REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 67 OF 2016

BETWEEN

JACKSON KHAYEGA MUYUNGU.....APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from original conviction and sentence of 20 years imprisonment dated 9.10.2012 by Hon. J. K. Ngarngar SPM in Hamisi SPMC Cr (SO) Case No. 467 of 2011)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. The Appellant herein Jackson Khayega Muyungu was charged with the offence of **defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act.** The particulars are that on the 31st Day of August 2011 at Kaptech Sub-location, he willfully and unlawfully defiled D.L, a child aged 13 years by causing penetration of his penis into her vagina.

2. The trial Magistrate convicted the Appellant of the said offence of defilement and sentenced him to 20 years imprisonment.

3. Being dissatisfied with both conviction and sentence, the Appellant lodged an appeal vide a Petition of appeal dated 28th October 2015. In the petition, the appellant raised the following four grounds:-

> **a. That the learned trial Magistrate erred in law and fact to convict him while relying on the prosecution witness evidence without considering that the Prosecution case was not proved beyond reasonable doubt hence it cannot hold water.**
>
> **b. That the learned trial Magistrate erred in law and fact by failing to consider that the Appellant was subjected to medical examination whose results could not implicate him to the commission of the offence.**
>
> **c. That the learned trial magistrate erred in law and in fact by failing to consider that the medical evidence failed to reveal that the sexual act was committed outside the time framed by the prosecution.**
>
> **d. That the learned trial Magistrate erred in law and fact by failing to take proper account of the credibility of the prosecution witnesses before him against the appellant and thereby convicting the appellant on the basis of the same in which he suffered prejudice.**

Duty of this Court

4. The duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. See ***Okeno Vs Republic [1972] Ea 32***.

5. In ***Kiilu & Another Vs. Republic [2005]1 KLR 174,*** the Court of Appeal outlined the duty of a first appellate court thus:-

"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must itself weigh the conflicting evidence and 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."

6. A similar view of the duty of a first appellate court was reiterated in the case of ***David Njuguna Wairimu V – Republic [2010] eKLR*** where the Court of Appeal stated:

"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

The Prosecution Case

7. PW1, DL a class seven pupil *[particulars withheld]* Primary school testified that on the night of 31st August 2011 at about 1.00am while she was sleeping at her grandmother's house with her younger siblings she felt someone's hand touching her. She stated that she woke up and found that her pants had been removed. When she tried to scream her assailant covered her mouth, slept on top of her and defiled her.

8. She testified that she finally managed to scream and her assailant dashed out, of the house, leaving his shoes behind. She stated that the assailant had threatened her and asked her to keep silent but when she finally screamed he ran away. She narrated that her grandmother heard the noise and went to her and she told her what had happened and she told her that they will deal with it the following day.

9. She also testified that she recognized the assailant's voice as that of the Appellant as he had earlier on in the day come to their home and eaten some food. She also identified the shoes as the same ones she had seen the appellant wearing during preparations for the day.

10. PW1 also testified that on the following day, she told her step mother what had happened to her after which she was taken to hospital by her uncle as she was bleeding. She stated that she was taken to Sabatia Hospital where she was treated and later reported the incident at the police station where she was issued with a P3 form. She identified the appellant in the dock and stated that she knew him well as he had assisted them carry out some chores during her father's funeral.

11. In cross examination, PW1 confirmed knowing the appellant and added that the door to the house where she was sleeping had not been locked. She also stated that she was telling the truth and that she was taken to hospital by her uncle.

12. PW2 EW stated that the minor told her that the Appellant had gone to her room at night removed her clothes and defiled her. PW2 herself checked PW1 and established that she had indeed been defiled. She stated that she took her to hospital and later to the police station where they reported the incident.

13. PW2 also stated that the complainant was sleeping at her grandmother's house at the time of the incident and that a pair of shoes and an inner pant that belonged to the Appellant were found at the scene. It was also PW2's testimony that the minor was born in 1997 and relied on her birth certificate to prove the same. She testified that Appellant was well known to her as he had helped with the casual work in the home when they had a funeral. She also stated that she had earlier on seen the Appellant with the shoes that were found at the scene.

