IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 44 OF 2015

SAMUEL WACHIRA MUTHUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the Judgment of the Chief Magistrate's Court at Kerugoya (Andayi W. Francis – CM) in Criminal Case No.677 of 2012 delivered on 28th September 2019.)

J U D G M E N T

1. The Appellant was charged with the offence of defilement contrary to **Section 8(1) and (2) of the Sexual Offences Act.** In the alternative he was charged with offence of Indecent Act with a child contrary to **Section 11 (1) of the Sexual Offences Act**. It was alleged that on 7th September 2012 at Kerugoya Township within Kirinyaga County, intentionally and unlawfully touched the virgina of ANW a child aged six (6). The appellant was found guilty on the alternative charge, convicted and ordered to serve fifteen years imprisonment. The appellant filed this appeal which is based on the following grounds:-

i. I pleaded guilty.

ii. That the learned trial magistrate erred in both law and facts failing to consider that there was a grudge between PW3 and the appellant about business that lead to framing of the case.

iii. That the leaned trial magistrate erred in both law and facts by failing to consider that alternative charge was also not proven beyond reasonable doubt.

iv. That the learned trial magistrate erred in both law and facts by failing to consider that I was sentenced on a charge which I was not found guilty of.

v. That the learned trial magistrate erred in both law and facts by failing to consider the contradictions made by PW1 and PW3.

vi. That the learned trial magistrate erred in both law and facts by failing to consider the medical officer did not proof the alleged offence.

vii. That the learned trial magistrate erred in both law and facts by failing to consider my defence.

viii. That the learned trial magistrate erred in both law and facts by giving me a harsh sentence of 15 years and not considering that I was a first offender and my mitigation

He prays that the appeal be allowed. The conviction be quashed and the sentence be set aside.

2. The court directed that the appeal be disposed off by way of written submissions. The appellant filed his submissions and a response was filed by the State. The Appellant filed a response to the submissions by the State.

3. The Appellant sought to introduce new evidence by way of a sketch plan which he attacked to his submission. An objection was raised by the State. The application was considered and in a ruling delivered on 10th September 2019 the same was repeated.

4. I have considered the appeal. This is a 1st appeal and as provided under **Section 347 (2) of the Criminal Procedure Code**, an appeal to the High Court may be a matter of fact as well as on a matter of law. It has also been held in a line of authorities by the High Court and the

Court of Appeal that the 1st appellate court has a duty to re-evaluate the evidence and come up with its own independent finding. In the case of ***Okeno- vs- Republic (1972) EA 32*** the Court of Appeal set out the duties of a 1st appellate court as follows:-

> **" An Appellant on a 1st appeal is entitled to expect the evidence as whole to be submitted to a fresh and exhaustive examination (Pandya -vs- Republic (1957) E.A 336) and the appellate court's own decision on evidence. The 1st appellate court must itself weight conflicting evidence and draws its own conclusion. (Shantillal M. Ruwala -vs- Republic (1957) E.A 570). It is not the function of a 1st appellate court to hereby scrutinize the evidence to support the lower courts finding and conclusion. It must make its own findings and drew 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 had the advantage of hearing and seeing the witnesses, see Peters -vs- Sunday Post (1958) E.A 424."**

The Court of Appeal in ***Kiilu & Another -vs- Republic (2005) 1 KLR 174*** stated:-

> **" An Appellant on a 1st 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 1st appellate court must itself weight conflicting evidence and drew its own conclusions.**
>
> **It is not the function of a 1st appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; and conclusions, it must evaluate the evidence. 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 had the advantage of hearing and seeing the witnesses."**

5. It is from these authorities that the 1st appellate court has to re-evaluate the evidence tendered before the trial court and come up with its own independent finding. It is not supposed to perform an exercise of supporting the conviction by the trial court. This based on the right of the accused person to a fair trial as enshrined under ***Article 50(2) (9) of the Constitution*** which states :-

> **" Every accused person has the right to a fair trial which includes the right-**
>
> **If convicted, to appeal to, or apply for review by a higher court as prescribed by law."**

