Simiyu v Republic (Criminal Appeal 49 of 2018)
[2021] KECA 295 (KLR) (3 December 2021) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 49 OF 2018

RN NAMBUYE, HM OKWENGU & S OLE KANTAI, JJA

DECEMBER 3, 2021

BETWEEN

KEN RODGERS SIMIYU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from a conviction and judgment of the High Court of Kenya (F. Ochieng, J.) dated 9th May, 2013 in Eldoret HCCRA No. 15 of 2011)

JUDGMENT

1. This is a second appeal arising from the judgment of F. Ochieng, J. dated 9th May, 2013 vide which the learned Judge dismissed the appellant's appeal against both the conviction and sentence handed down against him by the Chief Magistrate's Court at Eldoret (G. A M'Masi – SRM) on 17th January, 2011 for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that the appellant, Ken Rodgers Simiyu, on 29th October, 2010 in Eldoret East District within the then Rift Valley Province, intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of LN, a girl aged 7 years. The appellant also faced an alternative charge of an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that the appellant on the same day, time and place intentionally and unlawfully touched the private parts namely, vagina of LN, a girl aged 7 years. The appellant denied both the main and alternative charges provoking a trial in which the prosecution called five (5) witnesses to prove the charges against him, while the appellant was the sole witness in his defence.

3. The prosecution's case was briefly that JW (PW3) and SN (PW2) are parents of LN, the minor complainant born on 19th July, 2003 and was therefore seven (7) years as at the time the offences

were allegedly perpetrated against her. PW2, 3 and the appellant were at the material time members of [Particulars Withheld] Church in Eldoret. PW2 and 3 recalled PW3 leaving ahead of PW2 to the church the evening of 29th October, 2010 to prepare for "kesha". He was followed by the minor who was familiar with the church as they were living a few metres from the church. PW3 recalled seeing appellant in the church but he then suddenly vanished never to be seen again throughout the kesha. PW3 assumed the minor who also vanished from the church had gone back to the house which as we have alluded to above was a few meters from the church, only for PW2 to come and inquire from PW3 about the minor's whereabouts. They searched around the church but she was nowhere to be seen, only for her to resurface between 9 – 10.00pm. The minor did not raise any complaint concerning what she had been subjected to during the time she had gone missing.

4. It was not until the 7th November, 2010 when the child disclosed to PW2 that she had been defiled by the appellant on the very night of the kesha". PW2 disclosed that information to PW3, took the child to Eldoret District Hospital from where she was referred to Moi Teaching and Referral Hospital where the child was examined and treated by Dr. Synthia Kibet (PW4), whose findings were that the child's hymen was torn, but there was no vaginal discharge. PW4 concluded that the child had been defiled.

5. On 9th November, 2009 at 2.00pm, the matter was reported to CPL Silvan Onjeru (PW5) of Kapsoya Police Post who booked the incident in the OB and issued a P3 to the complainant, which was returned shortly thereafter duly filled. Subsequently, the appellant was arrested and arraigned in court. He denied the offence citing fabrication of the charges against him by PW3 the father of the minor over disagreements between him and PW3 over money issues in the church. He however admitted that he had no issue with the complainant.

6. At the conclusion of the trial, the trial magistrate, (G.A. M'Masi) analyzed the record and found the prosecution case against the appellant proved to the required threshold, convicted him and sentenced him to life imprisonment.

7. The appellant was aggrieved and appealed to the High Court vide Criminal Appeal No. 15 of 2011 raising various grounds of appeal. The learned Judge (F. Ochieng, J.) re-evaluated the record in light of the rival submissions before him and dismissed the appellant's appeal in its entirety.

8. Undeterred the appellant is now before this court on a second appeal raising six home grown grounds of appeal, which may be rephrased as follows: The learned Judge erred in law when he failed to:

    1) Appreciate that appellant's constitutional rights guaranteed under Article 49(1)(a)(i) of the *Constitution* on the right to be informed of the offence committed before arrest; and Article 50(2)(j)(h) on the right to be supplied with witness statements in good time to prepare for his deference were infringed.

    2) Properly appreciate that the age of the minor complainant was never established at the trial.

    3) Properly appreciate and address glaring discrepancies on the dates of the reporting of the offence to police as captured both in the charge sheet and the P3 form rendering the P3 form worthless and inadmissible in evidence.

    4) Appreciate that crucial witnesses including the investigating officer were never called to testify.

    5) Appreciate that the charge was never proved against him to the required threshold and therefore erroneously affirmed a life sentence against him without any basis.