14. In cross examination, PW2 confirmed that the Appellant was well known to the family as he had assisted with several casual jobs at the home during the complainant's father's funeral. She reiterated that the minor had been defiled and that she narrated the ordeal to her, and also told her the assailant was the appellant.

15. PW3 Henry Luvuku Imidiku,a farmer and youth winger in Kaptech area testified that on the 31st August 2011, he received a report that a child had been defiled in the area. He stated that he rushed to the scene where he found shoes and a pant which he identified as belonging to his brother, the Appellant. He stated further that the complainant mentioned that it was the Appellant who had defiled her and that he went in search of him and later handed him over to the police. He stated that the Appellant had been doing manual work at the complainant's home during her father's funeral. His evidence was corroborated by PW4, Benson Mulindi Ivavonga.

16. PW5 No. 214506 APC Benson Yano attached at Mutinda AP Post, testified that on 31/08/2011 while he was on duty, he received a complaint of defilement of a minor. He stated that he advised the reportees to take the minor to hospital. Later he rearrested the Appellant after he had been arrested by members of the public. His evidence was corroborated by that of PW6, No 92182 PC Diana Watembo**.**

17. PW7 Emmanuel Oranga, examined the minor and established that she had been defiled. He noted that the complainant's under pants were torn and blood stained while her sexual organs were swollen and the hymen torn. He also stated that there was a whitish discharge and blood clots in the complainant's private parts and that there were sperm cells in her urine. These details were captured in the P3 form produced as Pexhibit 3.

Defence Case

18. The Appellant, a resident and farmer at Kaptech Area testified that on the date of the alleged incident he was at home and that he was told that some people wanted to pay dowry and that one of them had died. He stated that he did not participate in the funeral arrangements and that the case against him was a frame-up.

Submissions

19. The prosecution in their submissions maintained that they had proved their case to the required standards and asked this court to uphold the findings of the learned trial magistrate.

20. In his submissions, the Appellant challenged the way the charges had been framed contending that the charge sheet was defective and that there was no compliance with ***section 36 of the Sexual offences Act***. He further submitted that he had been framed and asked this Court to allow the appeal.

Issues, Analysis and Determination

21. The first ground of appeal is that the learned trial Magistrate erred in law and fact in convicting the appellant without considering that the Prosecution case was not proved beyond reasonable doubt.

22. Section 8(1) of the Sexual Offences Act provides that:-

> **"8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

23. The above provisions of the law, set out the critical ingredients forming the offence of defilement which are; the age of the complainant, proof of penetration and positive identification of the assailant

24. In the case of ***Dominic Mwilaria V Republic [2018] eKLR t***he court held that:-

> **"[7] It is now beyond peradventure that, in cases of defilement, the prosecution must prove:**
>
> **1. The age of the child. This is important because defilement relates to children who are persons below the age of 18 years. Secondly, the age of the victim determines the sentence to be imposed.**
>
> **2. The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and**
>
> **3. That the perpetrator is the Appellant.**
>
> **See the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013 where it was stated that:**
>
> **"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

a) Proof of age of the complainant

25. It was the complainant's evidence that she was 13 years of age at the time of the alleged incident .Her evidence was corroborated by that of PW2, her step mother who testified that the minor was aged 13years at the time of the incident and relied on her birth certificate which was later produced in evidence as Pexhibit 4. The same was confirmed by PW7 a clinical officer who examined the minor.

