



REPUBLIC OF KENYA



KENYA LAW
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**Ochume v Republic (Criminal Appeal E008 of 2021)
[2024] KEHC 9470 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9470 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E008 OF 2021
WM MUSYOKA, J
JULY 31, 2024**

BETWEEN

PHILIP OMUNYU OCHUME APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. Mrs. Lucy Ambasi, Chief Magistrate, CM, in Busia CMCSOC No. 15 of 2016, of 29th March 2021)

JUDGMENT

1. The appellant, Philip Omunyu Ochume, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(2) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 29th January 2016, , within Busia County, he intentionally and unlawfully caused his penis to penetrate the vagina of MA, a child aged 7 years. The appellant denied the charges, and a trial ensued, where 4 witnesses testified.
2. PW1, MA, was the minor complainant. She described the appellant as a person she knew, and with whom she was playing on the day of the incident. He sent his own child to the river first, then took PW1 to his house, removed her underwear, removed his own trousers, and inserted his penis into her vagina. She felt pain. After that she reported the incident to her mother, who reported to the village elder, and took her to hospital. PW2, EA, was the aunt and guardian of PW1. She testified that PW1 went to the home of the appellant, to play with his child. Another child, who she described as E, came to inform her that the appellant had taken PW1 to his house as his wife. She went to the house of the appellant, where she found PW1 standing outside, trembling. When she enquired from her as to what had transpired, PW1 told her that the appellant had taken her to his house, removed her underpants and defiled her. She reported the matter to the village elder, who advised her to take PW1 to hospital, which she did.



3. PW3, Felix Otienge, was the clinical officer who attended to PW1, who came escorted by PW2. He noted that the minor majora had a laceration, and the hymen was missing. He concluded that there was penetration, based on the laceration and the absence of the hymen. He described her as 8 years old. PW4, No. 105635, Police Constable Esther Nabwire, was the investigating officer.
4. The record is unclear on whether a ruling was ever delivered on whether a prima facie case had been established against the appellant, to require him to defend himself. What is recorded is that on 11th January 2021, the court explained section 211, to the appellant, who thereafter made an unsworn statement, denying the offence, and implying that there was an issue between her and PW2.
5. In its judgment, delivered on 29th March 2021, the trial court found the appellant guilty, and sentenced him to life imprisonment.
6. The appellant was aggrieved, and brought the instant appeal, revolving around the trial court not complying with Article 50(2) of *the Constitution*; the prosecution not availing all the witnesses; the medical evidence not linking him to the offence; the circumstantial evidence not favouring a conviction; the investigations into the case being shoddy; and the case being founded on hearsay.
7. Directions were given on 7th May 2024, for canvassing of the appeal by way of written submissions. Both sides have filed written submissions.
8. The appellant submitted around the age of PW1 not being proved; vital witnesses not being called; penetration not proved; contradictions and inconsistencies in the evidence; and the sentence. He relies on Kaingu alias Kasomo vs. *Republic Criminal Appeal No. 504 of 2010* (unreported), Bukenya and others vs. Uganda [1972] EA 549 (Spry Ag P, Lutta Ag. VP & Mustafa JA), Wanjema vs. R. [1971] EA 493 (Trevelyan, J), Ogolla s/o Owuor vs. Republic [1954] EACA 270 and Hezekiel Mwaura Kibe vs. Republic [1976] eKLR 118 (Simpson & Kneller, JJ). He has also cited a number of unreported decisions, copies of which he did not avail, and which I have been unable to trace. Much of what is submitted on does not fall within the grounds of appeal set out in the petition of appeal.
9. The respondent has responded to those submissions. On non-compliance with Article 50 of *the Constitution*, it is submitted that the appellant has not pinpointed the specific rights that were violated. It is, however, noted that the trial record was silent on whether the trial court informed the appellant of his right to legal representation. It is submitted that the right to legal representation was not absolute, and Republic vs. Karisa Chengo & 2 others [2017] eKLR [2017] KESC 15 (KLR) (Maraga, CJ, Mwilu, DCJ & VP, Ibrahim, Ojwang, Wanjala, Ndungu & Lenaola, SCJJ) is cited. On some witnesses not being called, it is submitted that there was no legal requirement on the number of witnesses to be called to prove a particular fact. Section 143 of the *Evidence Act*, Cap 63, Laws of Kenya, and Keter vs. Republic [2007] EA 135 (Bosire, Githinji & Onyango Otieno, JJA) are cited. On the medical evidence not linking him to the crime, it is submitted that medical evidence is not the only evidence that proves a sexual offence, and AML vs. Republic [2012] eKLR (Odero, J) is cited. On investigations being shoddy, it is submitted that the failure to call the actual investigating officer was not fatal to the prosecution. On hearsay, it is submitted that the testimony of PW2 did not amount to hearsay. Kinyatti vs. Republic [1984] eKLR (Kneller, JA, Chesoni & Nyarangi, Ag JJA) is relied upon.
10. I will first consider the issues that the appellant submitted on. On the age of PW1 not being proved, and there being inconsistencies on her age, I note that the charge puts her age at 7 years. When PW1 testified, she stated that she did not know her age. Similarly, when her aunt and guardian, PW2, testified, she said she did not know when PW1 was born. The clinician, PW3, put her age at 8, although he did not state the basis upon which he did so. PW4, the investigating officer, referred to a clinical treatment card, which does not appear to have been formally produced, which indicated that PW1 was born in 2011.



