Rame v Republic (Criminal Appeal 44 of 2017)
[2024] KEHC 7888 (KLR) (Crim) (26 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7888 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 44 OF 2017

GL NZIOKA, J

JUNE 26, 2024

BETWEEN

HELMUTH RAME ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the decision of Hon. T. W. Murigi (Chief Magistrate) delivered on; 8th April, 2016, vide Criminal Case No. 2261 of 2005, at Milimani Law Courts, Nairobi)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's Court at Milimani charged vide Criminal Case No 2261 of 2005 with the offence of conspiracy to defraud contrary to section 317 of the *Penal Code* in count (1).

2. The particulars of the offence are that on diverse dates between 1st December 2004 and 27th February 2006 in Nairobi within Nairobi area jointly with others not before court conspired with intent to defraud Moses Wachira of USD 122,000 by means of agreeing to sell an aircraft LJ 528 Registration No 5Y-NBB falsely representing that the said accused persons were in a position to sell and transfer it in a serviceable condition.

3. The appellant was charged in count (2) with the offenceof obtaining money by false pretences contrary to section 313 of the *Penal Code*.

4. The particulars of the offence are that on the 27th day of January 2005 in Nairobi within Nairobi area with intent to defraud obtained from Moses Wachira USD 2000 by falsely pretending that he was in a position to transfer to him an aircraft LJ 528 Registration No 5Y - NBB in a serviceable condition a fact he knew to be false.

5. Similarly, the appellant was charged in count (3) with the offence ofobtaining money by false pretences contrary to Section 313 of the *Penal Code*.

6. The particulars are thaton the 10th day of February 2005 in Nairobi within Nairobi area with intent to defraud obtained from Moses Wachira Kshs 775,000/- by falsely pretending that he was in a position to find a new engine for the aircraft LJ 528 Registration No 5Y - NBB a fact that he knew to be false.

7. Finally, the appellant was charged in count (4) with the offence of obtaining money by false pretences contrary to section 313 of the *Penal Code*.

8. Thaton diverse dates between February 2005 and May 2005 in Nairobi within Nairobi area jointly with others not before court with intent to defraud obtained from Moses Wachira aircraft spares worth USD 98,490.02 by falsely pretending that he was in a position to repair the aircraft LJ 528 Registration 5Y - NBB a fact he knew to be false.

9. The charges were read to the appellant and he pleaded not guilty to all of them. The case proceeded to full hearing with the prosecution calling a total of ten (10) witnesses.

10. The prosecution case is that Captain Ricky Gitucha (PW3) informed PW1 Moses Kariuki Wachira (herein" the complainant") that the appellant was selling an aircraft registration No 5Y-NBB serial No LY528 (herein "the aircraft") situate at Wilson airport in Nairobi. That the complainant expressed interest in the purchase of the aircraft and flew into the country from United States of America (USA).

11. Upon arrival he was introduced to the appellant by Captain Gitucha (PW3) and showed the aircraft by the appellant which had been disassembled with the engine propellers and other vital components missing. That it was said to have been dissembled to reduce volume. Further it was said to have been manufactured in the year 1971, with engines serial number PCE 20174 and PC 2046.

12. That he was advised by the appellant to contact Neils Bruel, who was the owner of the aircraft and domiciled in Denmark. However, appellant offered to sell the aircraft for a sum of USD 190,000 if in flying condition or USD 100,000 if for repairs, with USD 90,000 to the appellant to repair, USD 45,000 for spare parts and USD 45,000 for labour charges.

13. That as he was assured the engine was available in the store, he committed himself to purchase the aircraft and buy the engine. That he was given the specification of the engine. On 1st December 2004, the complainant sent the 1st instalment of USD 16,000 which was acknowledged as evidenced by receipt marked (Pexh 3). The same was acknowledged by Neils Bruel.