26. In the case of ***Kaingu Elias Kasomo -V- R Malindi Cr. App. No. 504 of 2010*** the Court of Appeal stated that:-

> **"The age of the minor is an element of a charge of defilement which ought to be proved by medical evidence…….Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the Sexual Offences Act, the practice has been that age assessment of defilement victims is carried out by dentists. The said assessments while useful in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial court heard the minor's evidence and saw her. The court was convinced that she spoke the truth."**

27. In the case of **Edwin Nyambaso Onsongo Vs Republic (2016) eKLR,** citing the case of ***Mwolongo Chichoro Mwanyembe Vs Republic, Mombasa Criminal Appeal No.24 Of 2015 (UR)*** where the Court of Appeal held that:-

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

be credible and reliable."

28. Rule 4 of the Sexual Offences Rules recognizes that:

> **"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."**

29. The above authorities confirm that the evidence adduced by the prosecution in terms of the birth certificate and the evidence of the witnesses was sufficient to prove that the complainant was a minor aged 13 years at the time of the alleged incident.

30. The appellant however contends that if the minor was aged 13 years , he ought to have been charged with the offence of defilement contrary to ***section 8 (1) as read with Section 8 (3) of the Sexual Offences Act***. He submitted that the omission and the failure to amend the charge sheet rendered the trial null and void as it had not complied with ***section 214 of the Criminal Procedure Code,*** which provides for variance between charge and evidence and amendment of charge. He further contended that the same amounted to a violation of his rights to fair hearing envisaged under ***Article 50 of the Constitution of Kenya.***

31. It is indeed true that the charge sheet talks of defilement contrary to ***section 8 (1) as read with section 8 (2) of the Sexual Offences Act*** while the minor herein was aged 13 years. Was the defect fatal? I do not think so.

32. ***Section 382 of the Criminal Procedure Code*** provides:

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant,charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

33. In ***C M Versus Republic [2017] eKLR*** the court observed that:-

> **"A matter of preliminary a nature has arisen; that the charge theAppellant faced, convicted upon and sentenced thereto was defective. According to him, the defect is in the fact that the charge sheet stated that the offence was contrary to Section 8(1) (3) of the Sexual Offences Act- a section that is non-existent. Second, the charge sheet did not make reference to the penalty section as required. He concluded that a charge sheet should state the charge to be that of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. His view was that he was prejudiced when the trial court convicted him on a defective charge sheet, thus, a retrial should be ordered.**
>
> **[7] The type of complaint by the Appellant should be decided on the test provided in Section 382 of the Criminal Procedure Code. A finding, sentence or order passed by a court of competent jurisdiction shall only be reversed or altered on appeal or revision if the error, omission or irregularity in the Complainant, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial occasioned a failure of justice: And in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings....."**

34. The Court of Appeal in ***Thomas Aluga Ndegwa V Republic [2018] eKLR*** while considering the appellant's complaints that the charge as framed violated his rights to a fair trial as envisaged under ***Article 50(2)(b) of the Constitution*** and further that the charge sheet as framed violated the provisions of ***sections 134, 137(a)(1)(ii) and 214(1) of the Criminal Procedure Code,*** held the view that the errors pointed out by the appellant did not occasion a failure of justice and that in any event such errors were curable under ***section 382 of the Criminal Procedure Code*** (above). The Court of Appeal placed reliance on its own decisions in ***John Irungu versus Republic [2016] eKLR*** as well as ***Samuel Kilonzo Musau versus Republic [2014] eKLR.***

35. In the instant appeal it is not in doubt that the charge of defilement is provided for under ***section 8(1) of the Sexual Offences Act.*** The charge was read and the appellant fully understood it. ***Section 8(2) and 8 (3) of the Sexual Offences Act*** define the penalties and in this case the trial magistrate issued a sentence prescribed under section ***8(3) of the Sexual Offences Act*** as it ought to have been. In the circumstances, I do not think, nor is it evident from the record that the error and apparent defect in the charge sheet caused any prejudice to the appellant. The defect is minor and curable under ***section 382 Criminal Procedure Code.***

b) Proof of penetration

36. It was the complainant's evidence that while she was sleeping with her younger siblings she suddenly felt someone touching her only to wake up and find her pants removed .She testified that the appellant slept on top of her and defiled her. She stated that she bled and informed her grandmother of the ordeal. Her evidence was corroborated by that of PW2 and PW7.