There is a booklet with treatment notes, opened on 21st December 2009, when PW1 was 2½ years old, which would suggest she had been born in mid-2007. The P3 Form, dated 31st January 2016, put her age at 8. A child health card indicates the date of her birth as 5th April 2007.

11. Was there concrete evidence on the age of PW1? Only 2 documents were produced in the matter, the P3 Form and the booklet with treatment notes. The other documents referred to were not produced. None of the documents produced were specific on the particular or specific date when PW1 was born. There is no doubt that PW1 was a minor at the material time she testified. She testified that she was in Pre-Unit, and the trial court conducted voir dire examination, based on the belief that she probably was of tender years, and did not understand the need to tell the truth, and eventually the court concluded that she did not, and required her to testify unsworn. Would it be safe to make presumptions on the age of PW1 without proper documentation on age? I do not believe it would be. It would prejudice the appellant. In the absence of concrete evidence, the trial court should have concluded that the age of PW1 was not proved, yet proof of age is critical in defilement cases. The trial court had the benefit of seeing PW1, and was better placed to assess whether the person it was seeing appeared to be a minor, and one of tender years. However, even if that direction were to be taken, it would be prudent to have a record, by the trial court, making such observations. I see none in the record before me. It would be wholly unjust and prejudicial to the appellant to make any presumptions. Nothing would have been easier than producing a certificate of birth issued in respect of PW1, or to call her mother to testify on her date of birth. The failure to do so was fatal.
12. On vital witnesses not being called, I will start by stating that it is trite that there is no legal requirement that a particular number of witnesses be called to testify on a particular fact. What matters is the reliability of the testimonies of the witnesses, based on the credibility of the said witnesses. The prosecution is not obliged to call any particular number of witnesses, but call such as are sufficient to prove the case against the accused person. Perhaps the appellant has in mind Eliza, the child who allegedly alerted PW2 to what was happening to PW1. Well, PW1 was the victim of the offence. She described to the court what happened to her. He reported her ordeal to PW2. That was corroboration. PW3 adduced forensic evidence, which pointed to defilement, which provided corroboration. On penetration not being proved, PW1 gave a vivid narration of what transpired. How the appellant took her to his house, removed her underpants, and his trousers, lay on her and inserted his penis into her vagina, in which process she was injured, and she felt pain. That account was corroborated by PW3, the clinician who attended to her. He found a laceration on her minor majora, and the hymen was missing. He said he could tell that there was penetration.
13. On contradictions and inconsistencies, it is trite that these are to be expected in almost every case, for the witnesses are not expected to tell the same story, for each person perceives and processes the events differently, and modes of narrating or recounting events differ from person to person. Secondly, unless the witnesses testify based on some script, the events would have played out or unfolded unexpectedly, and evidence cannot be presented as if it was rehashed. Indeed, courts have ruled that where the testimonies are replicas of each other, there would be higher possibility of a choreographed trial, founded on contrived and false evidence. I have gone through the text of the recorded proceedings, and the contradictions and inconsistencies that I have noted were minor, and did not go to the core of the matter.
14. On sentence, the trial court imposed life imprisonment. The victim of the defilement was said to be 7 to 8 years old, which brought her within the bracket of a child of tender years. Section 8(2) of the [Sexual Offences Act](#) prescribes a mandatory sentence of life imprisonment for such cases. The hands of the court were, therefore, tied in that respect.