14. On 12th January 2005, the complainant made a payment of Kshs USD 35,000, which was acknowledged by Mr. Neils Bruel as per receipt marked (Pexh 5). Consequently, the complainant was issued with a receipt for a total sum of USD 108,032.39 marked as (Pexh 6). That the final payment was made to the appellant at Wilson Airport in the sum of USD 2000 in the presence of PW3 Captain Gitucha.

15. That in the month of January, the complainant met Mr. Neils Bruel and the appellant in the appellant's office and concluded the purchase of the aircraft. That the appellant was authorized to sign all documents and the complainant given bill of sale dated 2nd February 2005 marked as (Pexh 8) and a letter to the Kenya Aviation Authority for hand over of the aircraft. That he was further given a copy of certificate of registration of the aircraft (Pexh 11).

16. However, despite the appellant's promise to transfer the aircraft to him the same was never transferred. Further, he inquired about the repairs and he was told by the appellant that, one engine had gone

missing in June 2004 and the theft reported at Wilson Airport Police Station and that the complainant was confident it would be recovered.

17. The complainant further stated that he was to purchase, a 2nd aircraft and the appellant requested for down payment. That the parties executed a contract dated, 21st January 2005, written by Neils Bruce in Denmark. That the cost of the 2nd aircraft was USD 175,000 and on 22nd March 2005 he paid Mr. Neils USD 40,000. However, he did not make any more payment as the 1st aircraft had not been released.

18. That subsequently, the complainant purchased spare parts and sent to the appellant. However, when the appellant sought for more spare parts, he was not inclined to offer anymore spare parts but purchased them in protest.

19. That, the appellant continued requesting for more spare parts as he purchased in protest and even sent the appellant additional sum of USD 861.65 for other spare parts. That when the appellant requested for a further sum of USD 12,157.85 he declined and informed the appellant that, he would only pay on delivery of the aircraft.

20. That, as at that time he had paid a total sum of USD 110,000.

21. That, in the month of June 2005, he went to the appellant's office to ask for the aircraft, certificate of registration and the spares to take the aircraft elsewhere or the appellant pay him an equivalent of Kshs 2,000,000. However, the appellant claimed that, the complainant owed him a sum of USD 12,000 and that is why he declined to release the aircraft. That, the appellant became annoyed and punched his left shoulder.

22. The complainant testified that he became annoyed and reported the matter to the police. The appellant was then arrested and charged. That six (6) month after the appellant was charged, he transferred the aircraft to Kenya and Civil Aviation Authority and CID requested that the parties conduct an audit on the aircraft.

23. That the audit was to be performed by Mr. Wanyaro who produced a report (Pexh 17). However, the aircraft was not released to him and he requested the appellant to refund his money but he refused. However, Mr. Neils gave him part of the money. But he also confirmed that he had filed a civil claim against the appellant.

24. At the conclusion of the prosecution case, the appellant was placed on his defence. In a brief an unsworn statement he testified that, he was not in conspiracy of any kind or tried to defraud the complainant of anything. Further he never tried to sell any aircraft to the complainant and that, he does not own an aircraft. That, the aircraft belonged to Neils Bruel. He further denied receiving money for anything. He produced the documents referred to in cross-examination as exhibits 1-14.

25. At the end of the trial, the court delivered a judgment dated 8th April 2016, acquitted the appellant on count (1) and (2) on the ground that the prosecution did not prove the charges on those counts. However, he was convicted on count (3) and (4) and sentenced to pay a fine of; Kshs 500,000 in default one (1) years imprisonment on count (3) and on count 4, a fine of Kshs 1,000,000 in default to serve two (2) years imprisonment.