6. There is no set format on how the court will re-evaluate the evidence. The appellate court as is expected must scrutinize and analyze the evidence and state its own independent finding in the judgment while at the same time having regard to the conclusions of the trial court. It must be clear from the evidence that the court has performed the duty of the 1st appellate court. See ***Court of Appeal decision in David Njuguna Wairimu -vs- Republic 2010 eKLR.***

7. I will proceed to evaluate the evidence which was tendered before the trial court.

8. The facts of the case are that the complainant AN (PW1) was at the time she gave evidence in court a minor aged six years. After a ***voire dire'*** examination, she gave her testimony on oath. She testified that she new the appellant name Samuel Wachira. She testified that on the material day the appellant did bad manners to her. According to the minor she was on her way to the hotel when the appellant held her had and led her inside his butchery. while there the appellant removed his trouser. He then removed her pant and sat on a seat. He then touched her *"chuchu"* which she indicated as her virgina by touching between her legs. The appellant then inserted his *"chuchu"* in hers while raising her. The appellant then told her not to tell anyone and also told her not to do that with another person. The appellant also told her not to be wearing trousers.

9. While she was still in the butchery a customer came and she wanted to go to her mother. The appellant held her hand to stop her from going to her mother. The appellant gave her money go to and buy a matchbox. Her mother saw her and asked her what was the problem. She disclosed to her mother what the appellant did to her. The mother took her to the police station where the matter was reported. She was then escorted to hospital. According to the minor, the appellant had done that to her many times.

10. The appellant was examined by PW3- Hezron Maina a clinical officer at Kerugoya District Hospital. He testified that he examined her on 7th September 2012 on a complaint of having been sexually assaulted severally by a person well known to her. She alleged that she was sexually assaulted by the same person within a span of three weeks and latest being on 7th September 2012. On cross-examination PW3 found that the hymen was perforated though not freshly. There were no bruises seen on labia majora and labia minora. On laboratory examination of the High virginal swab, it revealed the presence of epithelial cells which was an indication or a sign of friction in a patient of her age. The age of the injury was consistent with long standing injuries, three weeks onwards. He confirmed the nature of the offence as habitual defilement. She confirmed that the age of the patient was six years old. The P3 form was produced in evidence

11. The complainant's mother EWM testified as PW3- and narrated to the court how on that material day 7th September 2012 the complainant went home from school and she sent her to go and keep her school bag. PW3- testified that she was operating the hotel which was next to a butchery which the appellant was operating. There was a corridor which separated the butchery and the hotel.

12. It was her testimony that during the day, the appellant had bought tea and dough nut from her hotel and he went with the cup to his butchery. Later in the evening she went for her cups from the butchery. The appellant told her he would take the cups to her. As she waited the complainant ran towards her from the rear of the butchery and held onto her while looking very embarrassed. Before she could say anything the appellant gave the complainant Kshs.5/- and told her to and buy a match box. When she returned, PW3- suspected that all was not well. She held the complainant by the hand and led her to the restaurant. The minor disclosed to her that the appellant had pulled her to

the butchery and touched her private parts and that it was not the 1st time. She informed her husband and she went and reported to the police. PW 3- testified that the complainant was born on 18th May 2006 and she produced the birth certificate to prove date of her age.

13. PW4 P.C Robin Nzioki who is stationed at Kerugoya Police Station Stated that on 7th September 2012 he was on duty at the Police Station when the complainant was taken to the Police Station by her parents. The complainant had a history of having been defiled by a person who was well known to her. The complainant gave the name of the perpetrator as Wachira. The complainant was escorted to hospital by corporal peris for a medical examination. He later accompanied Sergeant Kimanzi and proceeded to Muringa-ini area and arrested the appellant and butchery where he was employed. The P3 form for the complainant was filled. He then recorded the statement of the complainant and that of her mother. He then charged the appellant.