37. Section 2 of the Sexual Offences Act provides that;

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

38. In **George Owiti Raya Vs Republic [2013] eKLR** it was held that:-

> **"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane."**

39. In the case of ***Erick Onyango Ondeng V. Republic (2014) eKLR*** the Court of Appeal stated the following on the issue of penetration:-

> **"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."**

40. In the case of ***G O A Versus Republic [2018] eKLR*** the court, in holding that penetration was proved stated that:-

> **"The lacerated vaginal walls, the presence of the used condom in the vagina and the missing hymen corroborated the testimony of the complainant that a penis had penetrated her vagina. There was also the evidence that the complainant could not walk properly due to the pains. PW2 corroborated that evidence of the complainant. Further, the clear narration by the complainant described a male- female genital sexual intercourse. There is therefore sufficient evidence on record to prove that the complainant's vagina was penetrated by a penis since the then status of the complainant cannot reasonably be explained otherwise in the face of the evidence. I find and hold that penetration was proved."**

41. Also see ***Michael Mumo Nzioka V Republic [2019] eKLR*** for a similar holding.

42. In this present case, the P3 form and the evidence of PW7 corroborated the complainant's evidence that she was defiled. I am therefore satisfied that the evidence adduced by the prosecution was sufficient to prove penetration and that the trial magistrate finding on the same well grounded.

c) <u>Whether the appellant was positively identified by the minor as her assailant</u>

43. It was the complainant's evidence that she knew it was the Appellant who defiled her as she recognized his voice. She stated that the Appellant had earlier on in the day come to their home and had asked her grandmother for food. She stated that he was offered food and that she knew his voice very well.

44. She also stated that the appellant left his shoes and inner pants behind when he ran away after she started screaming. She testified that she had seen the Appellant with those same shoes during the day and that they belonged to him .The shoes were produced as Pexhibit 1.

45. In cross examination she confirmed that the Appellant was well known to her and that the shoes belonged to him.

46. Her evidence on the ownership of the shoes was corroborated by that of PW3 who stated that when he visited the scene, he saw a pair of shoes which he confirmed belonged to his brother the appellant.

47. The complainant in her evidence both in chief and in cross examination, did not waver from her testimony that it was the Appellant who defiled her. She did not at any time waver in her identification of the appellant. Given that the appellant was a man well known to the child there exists clear evidence of recognition, and I find no reason to doubt the same. In this regard, I find support in the case of ***Kauli Beja Lewa V Republic [2018] eKLR*** where the court held that:-

> **"As regards the evidence of identification, while it is true that it is only the complainant who testified as to the identity of the appellant as the perpetrator, this was not an issue of identification but recognition. In Peter Musau Mwanzia vs. Republic [2008] eKLR, the Court of Appeal expressed itself as follows:**
>
> **"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition."**

48. In **Anjononi & Others vs. The Republic [1980] KLR 59** it was held that:-

> **"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."**

49. Also see the case of ***S C N Versus Republic [2018] eKLR*** for similar observations.

50. The complainant in this case knew the Appellant so well that mistaken identity could not have arisen. In his evidence the appellant did not dispute ownership of the shoes that were found at the scene and confirmed to be his, neither did he offer any explanation as to how those shoes got to the scene. In the absence of any evidence to the contrary, I am satisfied that the complainant sufficiently identified the Appellant as her assailant.

51. From the fore going it is clear that the prosecution proved all the elements of defilement as required by law, and consequently grounds 1, 3 and 4 of the petition of appeal must, and do fail.

52. The Appellant further contended that the trial Magistrate erred in law and fact by failing to consider that the results of the appellant's medical examination did not implicate him in the commission of the offence. This complaint is in my view misplaced because at no point in the proceedings did the court order for medical examination on the Appellant to prove the charges herein.