9. The appeal was canvassed via Go-To-Meeting platform due to the prevailing Covid-19 challenges through written submissions. The appellant appeared on his own behalf while Miss Gacau the learned

Prosecution Counsel (1) (PPC (1) appeared for the State. Both adopted their written submissions without orally highlighting them.

10. It is the appellant's contention on ground 1, that he was not given reasons for his arrest by the arresting officer. Neither was he given witness statements and the documents that the prosecution relied on at the trial as evidence against him. He was therefore not accorded a fair trial.

11. On ground 2, the appellant faults both courts below for relying on both the child's health clinic card and the P3 as basis for establishing the complainant's age both of which appellant contends were erroneously admitted in evidence as the clinical card bore no official stamp. It was also in the same hand and therefore suspect while the P3 form was faulted for PW4's failure to mention that she ever examined the child before filling the P3 form. Neither did PW4 mention that any medical treatment chits were handed to her to use as basis for filing in the details in the P3 form. There were also many gaps in the P3 form which according to the appellant also made it unreliable.

12. On grounds 3 and 4, the appellant reiterates his submission in support of ground 2 and faults PW4's evidence for the failure to explain how the hymen of a minor aged seven (7) years, could have been broken by a man lying on his back and simply placing his penis on the vagina of the minor with no mention by the minor of presence of any blood or pain experienced during her vagina's contact with the man's penis with or alternatively evidence of any reaction by the minor as a result of that contact. Second, the doctor also failed to state the age of the injury which in the appellant's opinion was tantamount to stating that there was no defilement at all especially when the weapon causing the alleged injury was not indicated in the P3 form.

13. On ground 5, the appellant complains that the two courts below failed to appreciate and address discrepancies in both the charge sheet and the P3 form with regard to the date of reporting of the incident. It is his observation that the P3 form on page 1 indicates the date that the incident was reported to police as 09/11/2010 at 1400hrs while at the corner of the charge sheet, there is indication of OB xxxx which according to him means OB entry No. xxxx. His position is therefore that the two dates refer to different offences and since the two documents were relied upon in support of his conviction in the absence of the discrepancies therein being reconciled the trial was flawed, the conviction is therefore unsafe and should be vitiated.

14. On ground 6, it is the appellant's position that failure to call the investigating officer and independent members of the church who were present during the kesha as witnesses to corroborate PW2 and 3's evidence was fatal to the prosecution case as in his opinion, there is therefore nothing to controvert his assertion that PW2 and 3's evidence was nothing but a family conspiracy to use PW1 to fix him over financial differences between him and PW3. He therefore urges the court to allow his appeal in its entirety.

15. In rebuttal, the State has urged the court to reject the appellant's complaint that he was neither given reason for his arrest nor witness statements for his failure to raise those complaints before the trial court whose record is explicit that he fully participated in the trial to its logical conclusion without raising those complaints for the trial court to address them accordingly.

16. The State therefore submits that on the totality of the record as laid before the court the conclusions reached by the trial court and as affirmed by the first appellate court are sound and well-founded both on the facts and in law. There was therefore sufficient demonstration of proof of all the elements/ ingredients for proof of the offence of defilement, namely, proof of the age of the complainant, penetration and the appellant as the perpetrator of the offence committed against the complainant rendering the conviction safe and does not therefore warrant any interference by this Court.

17. On proof of the age of the minor, the State relies on the case of *Richard Wahome Chege vs. Republic [2014] eKLR* and submits that the age ofthe minor was properly established through the evidence of PW2 who in her testimony was very categorical as to the age of the child which was also corroborated by a clinic card produced in evidence as an exhibit without any objection from the appellant.

18. On proof of penetration, the State relies on section 2 of the *Sexual Offences Act* No. 4 of 2006 on the definition of penetration and the case of *Mark Oiruri Mose vs. R (2013) eKLR* and *Erick Onyango Ondeng vs. Republic (2014) eKLR* on the threshold for proof ofpenetration and submits that the findings in the P3 form were sufficient proof of penetration. Second, the fact that the doctor signed the P3 form was sufficient proof that the doctor examined the minor.

19. On the alleged failure to call crucial witnesses, the State relies on section 143 of the *Evidence Act* which provides that no number of witnesses shall in the absence of any provision of law to the contrary be required for proof of any fact and the case of *Julius Kalawa Mutunga vs. Republic [2006] eKLR* and *Bukenya vs. Uganda [1972] E. A 549* in support of their submission that the witnesses tendered by the prosecution at the trial sufficiently proved the charge the appellant faced at the trial to the required threshold and urged the court to dismiss appellant's appeal in its entirety.