14. The appellant was put on his defence and he elected to give a sworn statement. He told the court that on 7th September 2012 at 9.30 pm he was arrested by two policemen who told him that he was a suspect of defilement He testified that PW4 demanded Kshs.50,000/- and he would finish the case there and then. He refused to give out money without a reason. He told the court that the evidence of the complainant was lies as the prosecutor was telling her what to testify. He testified that there were customers in the butchery and that when the complainant was defiled she did not make any noise. He further said that there were children outside and none of them knew what book place apart from the complainant's mother. He further testified the doctor established that the complainant had not engaged in any act. He further stated that there was discrepancies in the evidence of the complainant and that of her mother and their evidence was not reliable. He stated that the complainant was used by her mother to finish him over business rivalry.

15. The trial magistrate in his Judgment held that penetration had not been proved beyond any reasonable doubts. That the evidence that acts of defilement had been committed on several previous occasion is not material to the present charge. He concluded that the prosecution proved the alternative charge beyond any reasonable doubts.

16. The appeal proceeded by way of written submissions

The Appellant submitted on his grounds of appeal that the timeline contradictions existed between PW1 and PW3 statements, and that it was the courts duty to analyze facts that could negate or corroborate PW1 's statement. He submitted that according to the statement of PW3 the indecent act on the minor was between 5:30 to 6:00 p.m. while according to the victim's statement it was at night.

He also submits that the prevailing circumstances did not exist for the offence to be committed he argues that if the act was done at nighttime at his place of business at the butchery, then it would have been at one of the busiest times and that they would have been seen by customers. He refers to a customer who came and that PW1 saw him, he submits that the he could not have been able to pull pw1 into the butchery while a customer was present.

The appellant submitted that the medical evidence exonerated his involvement with regard to the material date as to the defilement or indecent act. He also stated that the allegation of defilement was a creation of PW1, and that he only interacted with PW1 in the presence of her mother.

The prosecution relied on the case of **Okeno Vs Republic 072 EA 32** where the appellate court set out duties of an Appeal court. It held that the duty of the appellate court is to make its own findings and draw its own conclusion, bearing in mind that the trial court had the advantage of hearing and seeing the witnesses. The state submitted that the appellate court should hold that the case against the appellant for defilement and indecent act with a minor were proved beyond reasonable doubt.

The prosecution submitted on the key elements of the offence of defilement, the age of the complainant, proof of the penetration and the identification of the appellant as the perpetrator of the crime.

On the issue of inconsistencies in testimony the state relied on ***Willis Ochieng Odero vs Republic 2006 eKLR*** which held that contradictions are not grounds for quashing a conviction in view of section 382 of the Criminal Procedure Code

On the issue of uncorroborated evidence of PW1 the state submitted that it is trite law that corroboration in sexual offences is not mandatory as per **Section 124 of the Evidence Act.**

On the issue of a single witness the state refereed to **Section 143 of the Evidence Act,** which states that no particular number of witnesses are required to prove a fact.

The state submitted that the appeal should be dismissed and the appellant should be convicted on the first count of defilement. They submit that in accordance with the Muruatetu decision the appellant should be imprisoned for 30 years instead of life imprisonment.

In an oral submission the appellant presented to the court various certificates on carpentry and bible study/ theology studies to prove that he is a reformed man. He requested the court to bear this in mind in its determination.

I have considered the evidence tendered before the trial magistrate and the submissions by the parties. The issues which arise out of the grounds of appeal and the submissions are:-

a. Whether the appellant's conviction on indecent act with a minor was sufficiently proved by evidence

b. Whether this court should convict the appellant on the first charge of defilement which the appellant was acquitted of as submitted by the prosecution.

On the 1st issue, the appellant has alleged that there was a grudge arising from business rivalry. I find that this allegation is not true. At page 7 line 3-5 of the record the counsel for the appellant in the lower court informed court that the appellant had no problem with the complainant and the family and they had known each other for three months- see page 7 line 3, 4 and 5. When PW3- testified and was cross-examined, there was no allegation that they had a grudge. When the appellant gave his defence he admitted that he had no difference with the complainant\s mother. This is at page 59 of the record line 3. He also admitted that he used to buy tea from the complainant's mother including on that material day. I find that the allegation that the appellant had a grudge with the complainant's mother is not true. This ground must fail.