26. However, the appellant is aggrieved with conviction and sentence and appeals against it on the grounds stated as follows: -

    a. The learned magistrate erred in law and in fact when she convicted the Appellant on Count 3 when in fact no evidence was tendered to the effect

that the Appellant ever received any penny let alone Kshs 775,000 from the Complainant.

b. The learned magistrate erred in fact when she convicted the Appellant on Count 3 when she failed to appreciate that the Complainant himself had given an undertaking to replace the missing engine with Niels Bruels and not the Appellant.

c. The learned magistrate erred in law and in fact when she convicted the Appellant on Count 3 when she failed to appreciate from the evidence before her that the Complainant made payments to a company called Air Traffic Co Ltd in which the Appellant worked and not the Appellant himself in regard to the repair of the Aircraft 5Y-NBB

d. The learned magistrate erred in law and in fact when she failed to appreciate that the prosecution's evidence in respect to the missing engine did not in any manner refer to or incriminate the Appellant.

e. The learned magistrate erred in law and arrived at an unlawful decision in respect to Count 3 when she ignored the entire evidence of PW10, the investigating officer Mr. Oburu, whose testimony as such I.0. exonerated the Appellant entirely.

f. The learned magistrate erred in law and in fact in failing to properly evaluate and asses the evidence before her in convicting the Appellant on Count 3, which evidence exonerated the Appellant.

g. The learned magistrate erred in law and in fact when she convicted the Appellant on Count 4 when she failed to appreciate from the evidence before her that the spare parts that the Complainant in respect of the Aircraft 5Y-NBB he was buying from Niels Bruels were sent and delivered to a company called Air Traffic Co. Ltd and not the Appellant at all.

h. The learned magistrate erred in law and in fact when she convicted the Appellant on Count 4 when she failed to appreciate that no evidence had been tendered to demonstrate that the Appellant was the recipient of the alleged spare parts.

i. The learned magistrate erred in fact when she convicted the Appellant on Count 4 when she failed to appreciate from the evidence before her that the repairs to the Aircraft in question were to be effected by a company called Air Traffic Co. Ltd and not the Appellant.

j. The learned magistrate erred in law and in fact when she convicted the Appellant on Count 4 when she failed to appreciate that the company called Air Traffic Co. Ltd is a legal person of its own separate from the Appellant and hence no lawful conviction of the Appellant could flow thereby.

k. The learned magistrate erred in law when she imported evidence into the case that had not been tendered at all, to justify convicting the Appellant on Count (4)

l. The learned magistrate erred when she failed to warn herself on the dangers of convicting the Appellant on evidence she had not tried, being the 4th

magistrate to take over the matter after she declined to start it de novo. She thereby failed to apply the correct principles of law.

m. The learned magistrate failed to warn herself on the likely violation of the Appellant's right to a fair trial under Articles 50 read together with Article 25 (c) of the *Constitution* granted the effluxion of time and lengthy period between the charge and final trial.

n. The learned magistrate erred when she failed to appreciate that the prosecution failed to prove their case beyond reasonable doubt with respect to Count 3 & 4 such as would sustain a conviction.

27. However, the respondent opposed the appeal vide grounds of Opposition dated 31st January 2022 which states that: -

a. The Appeal is not arguable and has no chance of success since the evidence on record adduced by the prosecution during the trial was sufficient to support both the conviction and sentence.

b. The Appellants was properly convicted and sentenced lawfully.

c. The applicants have not demonstrated existence of an arguable appeal with high likelihood of success.

d. The orders sought on sentencing are discretionary and to that effect the Appellant has failed to demonstrate that they are deserving of this court discretion.

28. The appeal was disposed of way of written submission. The appellant filed submissions dated 25th January, 2019 while the respondent filed submissions dated 6th March 2019.

29. The appellant identified three issues for determination namely whether:

a. That the trial was unfair;

b. That the charge sheet was fatally defective and;

c. The evidence was insufficient

30. On the first issue, the appellant submitted that the learned trial Magistrate failed to inform the appellant of his right to recall witnesses under section 200 of the *Criminal Procedure Code* (herein "the *CPC*") when she took over the matter and only heard the appellant's evidence. He relied on the Court of Appeal decisions in *Bob Ayub v Republic* [2010] eKLR; *David Kimani Njunguna v R* [2015] eKLR and, *John Bell Kinengeni v Republic* [2015] eKLR, where it was held that the provision of section 200 of the *CPC* was mandatory and had to be put to the accused, failure of which the trial was a nullity.