15. However, recent developments in jurisprudence in that area of the law, with respect to mandatory sentences, and life imprisonment in particular, have changed the matrix. Mandatory and minimum sentences, for sexual offences, have been declared unconstitutional, in *Maingi & 5 others vs. Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021* (Mativo, J). In *Julius Kitsao Manyeso vs. Republic Malindi CACRA No. 12 of 2021* (Nyamweya, Lesiit & Odunga, JJA), the sentence of life imprisonment itself has been declared unconstitutional, with the court holding that no one should face an indefinite sentence; while *Evans Nyamari Ayako vs. Republic Kisumu CACRA No. 22 of 2018* (Okwengu, Omondi & J. Ngugi, JJA)(unreported), it has held that a sentence of life imprisonment should translate to a maximum of 30 years imprisonment. Given these developments, the sentence of life imprisonment, imposed on the appellant is no longer tenable.
16. Let me advert to the matters raised in his petition of appeal, which the respondent has reacted to in his written submissions. The first relates to non-compliance with the fair hearing principles stated in Article 50(2) of *the Constitution*. He has not submitted on this, and, therefore, he has not pinpointed the particular violations or non-compliances that he complains about. It would appear that he abandoned that ground. The respondent submits that there was compliance with some, and non-compliance with others. The non-compliance, the respondent points at, relates to failure to inform the appellant of his right to legal representation. I have perused the trial record. The record of 29th February 2016 was not properly kept. It is not clear whether the appellant was present or absent, although it is indicated that he responded to the charge. It is not clear which language the appellant was competent to use at the trial, for he did not indicate his choice of language, although it is indicated that English and Kiswahili were used. I note too that he was admitted to bond, and bond was indeed processed. An order was made early enough for the appellant to be furnished with witness statements, on 3rd March 2016. The trial commenced in the earnest on 26th September 2016, when the first witness testified. There was no indication in the record, whether witness statements had been supplied to the appellant by the time the hearing commenced, or even thereafter. The record is completely silent on whether those statements were ever given to the appellant. On confronting his accusers, I note that the appellant did cross-examine the witnesses presented by the prosecution. However, I note that the same tended to be rather brief. I note that the issue of legal representation did not arise, going by the record. That would mean that the appellant was not informed of his right to legal representation, and that he was entitled to legal representation at State expense.
17. The charge that the appellant faced was very serious, in the sense that it exposed him to a harsh sentence, were he to be convicted. That is eventually what happened, for, upon conviction, he was sentenced to life in prison. Not much was disclosed about the background of the appellant, and it would appear that he is an ordinary citizen, of probably modest education. The constitutional safeguards for a fair trial, in Article 50(2), were meant to protect such individuals, who found themselves facing very serious charges, so that the trial court could go out of its way, to ensure that he received a fair trial, and so that he did not find himself in a sea that he was unfamiliar with, in complex proceedings that were strange to him, and which he was expected to navigate comfortably. Given the gravity of the charges, and the constitutional demands that *the Constitution* has placed on the courts, there is a duty for the court to ensure that it scrupulously records the proceedings, with an eye to documenting compliance with Article 50(2).
18. I have stated in other matters that the paradigm has shifted, with respect to the way plea-taking is conducted. The promulgation of *the Constitution* in 2010 meant that the trial courts had to change the way the exercise is conducted, to ensure that the record reflects clearly that the constitutional prescriptions were complied with. That is the only way of keeping track of compliance with *the*