On the second ground the appellant states that the alternative charge was not proved beyond any doubts, **Section 11(1) of the Sexual Offences Act, No3/2006** provides-

> **"Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both."**

The term indecent act is defined at Section -2- of the Act as follows:-

> **a. Any contact between any part of the body of a person with the genital organs breasts or buttocks of another but does not included an act that cause penetration**
>
> **b. Exposure or display of any pornographic material to any person against his or her will.**

The elements of the offence of indecent act with a child included any contact with the victims body by the accused with this genital organs, breasts or buttocks. This offence does not require prove by medical evidence unless the victims alleges that he sustained injuries as a result of the indecent act. Evidence of contact between the victim and the offender is sufficient to prove that an indecent act was committed.

The testimony of the complainant proved that the Appellant touched her private parts using his hands. She stated that the appellant touched her ***"chuchu"*** before he put his ***"chuchu"*** into hers.

The sexual offences Act defines a child as having the same meaning as that assigned in the **Children Act (No. 8 of 2001)** see **Section 2** of the **Act.** Under the Act a child is defined as any human being below the age of eighteen years. The intention of parliament that is under the **Sexual Offences Act**, where the word child appears, it means a person below the ae of eighteen years. The prosecution produced a birth certificate which proved that the complainant was not only a child but a child of tender years as she was six years old at the time the offence was committed. The complainant was well known to the appellant, a fact which is not in dispute. The evidence of the complainant was corroborated by the testimony of PW3 who though not witnessing the indecent act, confirmed that the complainant came out from the butchery of the appellant. The court was imposed by the complainant who she found to be intelligent and bright. She was affirmed. The allegation by the appellant that the witness was coached in his presence cannot possibly be true. It was not brought to the attention of the trial court and was raised too late in the day. The allegation is not true. There was sufficient evidence to prove the charge of indecent act with a child.

In the 2nd issue for determination, the charge against the appellant was defilement. The offence of indecent act with a child was an alternative charge. Where one charged with a main and alternative charge, it means he can only be convicted in one of them which the prosecution will have proved.

17. In this case the prosecution has urged the court to convict the appellant with the offence of defilement which he states was proved and impose the appropriate sentence. In this case the complainant testified that the appellant defiled her by putting his ***"chuchu"*** in her ***"chuchu."***

Section 8(1) (2) of the Sexual offences Act provides-

> **" 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."**

The main ingredients of the charge of defilement are-

1. Age of the victim

2. Penetration

3. Identity of the perpetrator

18. The age of the victim of the defilement is key as it determines the section and the subsection under which the offender is to be charged and the sentence to be imposed. In this case the age of the victim was proved beyond any reasonable doubts by:-

- The complainant's mother (PW3) who testified that she was six years and produced her birth certificate showing that she was born on 28th May 2006. At the time offence was committed the complainant was six years old.

- The clinical officer who examined her stated that she was six years at the time he examined her. In terms of the Sexual Offences Act , age of the complainant Rules of Court) 2014 Legal Notice 101/2014 age of the complainant may be determined by way of a birth certificate, any school document, baptismal card or any other similar document.

The age of the complainant was proved with the production of the birth certificate. She was six years old at the time the offence was committed.

19. On penetration, there was evidence by the complainant that the appellant penetrated her by putting his ***"chuchu"*** which she graphically explained in court to mean his penis into her genital organs.

PW3 – Hezron Maina (was the second witness) who examined the complainant and found that the hymen was broken (old laceration).