31. Further, the trial Magistrate Hon. T.W. Murugi (CM) proceeded to conduct the defence hearing despite the fact that Hon. Ngenye-Macharia (SPM) (as she then was) had ordered the matter to start de novo.

32. He argued that, none of the previous trial magistrates recorded the demeanour or credibility of the witnesses and significantly and materially prejudicing his right to a fair trial as guaranteed under on Article 50 (2) of the *Constitution* of Kenya which contemplates that, a trial is to be conducted by a judicial officer who has the opportunity to hear and see prosecution witnesses give evidence, and the

appellant challenging that testimony. He cited sections 200 (4) and 199 of the *CPC* in support of his submission.

33. On whether the charge sheet was fatally defective, the appellant submitted that the evidence led by the prosecution was at variance with the particulars in count three (3) of the charge sheet. That the money was paid through a cheque in the name of Air Traffic Co. Limited and not the name the appellant, however, he was charged in his individual capacity and not as a director.

34. That in any case a company is a distinct and separate entity from its directors and shareholders. He quoted the decision of the Court of Appeal in *Jason Akumu Yongo v Republic* [1983] eKLR on what constitutes a defective charge sheet.

35. On the sufficiency of evidence by the prosecution, the appellant submitted that he was never contracted in his personal capacity but that PW1 contracted AirTraffic Co. Ltd, a corporate entity. Further, the spare parts that were sent to him were installed in the aircraft by the corporate entity however, the complainant did not supply all the spare parts required.

36. Lastly, the appellant submitted that the prosecution failed to establish two essential elements of the offence being; the falsity of the representations made by the appellant on his ability to repair the aircraft, and that the false representations were made by the appellant with the intention to defraud the complainant of the spare parts. He urged the Court to quash the conviction and order a refund of the fine paid.

37. However, the respondent argued that the trial Magistrate complied with the provisions of section 200 (3) of the *CPC* and relied on the case of; *Mosobin Sot Ngeiywa & another v Republic* [2016] eKLR where the Court of Appel held stated that, the communication of the provisions of section 200 of the *CPC* does not strictly need to be between the accused and the learned trial Magistrate where the accused is represented by an advocate.

38. Further, the order for the trial to start de novo issued by Hon. Ngenye-Macharia (SPM) (as she then was) was overturned by this court different constituted in *Helmuth Rame v Republic* [2014] eKLR.

39. The respondent submitted that, the prosecution proved that the appellant had obtained money by false pretence and was therefore the charge sheet was not defective. Reliance was placed on the case of; *Joseph Mwai Nduati v Republic* [2017] eKLR where the court stated that a charge does not become defective merely because the evidence adduced did not prove the facts therein.

40. Finally, the respondent submitted that, it proved that the complainant made a down payment for the repairs as agreed with the appellant and sent the spare parts the appellant requested for. However, the appellant demanded for more spare parts than had been agreed to and when the complainant demanded for the spare parts to be returned, the appellant refused to do.

41. That in addition, none of the spare parts sent to the appellant were installed in the aircraft and thereby proved that the appellant committed the offence.

42. At the conclusion of hearing of the appeal and considering the arguments and submissions by the parties, I note that the role of the 1st appellant court as held by the Court of Appeal in the case of; *Okeno v Republic* (1972) EA 32, is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that this court did not benefit from the demeanour of the witnesses.

43. In regard to this matter, I find the following issues have arisen for determination:

    a. Whether the trial court complied with the provisions of section 200 *CPC* when the matter was taken over by the Hon. Magistrate who heard and concluded it.

b. Whether the complainant was dealing with Air Traffic Co. Ltd when he paid the sum of Kshs 775,000 and or sent the spare parts.

c. Whether the prosecution proved its case on the two counts (3) and (4) on the required standard of beyond reasonable doubt.

44. As regards the issue relating to section 200 (3) and (4) of the *Criminal Procedure Code*, the subject provisions states: -

> "(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.
>
> (4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial".