- Constitution, so far as Article 50(2) is concerned. In the absence of a clear record, indicating compliance, except for what appears on the face of it, such as cross-examination, it would be safe to assume that there was no compliance.
19. Article 2 of the Constitution makes the Constitution the supreme law in Kenya. all other laws, and the processes founded on them, are subordinate to it, and draw their legitimacy from it. The provisions and prescriptions of the Constitution cannot be subordinated to the other laws and processes. What the Constitution commands ought to be complied with, otherwise, by dint of Article 2(4) thereof, any act, which is tainted by non-compliance, would be invalid and a nullity. That would include a trial where the prescriptions in Article 50(2) are either not honoured, or are taken for granted. The result would be that there was no fair trial, the Constitution would not have been complied with, and the said trial would be invalid and a nullity, and should be vitiated.
 20. The right to legal representation is stated in Article 50(2)(g)(h) of the Constitution and section 43 of the Legal Aid Act, Cap 16A, Laws of Kenya. Article 50(2)(g) is about the right to choose and to be represented by an Advocate, and to be informed of the right promptly. Ideally, the proper time to be informed of the right to choose an Advocate of one's choice, to conduct the defence, should be before plea is taken, for the advice by the Advocate would be critical, on how the accused person is to plead. The Constitution places a duty on the trial court to inform the accused person of this right to legal representation of his choice at the trial, and to do so promptly. Failure to comply with this prerequisite, would render the trial unfair. It is a constitutional command, and the trial court is bound to comply. The record before me indicates that the right of the appellant, to be represented in the proceedings, by an Advocate of his own choice, was not raised, by the trial court, the duty bearer, at any stage of the proceedings. It did not come up at the arraignment on 29th February 2016, and it did not arise thereafter. The trial court did not comply with Article 50(2)(g) of the Constitution, and the trial of the appellant was unfair to that extent.
 21. Article 50(h) is about the right to have an Advocate assigned to the accused person, by the State and at State expense, if substantial injustice would otherwise result. This right, like that under Article 50(2) (g), should be communicated promptly to the accused. With regard to when the right ought to be communicated, ideally, it ought to be at the time of arraignment, particularly before plea is taken, so that the accused can benefit from legal advice on how to plead to the charge. In this case, the trial court did not inform the appellant of this right at arraignment, neither was it adverted to thereafter. The duty is imposed by the Constitution, on trial courts, and the omission to inform the appellant of this right rendered the trial unfair.
 22. Would substantial injustice have occurred in this case, to require an Advocate being allocated to the appellant by the State and at State expense? At the time the appellant herein was being arraigned in court, on 29th February 2016, the appellant herein was exposed to being sentenced, upon conviction, to life imprisonment, as indeed happened. That is a very lengthy time to spend in prison. Exposure to such sentence would require that an accused person be subjected to a trial where there is a vigorous scrutiny of the evidence being adduced, and strict observance of the rules of procedure.
 23. The object of the Legal Aid Act is stated in the preamble, to be "An Act of Parliament to give effect to Articles 19(2), 48, 50(2)(g) and (h) of the Constitution to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes." So, the Legal Aid Act is meant to operationalize Article 50(2)(g)(h) of the Constitution. Article 50(2)(g)(h) of the Constitution and the Legal Aid Act are about access to justice, by providing legal aid services to indigent persons in Kenya. It is about inclusion, non-discrimination and protection of marginalized groups, according to sections 3 and 4 of the Legal Aid Act. Section 43 of the Legal Aid Act imposes duties on the court, before whom an unrepresented person is presented,