20. This is a second appeal. Section 361 of the Criminal Procedure Code enjoins this court to consider matters of law only when hearing and determining a second appeal. In *Karingo vs. Republic [1982] KLR 219*, this court stated the principle underpinning section 361 of the Criminal Procedure Code as follows:

> " A second appeal must be construed to points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did."

See the reiteration in *Dzombo Mataza vs. Republic [2014] eKLR* among numerous others as follows:

> " As already stated, this is but a second appeal. Under the law, we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court....
>
> By dint of the provisions of section 361(1)(a) of the *Criminal Procedure Code*, our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

21. We have considered the record in light of the above mandate. The issues that fall for our consideration are the same as the rephrased complaints of the appellant on appeal. The first relates to alleged breach of appellant's constitutional right guaranteed under Article 49(1)(a)(i) for the alleged failure to inform him of the offence committed before arrest. The record is explicit that, indeed, PW5 never mentioned in his testimony that he informed the appellant of the offence for which he was arrested. It is however, our position that the same record is also explicit that the appellant responded to the charge and gave evidence in his defence which was a clear indication that he was aware of the charge he was facing. We therefore, find that no prejudice was occasioned to him by PW5's failure to inform him of the offence before his arrest. This complaint is accordingly dismissed.

22. On alleged infringement of the appellant's rights under Article 50(2)(j) of the Constitution, we agree with the State's observation that the record is silent as to whether the witness statements were ever requested for by the appellant. It is however evident from the record as also correctly observed by the State that no complaint was raised with regard to this issue by the appellant at the trial. It is also rejected for the same reason firstly as being belated as he fully participated in the proceedings up to its logical conclusion and secondly, it similarly amounts to an invitation for us to reappraise the facts which we are in law enjoined not to do in the absence of demonstration that these were either misapprehended or mis-appreciated by the two courts below and the law misapplied to them, a position not demonstrated herein.

23. On proof of the age of the minor, we have revisited the record of the proceedings before the first appellate court and considered it in light of the grounds of appeal the appellant had raised before that court and find that the first appellate court judge did not express himself on this issue because it was not one of the grounds of appeal raised by the appellant in his grounds of appeal before the first appellate court. However, being a point of law which can be raised at any stage of the proceedings and since both parties have made submissions thereon, we find it prudent to pronounce ourselves thereon.

24. The position in law as we know it is that proof of age of the victim in sexual assault offences is crucial to the proof of the offence against an alleged perpetrator. This court has already numerously pronounced itself on the issue of the need to establish the age of a victim of alleged sexual assault. We fully adopt the position taken by the court in the case of *Kaingu Elias Kasomo vs. Republic; Malindi C.A Criminal Case No. 504 of 2010* in which the court expressed itself on this issue as follows:

> " Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

25. The court has also expressed itself on the threshold for such proof. In the case of JKM vs. Republic [2020] eKLR, the court approved the holding in the case of John Cordon Wagner vs. Republic Criminal Appeal No. 404 of 2009, for the holding inter alia that;

> " In defilement cases, the age of the complainant is proved either by medical evidence or through other evidence since the *Sexual Offences Act* has different categories of ages"

and the case of *Musyoki vs. Republic [2014] eKLR* for the holding inter alia that apart from medical evidence, age may also be proved by birth certificate, the victims' parents or guardian and by observation and common sense.

26. When similarly confronted in the case of Richard Wahome Chege vs. Republic [2014] eKLR and which we also fully adopt, the courtexpressed itself as follows:

> " on the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? ..."

27. In the instant appeal, the age of the minor was given by PW2, the mother of the minor and corroborated by the child's clinic card both of which fell into the category of mode of proof of age in sexual offences already approved by the court. That evidence was never challenged at the trial or before the first appellate court. The appellant's belated attack on a second appeal though we appreciate is a

point of law that can be raised at any stage of the proceedings as already alluded to above, has no basis in law and is accordingly rejected. We are satisfied that the age of the minor was properly established.

28. Issue number 3 relates to alleged existence of discrepancies in the particulars with regard to the date of reporting the offence and commission of the offence as reflected in both the charge sheet and the P3 form. The law with regard to the mode of approach in instances where allegation of alleged existence of inconsistencies, conflicts and contradictions in a prosecution is as laid out in section 382 of the Criminal Procedure Code. It provides:

> " Subject to the provisions herein before contained no findings 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 should have been raised at an earlier stage of the proceedings."