45. The law is settled that the provisions of section 200 of *Criminal Procedure Code* are mandatory as held by the Court of Appeal *David Kimani Njunguna v R* [2015] eKLR which stated that: -

> "All of these decisions declare that the provisions of Section 200(3) are mandatory and a succeeding Judge or Magistrate must inform the appellant person directly and personally of his right to recall witnesses. It is a right exercisable by the appellant person himself and not through an advocate and a Judge or Magistrate complies with it out of a statutory duty requiring no application on the part of an appellant person. Further, failure to comply by the court always renders the trial a nullity."

46. In the instant matter Hon. Ngenye- Macharia (SPM) (as she then was) ordered the matter herein to start de novo. However, the High Court vide the decision of, Hon, Justice Mbogholi Msagha vide *Helmuth Rame v Republic* [2014] eKLR ordered the case to proceed from where it had reached.

47. The High court stated as follows: -

> "The accused person was and is represented by counsel. The record shows that the witnesses were subjected to lengthy and searching cross-examination. It has not been stated what value will be added if the order for starting the case de novo were to be granted. It is considered that many years have gone by since the accused was first arraigned in court. This however cannot be attributed to the court alone. The record shows both learned counsel for the accused and the state were equally busy with other matters during the trial. Be that as it may, the memory of the witnesses cannot be guaranteed, yet we have a written record of what transpired during the trial.
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> Indeed, it has been observed in the past that although the accused has all the rights to be informed of the provisions of Section 200 of the *Criminal Procedure Code* it has been held,
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> "Section 200 is a provision of the law which is to be used very sparingly indeed and only in cases where the exigency of the circumstances, not only are likely but will defeat the end of justice, if a succeeding magistrate does, or is not allowed to adopt and continue a criminal trial started by a predecessor or owing to the latter becoming unavailable to complete the trial".

> See – *Ndegwa v Republic* (1985) KLR 53 and Criminal Revision No 6 of 2013 *Epraim Wanjuhi Irungu and 7 others v Republic*.
>
> the *Constitution* demands that justice shall not be delayed. If an order were to be made to start this case afresh we shall be breaching the *Constitution*. I find that that order was misplaced and that the hearing should and must continue from the defence case as ordered by Mrs. Githua (as she then was)."

48. Pursuant to the aforesaid, the ground of appeal on section 200 of the *Criminal Procedure Code* has no merit and is thus dismissed.

49. The next issue is whether the complainant paid the money stated in count (3) to the appellant or Air Traffic Ltd. The complainant's testified that he offered the appellant USD 10,000 equivalent to a sum of Kshs 773,000 vide a cheque No 000882 drawn by Middleton Forex Bureau in favour of Air Traffic Ltd.

50. As such, the payment was not made to the appellant in his personal capacity as stated in the particulars of the charge that he obtained from Moses Wachira Kshs 775,000. Taking into account that, the company is a legal entity separate from its directors, then the appellant or its director cannot be held liable for the company's debts or actions. On that ground alone the prosecution did not prove the appellant received the said money.

51. It is also stated in the particulars of the charge sheet that the appellant obtained the subject sum by falsely pretending that he was in a position to find a new engine for the aircraft LJ 528 Registration No 5Y - NBB a fact that he knew to be false.

52. However, the complainant testified that, the sum paid was part of the money paid for repairs. That the repair cost as per the agreement of the parties was USD 45,000 and he paid USD 10,000 and leaving a balance of USD 35000. He did not state that it was for payment of engine, in fact evidence reveals that indeed there was a report made by the appellant to the police that the engine was stolen.

53. That, the complainant even offered to purchase the engine and therefore the sum in count (3) was not earmarked for the engine. As such the finding of the trial court that the sum was for purchase of the engine was not supported by evidence.