The complainant had adduced evidence that the appellant had defiled her severally before the material day. This fact was corroborated by the medical evidence. The term penetration is defined under **Section 2- of the Sexual Offences Act** to mean ***"the partial or complete insertion of the genital organs of a person into the genital organ of another person."***

> **" Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome we however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person."**

> **" Many times, the attacker does not fully complete the sexual act during the commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed so long as there is penetration whether on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl organ."**

Penetration was proved. The complainant's evidence was that the appellant penetrated her. The trial magistrate by holding that it was not clear whether the appellant's private parts ever reached the private parts of the complainant in order that the act of penetration be deemed complete. The trial magistrate who stating that defilement is proved where there is complete insertion of the genital organ in this case the penis into the genital organs of the complainant. In view of the definition of the term penetration. penetration need not be complete insertion of the genital organ nor must it be proved by medical evidence only, see ***George Kioji -vs- Republic*** above where the court held that medical evidence is not mandatory or only evidence which an accused person can properly be convicted for defilement.

The trial magistrate has to satisfy himself with the evidence presented that defilement was committed. The evidence by the complainant shows that the appellant penetrated her. It may have been partial penetration. There was evidence of penetration on that material day. Medical evidence corroborated the testimony of the complainant that the appellant had defiled her repeatedly previously and was doing what he was in the habit of doing.

The Appellant submitted that he was acquitted of the offence of defilement. It is my finding that the prosecution proved beyond any reasonable doubts that there was penetration based on the evidence of the complainant. The trial magistrate ignored the evidence by the complainant during cross-examination that she felt pain in holding that there was no prove of penetration. It is not unusual to find that sex pests doubtfully complete the sexual act. This is why the ***Court of Appeal in Mark Oirori Moses -vs- Republic (2013)eKLR*** stated;

> **" Many times, the attacker does not fully complete the sexual act during the commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed so long as there is penetration whether on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl organ."**

This means that it is not necessary or a must that medical evidence be availed to prove penetration, provided that there is evidence that there was partial penetration or on the surface, the ingredient of the offence is demonstrated.

In a persuasive decision by ***Ondunga in B.O.O -v- Republic (2018) eKLR*** it was stated

> **" with respect to the evidence of penetration, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence."**

There was evidence of penetration by the complainant and even medical evidence found upon examination of high virginal swab there was presence of epithelia cells which was a sign of friction.

20. It should also not have escaped the mind of the trial magistrate that this being a sexual offence, it is not normally committed in the glare of the public for there to be eye witnesses. That is why the law leans on believing the testimony of the complainant without requiring corroboration. The evidence of a child of tender years who is a victim of sexual violence need not be corroborated if the court is satisfied that the child is telling the truth. In this case the trial magistrate found that the child had sufficient intelligence and went ahead to have her sworn. The trial magistrate ought not have doubted her testimony on the fact of penetration see ***J.W.A -v- Republic (2014) eKLR*** where the court of Appeal held that where the trial court found after conducting ***voire dire*** that the witness was truthful there was no reason why the court would not rely on her evidence.

21. On the identity of the perpetrator, there is no dispute that the appellant was well known to the complainant. The testimony of the complainant that she was defiled in the complainant's butchery was corroborated by PW3- who saw her coming out of the butchery. These events are not in dispute as the appellant admitted that the complainant's mother had gone to the butcher to collect her cups. There is no

requirement of corroboration of the evidence of the complainant. **Section 124 of the Evidence Act** provides:-

> **"124. 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."**

In this case the appellant was not a stranger to her. The trial magistrate found that she was honest and truthful. He therefore had reason to believe her.

The prosecution adduced sufficient evidence to prove the identity of the perpetrator.

The trial magistrate erred by ignoring the evidence of the complainant on the fact of penetration and wrongly concluding that penetration could only be proved by medical evidence. The trial magistrate erred by holding that several previous occasions of defilement were not material when they were confirmed by medical evidence. They were relevant to prove that the appellant was in the habit of defiling the complainant and the appellant was just repeating he beastly act of defiling a minor aged six years.

The medical evidence confirmed the testimony of the minor and could not be dismissed in the manner that the trial magistrate dismissed it. The trial magistrate proceeded on a wrong view that the penetration had to be complete insertion of the penis into the virgina and result in injuries. Partial insertion amount to penetration.