53. In **Joel Sio Mwasi V Republic [2014] eKLR** the court held that:-

> **"Precedence shows that medical examination of an accused person under Section 36 (1) of the Sexual Offences Act, 2006 is not mandatory but discretionary on the trial court. In the case of Ahmed Ibrahim Adan v Republic, Garissa High Court Criminal Appeal No. 36 of 2013, [2013] eKLR, Mutuku, J. stated that:**
>
> **"On failure by the court to order for DNA test in respect to the appellant, section 36 of the Sexual Offences Act gives courts discretion to or not to order for this depending on the relevance of this test and the nature of the case."**

54. Also refer to the case of ***Abdinasir Guhad Bore versus Republic, Garissa High Court Criminal Appeal no. 74 of 2012, [2014] eKLR*** where the court held a similar view.

55. In ***George Muchika Lumbasi V Republic [2016] eKLR*** the court was of the view that

> **"40. Despite the existence of section 36, it is now settled law that sexual assault is proved by evidence and not by medical examination. Evidence by the victim or even circumstantial evidence is enough to prove rape or defilement as the case may be. In the case of Fappyton Mutuku Ngui v Republic [2014] eKLR while considering a similar issue of medical examination in a defilement case, the Court of Appeal stated:-**
>
> **"In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who had defiled her."**

56. In **Evans Wamalwa Simiyu Vs. Republic [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

> **"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her..."**

57. What emerges from the above authorities, is that subjecting the appellant to a medical examination was a matter of discretion. The Trial court herein was satisfied that the evidence that was adduced by the prosecution was sufficient to pin the appellant to the scene and to the commission of the offence. There was no doubt as to the identity of the assailant as the appellant was well known to the complainant .The evidence is sufficient and did not warrant the medical examination of the Appellant. I accordingly dismiss the appellant's complaint.

Sentencing

58. The Appellant did not appeal on sentence. It should however be noted that ***Section 8(3) of the Sexual Offences Act*** provides that:-

> **"8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."**

59. The court in **Francis Muthee Mwangi V Republic [2016] eKLR** was of the view that:-

> **"Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principles or if the court exercised its discretion capriciously."**

60. It is to be however that the Court of Appeal distinguished the penalties prescribed under the Sexual offences Act and other offences. It was its view in **Denis Kinyua Njeru V Republic [2017] eKLR** that:-

> **"The penalties under the SOA, may be described as "straight jacket" penalties leaving no room for the exercise of any discretion by the sentencing court…… Our view, on the above legal approaches to sentencing under the SOA, is that, since the penalty provisions under the SOA do not call for the exercise of discretion in sentencing, interference by an appellate court is limited to the determination as to the lawfulness or otherwise of the sentence under review..."**

61. The position of the Court of Appeal has since changed following the Supreme Court of Kenya decision in ***Francis Karioko Muruatetu & another versus Republic [2017] eKLR,*** and the Court of Appeal decision in ***Evans Wanjala Wanyonyi V Republic [2019] eKLR.*** In the Evans ***Wanjala Wanyonyi case,*** (above) the Court of Appeal held that:-

> **"On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 considered the legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution.**

62. In the present appeal, the appellant was sentenced to 20 years imprisonment. He did not mitigate on his own behalf though the prosecution had submitted that he was a first time offender. It is my considered view, therefore, that the sentence of 20 years imprisonment was suitable in the circumstances. see ***PW Versus Republic [2019] eKLR*** (CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK JJA delivered on 6th June 2019).

Conclusion

63. From the above analysis, I find no merit in the appellant's appeal on both conviction and sentence. The same be and is hereby dismissed.

64. Right of appeal within 14 days from the date of this judgment.

65. Orders accordingly.

Judgment written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 15th day of November, 2019

WILLIAM MUSYOKA

JUDGE

In the Presence of:-

Jackson Khayega Muyungu - Appellant in person

Ms Omondi for respondent

Erick - Court Assistant