54. Furthermore, whereas the charge sheet states that the appellant received Kshs 775,000. The evidence of the complainant states that the amount he paid was Kshs 773,000, while Joseph Korir PW5 stated that the sum was Kshs 776,000 and the cheque reveals that the amount was Kshs 773,000. Therefore, there was contradictions in the evidence of the witnesses on the amount of money which was allegedly paid. But even more fatal is the fact that the cheque was for Kshs 773,000 and the particulars of charge sheet refers to Kshs 775, 000. Therefore, the sum of Kshs 775,000 was not proved.

55. Furthermore, the trial court erred in shifting the burden of proof of rebuttal of evidence to the defence, when it held that the appellant did not deny that he received the money. He was the director of Air Traffic Limited which was paid and therefore could not rebut the prosecution evidence that he was paid what was not paid.

56. Finally, PW10 No 216885 Bathwel Waweru testified that when he investigated the matter the appellant was very cooperative and even allowed the investigators to take photos of the aircraft, the spare parts in the management office and store. That the Kshs 773, 000 was paid to Airtraffic Co. Limited and not the appellant thus exonerating him, yet he was the investigation officer.

57. As regard the 4th count it was the evidence of the complainant that, he bought spare parts amounting to a sum of USD 98,490.02 and gave the appellant. However, the complainant did not produce any evidence to prove that he purchased those spare parts. The trial court held that although receipts were not produced the quotations and invoices produced were adequate proof of purchase of the spares.

58. It is trite law that an invoice is not evidence of expenditure. In the case of; *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited* [2015] eKLR the Court of Appeal stated that:

> " In the case of *Great Lakes Transport Co (U) Ltd v Kenya Revenue Authority* (2009) eKLR 720, on the production of proforma invoices, this Court stated thus'
>
> "What we mean is that, in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word" paid" on the invoice and that would turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of goods wanted would be, i.e. quotation given on enquiry as to the price of the goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case none of the two documents would amount to a receipt.
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> From the judgment, the respondent produced proforma invoices in support of the claims for the retained petrol station equipment. A proforma invoice is considered a commitment to purchase goods at a specified price. It is not a receipt, and as such cannot attest to the existence of or the acquisition of goods. We consider that a proforma invoice was not satisfactory proof of the respondent's loss, or the replacement value of the respondent's equipment, and the learned judge misdirected himself in finding that the proforma invoices were sufficient proof of special damages for the respondent's equipment supposedly withheld by the appellant."

59. The trial court also found that there was no evidence that the spares received by the appellant were ever used in the aircraft. However, that was not factually correct as PW3 Captain Gitucha testified that he used to go and check on repairs of the aircraft and found ongoing repairs and that the appellant told them that some of the spares availed were not of proper specification. That evidence was corroborated by the investigating officer PW10.

60. Finally, PW10 No 216885 Bathwel Waweru exonerated the appellant when he testified in cross examination that "I do not know why the accused was charged in count (4).

61. Finally, the offence of obtaining by false pretence is stipulated under section 313 of the *Penal Code* as follows: -

> " Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years."

62. Similarly, section 312 of the *Penal Code* define false pretence as follows: -

> " Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence."

63. Therefore, the prosecution had to prove the ingredients of the charge of obtaining by false pretence being that the accused obtained something capable of being stolen; obtained it through a false pretence, with the intention to defraud.

64. The evidence reveals the parties herein had a contractual relationship and in deed the appellant was not even a part to the contract as he was not the seller of the aircraft. He was to facilitate repairs and be paid. As such there is no evidence that, first he obtained the money paid to the company and/or received the spares utilize them. The element of fraud nor intent to defraud were thus not proved.

65. All in all, I find the prosecution did not prove its case beyond reasonable doubt on count (3) and (4) and the conviction on both cannot stand. I therefore quash the conviction thereof and set aside the sentence. I further order that if any fine was paid it be refunded to the appellant unless otherwise ordered by the appellate court of higher jurisdiction.

66. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 26TH DAY OF JUNE, 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Kimani HB for Mr. Kilukumi SC for the Appellant

Mr. Mutuma for the Respondent

Ms. Ogutu: Court Assistant