she had recorded statements in a police file. She stated that the hospital had confirmed that she had indeed been defiled and that it was the appellant who had committed the offence. PW1 stated that the appellant had claimed that she was his girlfriend at the time of the offense. She testified that the appellant had a knife but she did not know where he had hidden it. On re-examination, the complainant said that she was found to be pregnant but the pregnancy was not for the accused because she had never met him before the material date.

5. **PW2** was **P.C Ibrahim Gedi NO.85363** who told the court that on the material date he was working at Machakos Police station when he received a report from the OCS at 6 a.m. of the incident. He stated that he accompanied the complainant to the room at Vienna Lodge once she had reported the incident and arrested the appellant. PW2 told the court that he had recovered both the appellant's and the complainant's underwear, shoes and a bag. He stated that the complainant's phone had been blocked by the appellant. The items were marked as follows:

i. Shoes – [particulars witheld]

ii. Nokia Phone [particulars witheld]

iii. Complainants bag- [particulars witheld]

iv. According to the witness, it was not clear to him whether the appellant and complainant knew each other. He stated that he took both appellant and complainant to the hospital and produced medical notes marked MFI10. On cross-examination, PW2 stated that he took the appellant to the hospital following his arrest at the Vienna Lodge where he was found sleeping.

6. **PW3** is **Emmanuel Loiposha** who was the doctor that examined the complainant presented the P3 form and stated that the complainant had been defiled by a person known to her. He stated that the complainant had told him that it was a pastor who raped her at knife point. PW3 stated that at the time of the offense and subsequent examination, the complainant was 15 years of age. He stated that upon examination, he found that she had lacerations on her labia minora and her hymen was broken but not freshly broken. She had a smelling whitish discharge and was negative for HIV though positive for Syphilis. A vaginal swab found epithelial cells and a positive pregnancy test. He stated that the complainant had medicine administered and that the examinations showed high infection and the degree of injury was grievous harm. He filed a Post Rape Care-(PRC) form 363 in favour of the complainant. He produced the complainant's P3 form as exhibit 2 and stated that he had certified the age and report done by the dentist. He stated in his testimony that the accused was found to be HIV negative and Syphilis negative. On cross-examination, PW3 stated that indeed the complainant had tested positive for pregnancy but that he had not conducted any DNA test. On age assessment, he stated that there are numerous ways to ascertain the age of a person using documentation such as birth certificates or physiological assessments. He reiterated that the complainant had lost her virginity before the offense took place and that the P3 form and post examination form for complainant was filled as per patient's report. PW3 confirmed to the court that he had put down the results of the examinations on relevant forms that is the P3 form and the PRC form which is where the medical officer ticks whether the test had been done or not. He stated that he was only conversant with the medical aspect of the case.

i. **PW4** was one **T M M** who told the court that he worked at [particulars witheld]. He stated that on the material date at 9 p.m, he was working when a customer who introduced himself as a pastor came into the lodging. PW4 told the court that the pastor had told him that he would pay for the room via MPESA in the morning. He stated that he later saw him as the police came to pick him up the next morning. PW4 also testified that he had received information of a girl seen running out of the compound. He said that when the police came, they asked to see the person who took Room No. 5. He stated that the pastor was arrested by the police but told the court that he was not sure whether the lady had come from room No. 5.

On cross-examination, PW4 stated that he did not see the lady going into the room on the night of the material date but says that he had a customer – implying that he may have been distracted. He stated that he had instructed the watchman to show the appellant to his room and the watchman had confirmed to him that the appellant came in with a lady. PW4 stated that he had no records to show who had booked a room at Vienna on the night of the offence nor did he see the appellant with a knife. He however testified that the appellant was known to him as a pastor as he often went to the lodging to book rooms. On re-examination, PW4 stated that he knows that the appellant is a pastor though he did not know in which church.

ii. **PW5** was **P.C Ochieng' No.91893** who told the court that on 04/12/2012, he had perused the OB and found that there was an ongoing investigation on a defilement case. The witness stated that he was shown the complainant D M and accompanied P.C Gedi to take the complainant to hospital. He stated that the appellant managed to lure the complainant by telling her of other pastors at [particulars witheld] church. He stated that once the complainant followed the appellant, he threatened her with a knife and defiled her. He recounted how the appellant was arrested and found with a bag and a bible with his name. He stated that they also recovered the complainant's bag which had her clothes and her shoes were recovered in the room marked as exhibit 1.