- to comply with Article 50(2)(g)(h) of *the Constitution*, by informing that person of his right to legal representation of his own choice, and where substantial injustice is likely to arise, to inform him of his right to be assigned an Advocate by the State, and where the accused requires legal aid, or is found to require such aid, inform the National Legal Aid Service to provide legal aid service to the accused person. According to section 43(1A) of the *Legal Aid Act*, that in determining whether substantial injustice is likely to occur, the court ought to take into account the severity of the charge and sentence, the complexity of the case, and the capacity of the accused to defend himself.
24. Informing an accused person of their rights, under Article 50(2)(g)(h) of *the Constitution*, and assessing whether the accused person requires legal aid services from the National Legal Aid Service, are prerequisites for a fair trial, and are condition precedents before a trial is mounted. It should be noted that the rights under the *Legal Aid Act* should even be invoked right after the arrest of the suspects, and before their presentation in court, because the *Legal Aid Act* also operationalizes Article 49 of *the Constitution*, on the rights of an arrested person, as section 42 of the Act provides for a person in lawful custody, and casts a duty on the officer in charge of the custodial facility, where the person is held, to inform the person of availability of legal aid, and to facilitate applications by a person who may wish to access such legal aid. These rights are constitutional imperatives, commanded by *the Constitution*. Trial courts have a duty to ensure that they are complied with, and failure to comply ought to automatically render the subsequent trial null and void, for non-compliance with *the Constitution*.
25. Were these constitutional fair trial prerequisites applicable in this case? The offence, the subject of these proceedings, was allegedly committed in 2016. *The Constitution* of Kenya, 2010, commenced on 27th August 2010. It would mean that, as at 2016, when the appellant was being arraigned in court, *the Constitution* 2010 was in application, and the court, before whom he was produced, was bound by Article 50(2)(g)(h) of *the Constitution*. The said court was obliged to comply with Article 50(2)(g)(h) of *the Constitution*, to inform the appellant of his right to legal representation of his own choice, and the right to legal aid from the State, in the event that he was indigent. The duty on the court was to assess whether the appellant was at risk of being exposed to substantial injustice, and to suffer lack of access to justice, on account of being indigent, or belonging to a marginalized or vulnerable group, and on account of the severity of the charge that he faced, and the sentence he was liable to be given, in the event of conviction. That was not done.
26. As the fair trial principles in Article 50(2)(g)(h) of *the Constitution* were not complied with, the appellant herein was subjected to an unfair trial. Article 2(4) of *the Constitution* provides for what happens whenever some act violates or contravenes *the Constitution*. It states that "... any act or omission in contravention of this Constitution is invalid." The omission or failure, herein, to comply with Article 50(2)(g)(h) of *the Constitution* amounted to a contravention of that provision, and of *the Constitution*, and rendered the entire trial invalid. The failure to comply with those provisions meant that the objectives of that Act were not met, in terms of making justice accessible to all, creating a level playing ground for all, ensuring that the indigent in society get to access the same facilities as persons who are not indigent, and that there was no discrimination and marginalization of those who cannot afford legal services.
27. The discussion above clearly demonstrates that some of the constitutional fair trial rights were not honoured and upheld, in the trial the subject of this appeal, which rendered the trial unfair. That would mean that the trial did not reach the constitutional threshold for fairness. The omission to comply with *the Constitution* sounds a death knell for any trial, given that *the Constitution* is the supreme law in Kenya. Whatever it commands must be honoured and complied with. Constitutional provisions are not decorative. They have to be complied with. Failure to comply with them renders useless whatever the purported act. Article 2(4) of *the Constitution* renders invalid any act or omission



which amounts to a non-compliance with provisions of *the Constitution*. The non-compliances that I have discussed above, rendered invalid and a nullity the criminal proceedings, that were conducted against the appellant in Busia CMCSOC No. 15 of 2016. That would mean that the outcome of those proceedings was invalid and a nullity.