In *Joseph Maina Mwangi vs. Republic [2000] eKLR* the court expressed itself on this issue as follows:

> " In any trial, there are bound to be discrepancies and any appellate Court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code to determine whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences. In Kimei vs. Republic [2002] I KAR 757, it was stated that "it is not every conflict or contradiction in evidence, even of a minor nature that vitiates a trial. To lead to such eventuality, the contradiction involved must be of such a nature as to create doubt in the mind of the Court regarding the guilt of the accused." In Njuki & 4 Others vs. Republic [2012] IKRL 771, it was stated that "where discrepancies in the evidence do not affect on otherwise proven case against the accused, a court is entitled to overlook those discrepancies.""

29. Our take on the above exposition when considered in light of section 382 of the CPC is that an error, omission or irregularity is curable within the ambit of section 382 of the CPC where the same has not occasioned a failure of justice. See also the case of *Mugo vs. Republic [1984] KLR 608*, *David Irungu Murage & Another vs. Republic [2006] eKLR* and *Thomas Aluga Ndegwa vs. Republic [2018] eKLR* on the abovethreshold.

30. On doubts, gaps, inconsistencies, discrepancies and contradictions in evidence, the position in law is that these are bound to occur in a criminal trial. See *Njuki & 7 Others vs. Republic [2007] KLR 771*. The role of the court where these are alleged to exist is to reappraise them and determine whether they are inconsequential to an accused person's guilt or whether they are fundamental and therefore vitiate the trial. See Vincent Kasyula Kingoo vs. Republic Nairobi Criminal Appeal No. 98 of 2014.

31. The discrepancies the appellant complains of are those indicated in the top left hand corner of the charge sheet as OB xxxx and that indicated in the P3 form against the date and time the offence was reported to police indicated as 9/11/2010 at 1400hrs which according to appellant refer to two different incidences rendering the trial flawed.

32. Section 134 of the Criminal Procedure Code provides, inter alia, as follows:

> " Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

In *Mwasya vs. Republic [1967] E.A 345*, the court held inter alia that where a crucial issue of fact is not contested in any trial, the variance between the charge and the evidence tendered is curable under section 382 of the Criminal Procedure Code. In *Yongo vs. Republic [1983] KLR 319*, the Court held, inter alia, that a charge is defective where it, inter alia, gives a mis-description of the alleged offence in the particulars. See also *Kimeu vs. Republic [2002] 1 KLR 756* for the holding, inter alia, that not every conflict between the particulars of the charge and the evidence will vitiate a conviction especially where the conflict is minor or of such a nature that no discernible prejudice is caused to the accused.

33. Applying the above threshold to the appellant's complaint herein, our finding thereon is that the appellant's complaint is baseless. This is because the OB entry xxxx corresponds with the date of arrest as indicated further down in the charge sheet, while the date in the P3 form as clearly indicated refers to the date the report was made to the police. Nothing much turns on this complaint. It is accordingly rejected.

34. On witnesses, the position in law is as explicitly stated in section 134 of the *Evidence Act* Cap 80 Laws of Kenya that no particular number of witnesses in the absence of any provision of law to the contrary is required to prove any fact. In B*enjamin Mwangi & Another vs. Republic [1984] eKLR*, the court held, inter alia, that as to whether awitness should be called by the prosecutor is a matter within the discretion of the prosecution and a court will not interfere with that discretion unless, perhaps, it may be shown that, the prosecutor has been influenced by some oblique motive to withhold such a witness from the court.

35. In *Bukenya & Others vs. Uganda [1972] E. A 549,* the predecessors of the court placed an obligation on the prosecution to make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. A corresponding obligation was placed on the court to call witnesses whose evidence is essential for the just decision of the case. The power donated in the Bukenya case [supra] is no licence for either the prosecution or the court to call a superfluity of witnesses. The power exists solely for purposes of calling only such witnesses as are sufficient and necessary to establish the charge to the required threshold. *See Keter vs. Republic [2007] 1 E.A 135*.

36. The witnesses the appellant complains were not tendered to testify are the investigating officer who investigated the incident for him to shed light on his findings on the investigations into the incident and independent witnesses who were allegedly present during the kesha for them to confirm that they saw the appellant and the child on the material night when the incident allegedly occurred to rule out what the appellant termed as a family conspiracy to fabricate the charge against him to settle differences between him and PW3 over funds collected from the church community and were meant for the youth welfare purposes to which PW3 was opposed.