22. The appellant has alleged that the trial magistrate failed to consider the contradictions. The appellant submits on the evidence that the complainant's mother said she realized the complainant was at the appellants hotel at 6.00pm while the complainant said when Wachira called her it was at night. There were no contradictions. Evening and night are at times used inter-changeably. The evidence is well corroborated that it was between the time the complainant came from school and complainant's mother was about to close the hotel and went to collect the utensils.

23. It is trite that not all contradictions will lead the court to acquit an accused person. For contradictions to lead to an acquittal, they must be such that they had cast doubts in the prosecution case which in that case will go to the benefit of the accused. However the court will ignore minor contradictions. The court of Appeal stated as much in ***Ochieng Odero -vs- Republic (2006) eKLR*** where it stated;

> **" as for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with the date indicated in the P3 form as the date of offence is different. But that per se is not a ground for quashing the conviction in view of Section 382 of the Criminal Procedure Code.**

24. The discrepancies on the time lines stated by PW2 do not cast doubt on the prosecution's evidence.

25. The appellant submits that the evidence of PW1 was not adequate. This is a sexual offence where the court is not found to seek corroboration of the complaint's evidence if it is satisfied that the witnesses was telling the truth**. Section 143 of the Evidence Act** (Cap 80 Laws of Kenya) provides that no particular number of witnesses shall in the absence of any provision of law to the contrary be requested to prove any fact. This was reiterated by the ***Court of Appeal in Benjamin Mbugua Gitau -vs- Republic (2011) eKLR.***

In **Mwangi -vs- Republic (1985) KLR 595**. The Court of Appeal held that whether a witness should be called is a matter within the discretion of the prosecution and the court will not interfere with the discretion unless it may be shown that the prosecution was influence by some obglique motive.

In **Keter -vs- Republic (2007) I.E.A 135** the court emphasized that no particular number of witnesses are required to prove a case and that only such witnesses are required to prove a case and that only such witness as are sufficient to establish the charge beyond any reasonable doubts may be called.

26. In this case the prosecution called sufficient witness to prove the charges. Having considered all the evidence tendered by the prosecution, evaluated it and analysed it above, I find that the prosecution tendered sufficient evidence to prove the main charge of defilement against the appellant beyond any reasonable doubts.

27. The appellant has stated in his submissions that the Judgment of the trial magistrate was not signed. This is however not correct as the original Judgment is signed by **Andayi W. Francis** on 30th September 2015 and was signed by **J. Kassam** who delivered it.

The appellant has also submitted that he was committed to prison for office of defilement as per the committal warrant and yet he was not convicted for that offence. The record shows that the initial committal warrant was for the offence of defilement. The warrant was however amended on 13th October 2015 to show that the appellant was committed for the offence of committing an indecent Act with a child contrary to **Section 11(1) Act 3 of 2006**. The committal warrant was corrected and the Appellant did not suffer any prejudice.

28. This question is whether this court can convict the appellant for the offence defilement and also enhance the sentence. S**ection 354 of the Criminal Procedure Code** provides for the powers of the High Court on appeals. The Section gives this court power to make such orders as

may appear just and proper. In this matter upon analyzing the evidence I find that the appellant ought to have been convicted for the main charge of defilement. I therefore set aside the conviction on the alternative charge of indecent Act with a child and substitute it with a conviction on the offence of defilement under Section 8(2) of the Sexual Offences Act.

On Sentence, the sentence provided under **Section 8(2)** is life imprisonment. The State did not give notice to the appellant that it would seek enhancement of the sentence. It would therefore not be fair to enhance the sentence. I will maintain the sentence imposed by the trial magistrate.

The appellant will therefore serve fifteen years imprisonment. The upshot is that the appeal is without merits and dismissed.

Signed By:

HON LADY JUSTICE LUCY GITARI

JUDGE

Dated, signed and delivered at Kerugoya this 8th day of October 2020.