28. The promulgation of *the Constitution* of Kenya, 2010, completely changed the configuration for plea taking. The paradigm shifted, which is something that courts, presiding over a plea taking exercise, should come to terms with. Previously, it was enough to just have the charges read to the accused, have him plead to them, consider whether to release him on bond, and thereafter allocate a date for hearing. Article 50 has added a host of other things, that the court taking plea, must do or observe. These are constitutional commands, and failure to comply with them would render the trial unconstitutional or non-compliant with *the Constitution*. Bond is now available for all offences, to be denied only for compelling reasons. Advance disclosure of the case by the prosecution is now a constitutional requirement. *The Constitution* has done away with certain aspects of the presumption that everyone knows the law, and imposes a duty, on the court, presiding over plea-taking, to inform the accused of their legal rights, with respect to the right to be represented by an Advocate of their own choice, and, where the accused is indigent, to inform them of their right to an Advocate paid for by the State, where their case meets certain conditions. The plea taking exercise is now more loaded. The court has to go the extra mile, particularly in the more complex and serious offences, and assess whether the accused person, before it, is indigent or not, whether he or she has capacity to defend himself or not, or whether he needs an Advocate paid for by the State or not, and, if he does, set in motion the process for him getting such an Advocate.
29. On the issues around the medical evidence not linking the appellant to the offence; it is trite that it is not a legal requirement that a sexual offence be proved by way of forensic evidence. Section 124 of the *Evidence Act*, Cap 80, Laws of Kenya, states so, and provides that a conviction may be founded only on the testimony of the victim, so long as the court is persuaded that the evidence was credible and reliable. On the circumstantial evidence not favouring a conviction, it should be pointed out that the case was not founded on circumstantial evidence, but direct evidence. PW1 was the complainant and victim. The incident giving rise to the charges happened to her, and she described first-hand what transpired. PW3 attended to her, and gave evidence of his findings.
30. On the investigations into the case being shoddy, I will start by saying that the role of the court is not to audit how the police investigated a matter, so that where it is established that the investigations were shoddy, the accused would be acquitted. That is not what the law requires. The court only works with the evidence presented by the prosecution. The concern is not with how the investigations were conducted or its quality, but with the evidence presented in court, and evaluation of that evidence to establish whether it proved commission of the offence charged. Whether the police did a good job of investigating the offence herein is, therefore, neither here nor there.
31. Finally, on whether the case was founded on hearsay, I am not quite clear on what the appellant means by that, given that he did not submit on it. Hearsay is about giving evidence based on what a witness heard, rather than based on what he saw, or touched, or smelt, or felt. The complainant or victim of the charged offence is PW1. It happened to her. She testified on what the appellant did to her, or based on what she experienced, or went through with the appellant, as opposed to what she was told by or heard from someone else. The issue of hearsay does not arise. It is true that PW2 narrated what PW1 had informed her about what transpired. However, that would not amount to hearsay, as she was merely confirming or corroborating what PW1 had conveyed to her. The case was not founded exclusively on what PW2 testified on, for the principal witness was PW1, and PW1 herself testified.



32. I have mentioned above, that the plea taking process was not handled well. Arraignment was done on 29th February 2016. The recording of that process fell short. It was not indicated the language that the appellant was conversant with. There is ambivalence on whether the appellant was present when plea was taken, and also how many accused persons were present. It is not clear the language used for the purpose of reading and explaining the charge. It is also not clear whether the appellant was a was male or female. The appellant was not informed of his right to legal representation, and of the right to an Advocate at State expense. The record is scanty.
33. The record reflects as follows:

“29/2/16

Coram: Hon. MA Nanzushi – Senior Resident Magistrate

Prosecutor: Gacharia

Court clerk: Rachel

Interpreter: English/Kiswahili

Accused present/absent represented by

The substance of the charge(s) and every element thereof been started by the court of the accused persons in the language he/she understands. Who being asked whether he/she admits or denies the truth of the charge(s).

Replies:

Accused

It is not true.

Court

Plea of not guilty entered.

MA NANZUSHI

Senior Resident Magistrate

Alternative Count

Accused

It is not true

Court

Plea of not guilty entered.

Court

Bond of Kshs. 200,000/- with 1 surety of similar amount.

Mention 14/3/2016

Hearing 8/6/16 court 1 with statements to issue.

MA NANZUSHI

Senior Resident Magistrate”



34. Secondly, I have indicated elsewhere that no ruling on whether the prosecution had established a prima facie case, and that he had a case to answer, to warrant his being on his defence, was never delivered by the trial court. The trial court record has no record of such a ruling.
35. In view of the above, I hereby declare mistrial. Trial courts ought to be vigilant in the way they handle trials, to ensure that justice is done for both the victim of the offence and the perpetrator. Justice cuts both ways. The victim is entitled to have her tormentor subjected to punishment; while the accused is entitled to a fair trial, which meets the constitutional and legal thresholds. The trial conducted in Busia CMCSOC No. 15 of 2016, did not meet those thresholds. Consequently, I shall quash the conviction of the appellant in that matter, on 29th March 2021, and I set aside the sentence that was imposed on him the same day. I shall, accordingly, order a retrial. The appellant shall be handed over to the police, forthwith, who shall present him to the Chief Magistrate's court at Busia, for a fresh trial. It is so ordered.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 31ST DAY OF JULY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Philip Oguny Ochume, the appellant, in person.

Advocates

Ms. Chepkonga and Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

7