On cross-examination, he told the court that he is a qualified investigator. He stated that the complainant knew the appellant as they had fellowshipped together at AIC Church. He rejected what the appellant alleged that the defilement case came as a result of a personal grudge. He stated that the doctors report confirms what the arresting officers testified that the appellant had been found asleep in the lodging after defiling the complainant. He stated that the appellant had been arrested with all the exhibits. He maintained that it was the appellant who had defiled the complainant.

Defence witnesses

i. When put on his defence, the appellant **Gabriel Musau** testified as **DW1** and stated that he did not defile the complainant. He stated that on 04/12/12 he was at a church service at AIC ministering. He testified that the complainant was known to him from when she had visited with them. He stated that he was arrested alone on 4/12/12 near Shalom Hospital opposite the General mortuary. He denied having seen the complainant's bag and denied that he had booked a lodging at [particulars witheld]. The appellant stated in his defense that the matter was aimed at frustrating his ministry and add on to challenges he had already been facing in church.

iii. On cross-examination, he stated that he had been found with a collar in his bag which he was allowed to wear outside church. He added only that he did not know [particulars witheld] lodge and that he was arrested holding his bag. He told the court that the complainant was a lady known to him and that he went to college with her sister.

7. **DW2** is **Esther Musau** who told the court that the accused/ appellant is her fourth child. She stated that the accused had slept over at her house on 03/12/12. She added that she learned that the accused had been arrested on 05/12/12 but stated that she did not know of his whereabouts on 04/12/12. DW2 said that the complainant had been to their church on 04/12/12 to ask for the pastor's place. She testified that the accused left her house on the morning of 04/12/12 at 7.30 a.m. to return at 11 a.m. She said that the accused/ appellant's father had also been present.

On cross-examination DW2 stated that the complainant was known to her as she attended the church near their home. She told the court that she had met her twice and could not easily recognize her. She did not know whether the person named D was the complainant in the case. She testified that the appellant was not married and was born in 1985. She said that he was living in her house as he did not have one of his own and that he wears a collar from the AIC church.

8. **DW3** was one **Peter Nzioki Mwinzi** who told the court that he hails from Kathiani and that the accused/appellant is a person known to him. He stated that he got the information from his parents that the appellant had been arrested for having defiled a lady. He stated that he was not present when the crime took place but said that he had once seen the complainant in February 2013. He stated that he had been with the accused/appellant and his father and the girl with her parents at AIC Kathiani. He told the court that the complainant had said that she had not been defiled by the appellant but there had been other issues. He stated that he knew the accused as a good person.

On cross-examination, he told the court that he does not know the accused/ appellant's age but he confirmed that he was not married. He stated that he had taken the appellant to Bible College and said that he did not know the complainant before he went to her home at the church. He stated that at the time they met, accused was at remand. He said that it is the accused's father that had requested that he take him there though he did not know much about the case.

SUBMISSIONS

Appellant's submissions

9. In his submissions the Appellant says that the case has not been proven beyond reasonable doubt because there is nothing to show that the complainant was at the scene of the crime. He stated that PW4 who was working at the hotel did not mention that he was accompanied by anyone as he showed him the rooms and admitted that he did not see the two leave the hotel together. He testified that he did not know which room the complainant was staying in.

10. In this regard, the appellant also cited that if it was true that he had defiled the complainant, they would both have been found to have Syphilis. He however tested negative while the complainant was positive. He also questioned the validity of the testimony concerning the items found in the room where he was arrested, saying that there was nothing to prove that these items were indeed found in that room. In addition, he cited that there was no search/recovery certificate showing the items that were collected from the said room.

11. The appellant cited contradictions in the recording of the date when the crime took place saying that it casts doubt on whether the offense took place. He also highlighted the issue of the rank of the investigating officer stating that the officer was a corporal whereas the law prescribes that the investigating officer be at least in the rank of an assistant inspector. He stated that this rendered the trial a nullity.

12. Concerning the medical report, the appellant stated that it was not properly evaluated citing that the complainant's hymen was shown to be broken though not freshly broken. He said that this evidenced that she had engaged in sexual relations earlier, also confirmed by the fact that she was pregnant.

13. He stated that the complainant must have mistaken him for a person who had defiled her on an earlier date.

14. The accused/appellant stated that there was no resistance by the complainant as she did not scream. He stated that this was a sign that the offense against him was fabricated and added that PW4 also stated that he did not hear any noise from the room.

15. He cited the absence of the watchman from ABC plaza whom he said was a key witness in the matter and whose presence would have shed more light on the case. The appellant also stated that the watchman from Vienna also ought to have been called because according to PW4, it was him who took the complainant and the appellant to the room. He also noted that Dr.Kiragu who conducted the age assessment test would have been a key witness in the case. He concludes in this regard that failure to call all the witnesses damaged the case.

16. The appellant also stated that the trial magistrate failed by dismissing his alibi defense and the evidence of his defense witnesses. He said that the reasons given for dismissing the case were not in compliance with Section 169(1) of the CPC. He highlighted that the burden of

proof never shifts from the prosecution to the accused/appellant even with the introduction of an alibi. He states that the prosecution poorly investigated the alibi.

Respondent's submissions

17. The Respondents submit that the matter was indeed proven beyond reasonable doubt because the evidence was credible and well corroborated. They said that the evidence adduced proved that the complainant was a minor aged 15 years and that the person who defiled her was the appellant.

18. On the issue of the investigating officer's rank, the Respondents state that the law that provided that the investigating officer not be below the rank of Assistant Inspector was amended in 2007. They stated that the only requirement currently is that the appointment be via a notice in the Kenya Gazette.

19. The respondents stated that it was untrue to state that the medical doctor had exonerated the appellant from the offence. Though the hymen had been broken prior to the incident and the pregnancy on the complainant conceived earlier, there was evidence of infection similar to that of the complainant on the accused from the Urinalysis and he was put on antibiotics.

20. Respondent stated that even though the medical evidence proving defilement was lacking, the complainant's testimony in the case of a sexual assault was enough to incriminate the accused/appellant of the offense of defilement. He cited that this was held in the case o*f* ***KASSIM ALI vs. REPUBLIC*** (2006) eKLR.

21. In respect to the issue of calling witnesses the respondents state that the appellant had a chance to call all the relevant witnesses to his case who would have established his defense. This ground was therefore untenable.

22. Concerning the defense of alibi, the respondent states that the alibi was not worth pursuing due to the fact that PW1, PW2 and PW4 all testified that the appellant was arrested at the scene of the crime. The appellant's mother is the only one who claimed that the appellant was at her house on the material date.

Issue for determination

23. In examining the appellant's grounds for appeal and the submissions by the appellant and the Prosecution, the main issue for determination is whether the defilement case was proven beyond reasonable doubt.

24. Reasonable doubt was described in the case of ***Miller – V- Minister of Pensions*** [1947] 2 ALL ER 372 *where Denning J* stated:

> ***"****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 proved beyond reasonable doubt, but nothing short of that will suffice."*

Proof of Defilement

25. In the instant case, the testimonies adduced by the prosecution witness put the appellant squarely at the scene of the crime. It is clear from the various witness statements that the appellant scouted for a room, lured the complainant there, defiled her and was arrested after the complainant escaped and reported the matter at the police station. The age of the child was proved by both her testimony that she was born in 1996 and that she was at the time of the offence 16 years of age, and medical assessment presented by the Doctor (PW3) as 15 years s at the date of the offence on 4th December 2012. The child did not produce a birth certificate to show the exact date in 1996 that she was born. On any count, however, she was a child within the meaning of the Sexual Offences Act, and the age element in offence of defilement under section 8 (1) of the Act was proved.

26. Efforts to show that the complainant was previously known to him were not corroborated and did not negate the effect of the crime or that it was him who committed it. It did not matter that the complainant was known to the appellant or his mother or that as testified by the mother come to visit their home. It was not a case of rape in which consensual sexual intercourse may be a defence. It was a case of defilement of a minor for which no consent, express or implied, would cure.

27. In addition, the medical evidence and the testimony of the doctor, PW3 showed that the complainant had indeed been defiled. The alternative charge of indecent assault could not stand as the medical examination proved penetration. It is not true as alleged in his grounds of appeal that the medical doctor had exonerated him from the crime of penetration. He testified that the complaint's hymen was broken before but this did not mean that she had not been defiled. Both the appellant and complainant received prescription for medication to treat an infection. The medical doctor also testified that the complainant had fresh bruises and lacerations on her labia minora evidencing sexual assault.

28. Defilement is not only committed by an assailant who first sexually penetrates a minor victim but also by repeated or subsequent penetration before the child attains the age of 18 years and it is immaterial that the girl's hymen had been broken in previous liaison.

Rank of Prosecutor

29. On the issue of the rank of the investigating officer, prosecution was previously restricted to the assistant inspector of police and above in **Section 85 (2)** of the **Criminal Procedure Code. It is** worth noting that the said provision was amended by **Legal Notice No. 7 of 2007**. There is no longer any requirement that a case must be prosecuted by a police officer who is not below the rank of an Assistant Inspector of Police.

30. Before 2007, *section 85 (2) of the Criminal Procedure Code* provided as follows:

> *"The Attorney General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purposes of any case"*.

31. It was also noted by the learned judges of Appeal in the Court of Appeal case of **JOSEPH *Kamau Gichuki V Republic*** CRIMINAL APPEAL NO. 523 OF 2010 that by Act No 7 of 2007, section 85 *(2)* was amended to delete the words *"not being a police officer below the rank of Assistant Inspector of police"*. It was highlighted that that amendment was a reaction to a number of cases where the courts in Kenya had nullified proceedings and acquitted accused persons whose prosecution was conducted by police officers below the rank of assistant inspector. The appellant abandoned his objection in this regard having been shown the Gazette Notice No. 17450 of 20th November, 2012 indicating that the prosecutor in this case was at the time he prosecuted the case gazetted as Prosecutor.

Additional witnesses

32. The witnesses called to testify had corroborative evidence which proved the prosecution case beyond reasonable doubt. Any witness that the appellant felt would have assisted his case ought to have been called by him. Failure by the Prosecution to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

33. As stated by the Court of Appeal in the case of ***Bukenya & Others –Vs- Uganda*** (1972) Ea 549, Page 550:-

> *"It is well established that the Director has a discretion to decide who the material witnesses are and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the director is not required to call a superfluity of witnesses; if the calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution."*

Alibi Defence

34. The appellant complained on appeal that the evidence of his defense witnesses was not considered. The alibi defence was set up by the evidence of his mother, DW2 who says that on the night of the offence, the accused/appellant spent the night at her house and that he only left at 7.30am on the morning of 4th December, 2012. This has however not been substantiated or corroborated by any other witness. Even the appellant himself did not claim to have been at his mother's home. DW3 only testified to his intervention after the appellant had been charged in court when he met the complainant and her parents, sister and a pastor with the object of seeing "whether case would be conducted when accused was out on bond" for which he testified that the parents had no problem. His hearsay statement that "the girl said that she was not defiled only there were other issues" is of course not acceptable as truth of the content of the statement.

35. In the case of ***Karanja Vs. R*** CRIMINAL APPEAL NO. 65 OF 1983 [1983] KLR 501 the Court of Appeal said *"the word "alibi" is a Latin verb, meaning "elsewhere" or "at another place". Therefore, where an accused person alleged he was at a place other than where the offence committed at the tie when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi."* The Court also held that –

> *"In a proper case, the court may in testing a defence of alibi and on weighing it with all the other evidence to see if the accused's guilt is established beyond reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, **at an early stage in the case, and so that it can be tested by those responsible for investigation** and prevent any suggestion that the defence was an afterthought."*

36. In the instant case, the appellant did not raise at all that he had an alibi. There was no room to investigate the alibi because the appellant stated in his testimony that he was at the church preaching at the time of the offence. He did not give an alibi warning earlier in the trail to allow for the prosecution to investigate the alibi. His statement as to having been at Church at Makueni in his evidence in defence. This piece of defence evidence is, moreover, self-contradictory in that while the appellant initially claims to have been at church at Makueni town ministering, he later on in his evidence-in-chief and on cross-examination states that he was arrested at Machakos on the same day 4th December 2012 at 9.00am. And it the same day that his mother who set up an alibi for him for the night of 3rd December 2012 could not account for his whereabouts after he allegedly left home at 7.30am on the 4th December 2012. On the other hand, the complainant, PW1, the arresting police officer PW2 and the Vienna lodge worker PW4 all testified to the appellant being arrested at Room No. 5 at the lodging following the report by the complainant to the police at 6.00am on 4th December 2012.

37. When the Court weighs alibi and defence evidence in the context of the whole evidence adduced in the trial, the court must reject the appellant's alibi defence as improbable and an afterthought, and a finding of the guilty on the appellant is irresistible.

Sentence

38. The sentence of imprisonment for 25 years on the offence which carries a minimum of 20 years was explained by the trial magistrate as deserved in the interest of deterrence in view of the prevalence of the offence and was based on the finding of the age of the complainant as 15 years. .The age of 15 years was given by medical assessment but the complainant herself gave her age as 16 years at the time of the offence. Section 179(2) of the Criminal Procedure Code allows the Court to convict for a lesser offence proved.

> ***"179. When offence proved is included in offence charged***
>
> *(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*
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> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."***

39. I consider that it would be prejudicial to the appellant to serve 25 years imprisonment on the basis that the age assessment that put the complainant's age at 15 years while the complainant's own testimony gave her age as 16 years. I would adopt the age of 16 years as given by the complainant herself and convict the appellant under section 8 (4) of the Sexual Offences Act, which is a lesser offence, within the meaning of section 179 (2) of the CPC, to the offence under section 8(3) of the Act. Section 8 (4) of the Sexual Offences Act provides:

> ***"****(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."***

40. I think that the Court has in the finding on age of the complainant a basis to interfere with the trial court's discretion in sentencing. See ***Wanjema v. R*** [1971] EA 493, 494.

Conclusion

41. Accordingly, pursuant to section 354 (3) (a) (ii) of the Criminal Procedure Code, I find that the offence of defilement contrary to section 8 (1) as read with 8 (4) has been proved beyond reasonable doubt and convict the appellant. However, as the sentence for the offence of defilement under section 8 (4) of the Sexual Offence Act is imprisonment for a minimum of 15 years, the Court in quashing the conviction under section 8 (3) of the Sexual Offences Act and substituting a conviction under section 8 (4) of the Act shall pass appropriate sentence thereunder.

Orders

42. Accordingly, for the reasons set out above, the Court alters the finding of the trial court and substitutes therefor a conviction for the offence of defilement contrary to section 8(1) as read with section 8 (4) of the Sexual Offences Act and sentences the appellant to an imprisonment term of 15 years from 4th April 2014, the date of the sentence in the trial court.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 19TH DAY OF APRIL 2018

D. KEMEI

JUDGE

APPEARANCES:

Appellant in person.

Mr. Cliff Machogu, Prosecution Counsel for the DPP.