37. We agree that the investigating officer was not called. Neither did he feature anywhere in the proceedings as the prosecution case involved an incident where the victim disclosed the perpetration of the offence against her almost a week later. She was taken to hospital and then the matter reported to the police following which report the appellant was arrested and subsequently arraigned in court. Calling such an investigating officer as a witness would not have added any value to the prosecution case as such a witness would simply have narrated to court the events as narrated by PW2. We therefore

find no miscarriage of justice was occasioned to the appellant for the failure to call that witness due to the peculiar circumstances surrounding the commission of the offence as aptly narrated by PW2.

38. As for independent witnesses, indeed none were called. We also find no prejudice was however occasioned to the appellant for the failure to call the said witnesses as this was an instance where no suspicion was raised about the disappearance of the child at the time she resurfaced. We therefore also find no prejudice was occasioned to the appellant for the prosecution's failure to call the independent witnesses especially when there is no evidence that any of them was privy to what had happened to the child.

39. On proof of the offence of defilement, the position in law is that there are three elements/ingredients for proof of the offence of defilement namely, age, penetration and identity of the perpetrator. We have already ruled above that the age of the victim was properly established. That leaves the issue of penetration and identity of the perpetrator. Section 2 of the *Sexual Offences Act* defines penetration to mean, "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

40. In *Maripet Loon Komok vs. Republic [2016] eKLR* it was held, inter alia, that penetration can be confirmed by medical evidence. See also *Mark Oiruri Mose vs. Republic [2013] eKLR* for the holding, inter alia,that "so long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ ...." and *Erick Onyango Ondeng vs. Republic [2014] eKLR* for the holding inter alia that "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 raptured."

41. The testimony of the minor victim was, inter alia, "He removed his penis and penetrated my vagina" while that of PW4, the doctor who examined the minor was that "the hymen was torn. There was no vaginal discharge. The girl was defiled."

42. The appellant has taken issue with that evidence for the failure of the girl to complain of any pain and how her hymen could have been torn in the manner the girl described how the offence was committed against her. As submitted by the State, those were matters that ought to have been put to PW1 and PW4 in cross-examination. Second, they amount to an invitation for us to interrogate facts tendered at the trial and pronounce ourselves there on a matter falling outside our mandate as a second appellate court and which we decline. Likewise, the attack on the contents of the P3 form and the adequacy or otherwise of its contents ought to have been raised at the trial with PW4.

43. In light of the principles assessed above on the legal threshold for proof of penetration and the nature of proof of penetration, we are satisfied that the evidence adduced on the record proved existence of both penetration and the identity of the perpetrator especially when it is not in dispute that the appellant was known to the victim. There was light. The victim knew the appellant's house before the alleged incident took place. Her testimony was unshaken. The court found her truthful and therefore credible. The law allows the court to base a conviction on her evidence even in the absence of corroboration. Herein, there was corroboration from medical evidence which we have ruled was properly admitted in evidence. We therefore, find no basis to differ with the concurrent findings of the two courts below on the identity of the perpetrator.

44. Lastly, on the issue of the life sentence, the court has numerously expressed itself on it. We take it from the reiteration on the current jurisprudential position on the issue as restated in the case of *JKM vs. Republic [2020] eKLR*. As for the constitutionality or otherwise of themandatory life imprisonment

sentence handed down against the appellant by the trial Court and affirmed on appeal by the High Court, the Court in the case of JKM vs. Republic [supra] has already expressed itself thereon as follows:

> "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 vs. Republic [2018] eKLR Kisumu Criminal Appeal No. 2011 and in Jared Koita Injiri vs. Republic, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the *Sexual Offences Act*. This Court noted that the Supreme Court in Francis Karioko Muruatetu & Another vs. 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. Guided by the aforestated Supreme Court decision, this Court in Christopher Ochieng vs. Republic (supra) stated:
>
> "In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis..... Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & Another vs. Republic (Supra), wewould set aside the sentence of life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial Court."
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> In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & Another vs. Republic (supra) and persuaded by the decisions of thisCourt in Christopher Ochieng vs. Republic (supra) and Jared Koita Injiri vs. Republic, Kisumu Criminal AppealNo. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 years' term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 years' term of imprisonment meted upon the appellant. We substitute the 20 years' term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on 18th September 2015.

45. We fully adopt the above as the correct position to take herein. In the result and on the totality of the above assessment and reasoning, the appeal against conviction is dismissed. The appeal against sentence is partially allowed. The sentence of life imprisonment is set aside and substituted with one of thirty (30) years' imprisonment from the date of conviction.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR