Mkirani v Republic (Criminal Appeal E010 of 2021)
[2021] KEHC 377 (KLR) (17 December 2021) (Judgment)

Neutral citation: [2021] KEHC 377 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E010 OF 2021

JM MATIVO, J

DECEMBER 17, 2021

BETWEEN

JOHNSON SILVANO MKIRANI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against Judgement, conviction and sentence passed in PMC Criminal Case Number E075 of 2021, at Voi, R. v Johnson Silvano Mkirani, delivered by C. Githinji, PM on 17.6.2021)

JUDGMENT

Introduction

1. The appellant seeks to overturn the conviction and sentence imposed on him in Voi PMCR No. E010 of 2021 on 17th June 2021. The appellant faced 2 counts of assault the particulars whereof were that on the 22nd day of January 2021 at 10am at Mwakingoli estate in Voi Sub-County within Taita Taveta County, he unlawfully assaulted a one Agnes Mwabire Koi thereby occasioning her actual bodily harm. He faced a second count of assaulting a one Pendo Konde Thuva on the same day and place occasioning her actual bodily harm.

The duty of a first appellate court

2. A first appellate court has to determine, whether the appellant was correctly convicted and/ or sentenced in respect of the offence(s). An appellate court will not interfere with the trial court's judgment on either conviction or sentence unless it finds that the trial court misdirected itself as regards its findings of facts or the law.[1] If the trial court misdirected itself either on the facts or the law, an appellate court will interfere as it deems fit including substituting its own order or decision for that of the trial court. This may include an order setting aside a conviction or the altering of the sentence.

[1] See *R vs Dhlumayo & Another 1948 (2) SA 677 (A)*. The principle was also restated in *S v Mlumbi 1991 (1) SACR 235(SCA)* at 247g.

3. The scope of this court's interference on a finding of fact and credibility is restricted to few instances among them where there is a demonstrable and material misdirection by the trial court where the recorded evidence shows that the finding is clearly wrong[2] or where there are factual errors such as where the reasons which the trial court provides are unsatisfactory or where the trial court overlooks facts or improbabilities. Also, where the finding on fact is not dependent on the personal impression made by a witness' demeanour, but predominantly upon inferences and other facts, and upon probabilities. The appeal court is also in an equal position to the trial court.[3]

4. It is imperative for a trial court to evaluate all the evidence and not to be selective in determining what evidence to consider. The conclusion which is reached (whether to convict or to acquit) must account for all the evidence. At times, some of the evidence might be found to be false, unreliable, possibly false or unreliable, but none of it may be ignored.[4] The facts found to be proven and the reasons for the verdict must appear in the judgment of the trial court. If there was evidence led during the trial, but such evidence is not referred to in any way in the judgment, it is safe for a court of appeal to assume that such evidence was either disregarded or not properly weighed or even forgotten about at the time of delivering the judgment. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for the judgment including its reasons for the acceptance and the rejection of the respective witnesses.[5]

5. However, by requiring the trial court to consider and weigh all evidence does not mean that the judgment of the trial court must include a complete embodiment of all evidence led, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led.[6]

6. This court must determine, as regards the conviction in the first place, what the evidence of the state witnesses was, as understood within the totality of the evidence led, including evidence led on the part of the defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decision.[7]

7. This court must consider whether the trial court considered all the evidence, weighed it correctly and correctly applied the law or legal principles to it in arriving at its judgment in respect of both the conviction and sentence. This exercise necessarily entails a close scrutiny of the evidence of each witness within the context of the totality of evidence, and what the trial court's findings were in relation to such evidence.[8]

8. Put differently, in order to determine whether there is any merit in any of the submissions made by the respective parties, this court must consider the evidence led in the trial court, juxtapose it against the

2 See *S vs Hadebe and Others 1997 (2) SACR 641 (SCA)* t 645e- f.

3 Ibid.

4 As Nugent J (as he then was) in *S v Van der Meyden 1999 (1) SACR 447 (W)* stated at 450.

5 As was stated in *S vs Singh 1975 (1) SA 227 (N)* at 228.

6 Mofokeng vs S// (A170/2013) [2015] ZAFSHC 13 (5 February 2015)

7 Ibid.

8 Ibid.

judgment by the trial court, and finally determine whether there is any basis for interfering with the judgment.[9] This means that if a court of appeal is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. The appeal court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal.[10]

The trial at the lower court

9. The following is a proper evaluation and summary of the evidence led by the respective parties in the lower court. For starters, the prosecution case rested on the testimony of the five witnesses, namely, the two complainants, a police officer, a Medical Officer, and the complainants' and the appellant's landlord. On the other hand, the defence case rested on the appellant's sole evidence. He did not call any witness(es). In a nutshell, the crux of the prosecution case was that the two complainants were assaulted by the appellant occasioning them actual bodily harm. The appellant's defence, on the other hand, was that he did not use force, that he has a metal plate in his leg so he could not kick the complaints as alleged.

10. Agnes Mwambire, the complainant in count one testified that on the material day, she had just come from her bedroom holding her child when the appellant who also lived in the same rental premises threw the child off from her and hit her with fists, blows and kicks. She screamed and the 2nd complainant, a one Pendo came holding a spade but the appellant held her by the neck and pressed her down. At this point the caretaker came and grabbed the spade. She testified that she was injured in the ear, she identified her treatment notes and the P3 form. She also identified the appellant in court who also lives in the same house.

11. Pendo Konde the complaint in count two testified that she heard screams from the bathroom area where PW1 was bathing and afraid that she an asthmatic since is asthmatic attack, she rushed to the scene only to see a man who was also a tenant in the same premises attacking her with kicks and blows. She testified that the attacker grabbed her by the throat and hit her with kicks and blows. She said that she took a spade, but the attack grabbed it and continued beating her. She stated that he took a knife and cut her at her thump. She said she was injured on her right knee. She identified her treatment notes and P3 form.

12. Njoto Nyawa, a Medical Officer at Moi County Referral Hospital testified that PW1 had bruises on the left ear caused by a blunt object and classified the degree of injury as harm and produced her treatment notes and P3 form. He also produced PW2's treatment notes and P3 form for the second complainant and classified her degree of injury as harm.

13. PW4 Sergeant Benard Githinji attached to Voi Crime Branch recorded the complainants' statements after which the appellant was arrested. PW 5 Mr. Biden Kisaka Mugoi testified that the appellant has been his tenant for one year and that he witnessed the incident.

14. At the close of the prosecution case, the trial Magistrate found that the prosecution had established a prima facie case and placed the appellant on his defence. The learned Magistrate complied with the provisions of section 211 of the Criminal Procedure Code.[11]The appellant elected to give sworn

9 Ibid.

10 Ibid.

11 Cap 75, Laws of Kenya.

evidence. He did not call witnesses. His defence was that he complained to PW1's husband about some gossip allegedly uttered by PW1 and despite raising the issue, PW1 did not stop gossiping, but instead she would throw words at him, spit saliva and act as if vomiting on seeing him prompting him to speak with her husband again. He also stated PW2 stopped talking to them. He said he could not use his legs to kick the complainants as alleged because he was previously involved in a road accident and his leg has a metal plate. On cross-examination he stated that there was no neighbour at the material time.

15. Upon analysing both the prosecution and the defence evidence, the learned Magistrate was persuaded that the prosecution evidence was credible and it was corroborated by medical evidence. She found the appellant's evidence as unconvincing and held that it did not shake or weaken the overwhelming prosecution evidence. She found the prosecution established its case against the appellant and convicted and sentenced the appellant to serve 2 years imprisonment on each count, both sentences to run concurrently.

The appeal

16. The appellant seeks to overturn the conviction and sentence citing 5 grounds, namely: -

    a. That the learned Magistrate erred in law and in fact in failing to find that the prosecution evidence was insufficient to sustain the conviction and sentence and by convicting the appellant against the weight of the evidence adduced.

    b. That the learned Magistrate erred in law in convicting the appellant on the unreliable evidence of the prosecution witness without evaluating it and making a finding on it.

    c. That the learned Magistrate erred in law in not considering the reasonable doubts available in the case against the appellant and erred in law in not giving the appellant the benefit of doubt.

    d. That the learned Magistrate erred in law in convicting the accused without the prosecution having proved all the ingredients of the offence.

    e. That learned Magistrate erred in law and in fact by not considering the appellant's mitigation.

17. As a consequence of the foregoing, the appellant prays that this appeal be allowed, that the lower courts judgment, conviction and sentence be set aside.

Courts directions

18. On 3rd December 2021, in a ruling dismissing the appellant's application to be released on bail pending appeal, I stated: -

> " The appellant's apprehension, as I understood it is that the appeal will take long to be heard because there is no judge in this station. That being the core ground, it is my view that it is possible to have this appeal heard and determined in the next 14 days. In this regard, the appellant's counsel is directed to file his submissions on the appeal within 2 working days and not later than close of business on 7th December 2021 and serve the Respondent who will be required to file theirs by close of business on 9thDecember 2021. In the event of non-compliance with the foregoing, the court will proceed to render the judgment the failure notwithstanding. Judgment shall be delivered virtually on 17th December 2021 at

8.00am. In view of the above finding, the prayer for bail is refused. Instead, the hearing and determination of this appeal will be expedited as aforesaid."

19. Notwithstanding the above clear timelines, the Respondent's counsel does not appear to have filed submissions within the said period nor was the court moved to extend or vary the timelines. I therefore prepared this judgment without the benefit of considering the Respondent's submissions. Parties are obligated to assist the court to achieve the constitutional edict of determining cases expeditiously by complying with courts directions.

The appellant's advocates submissions

20. The appellant's counsel cited Alex Kinyua Murakaro v Republic[12] which defined the offence of assault and underscored the requirement for an intention to assault and the assault must take place. He submitted that every criminal offence requires both a criminal act and a criminal intention. He submitted that mens rea is an essential ingredient of every offence except in absolute offences but even then the intention of Parliament must be clear. To buttress his argument, counsel cited R v Tolson[13] which held that "the full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined, nothing amounts to that crime which does not satisfy that definition."

21. Counsel cited Ndara v Republic[14] ingredients which defined the ingredients of the offence of assault causing actual bodily harm as assaulting the complainant or the victim and occasioning actual bodily harm. He submitted that for the prosecution to secure a conviction, the above ingredients must be established. He urged the court to take judicial notice of the gossip the appellant complained about which he argued provoked the confrontation. Counsel cited Libambula v Republic[15] which held that motive is an important element of chain of presumption of prove where a case rests on circumstantial evidence.

22. It was counsel's submission that the prosecution has failed to establish its case to the required standard. He cited Philip Nzka Watu v Republic[16] which held that to find a conviction in a criminal case, the trial court has to be satisfied about the accused person's guilt beyond reasonable doubt. (Also cited Stephen Nguli Mulili v Republic,[17] Miller v Ministry of Pensions[18] and Bakare v State[19]).

23. Counsel cited sections 107 and 108 of the *Evidence Act*[20]and argued that the 2nd complainant was also charged with a similar offence in Criminal Case No. E079 of 2021 R v Pendo Konde Tuva now pending

12 {2015} e KLR.

13 {1889} 23 QBD 168, 187.

14 {1984} KLR.

15 {2003} KLR 683.

16 {2006} e KLR.

17 {2004} e KLR.

18 {1947} 2 ALL ER 372.

19 {1987} 1 NWLR {PT 52) 579.

20 Cap 80, Laws of Kenya.

delivery of judgment and argued that the incident now turns out to be an affray and urged the court to find in favour of the appellant or in the alternative grant him a non-custodial sentence.

Determination

24. The legal burden of proof in criminal cases never leaves the prosecution's backyard. Viscount Sankey L.C. in the celebrated case of Woolmington v DPP[21] in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that: -

'Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

25. The appellant was tried and convicted of the offence of assault causing actual bodily harm contrary to section 251 pf the Penal Code.[22] The essential ingredients of the offence of assault causing actual bodily harm were spelt out in Ndaa v Republic[23] as follows: - i. Assaulting the complainant or victim, (ii). Occasioning actual bodily harm. In Rex v Donovan,[24] Swift J delivering the judgement of the Court of Criminal Appeal, said: -

> " For this purpose, we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling."

26. In R v Chan-Fook,[25] Lord Hobhouse LJ said of the expression "actual bodily harm," should be given its ordinary meaning: -

> " We consider that the same is true of the phrase "actual bodily harm." These are three words of the English language that receive no elaboration and in the ordinary course should not receive any. The word "harm" is a synonym for injury. The word "actual" indicates that the injury (although there is no need for it to be permanent) should not be so trivial as to be wholly insignificant."

27. Potter LJ in R v Morris[26] stated "what constitutes "actual bodily harm" for purposes of this Section ...is succinctly and accurately set out in Archibold[27] at para 19-197: -

> " Bodily harm has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the victim: such hurt or injury need not be permanent, but must be more than merely transient or trifling...

21 {1935} A.C 462 at page 481.

22 Cap 63, Laws of Kenya.

23 {1984} KLR.

24 {1934} 2KB 498.

25 {1994} 2 ALL ER 557 paragraph D.

26 {1998} Cr App R 336 at 393.

28. Thus, actual bodily injury is any physical injury to a person (which is not permanent), or psychiatric injury that is not merely emotions, fear or panic, to make out the offence, the prosecution must show that there has been an assault, and that the assault has resulted in actual bodily harm. There must be an intention to assault (mens rea) and the assault must have taken place (actus resus). The offence is committed when a person intentionally or recklessly assaults another, thereby causing Actual Bodily Harm. It must be proved that the assault occasioned or caused the bodily harm. Bodily harm has its ordinary meaning and includes any hurt calculated to interfere with the health or comfort of the victim, such hurt need not be permanent, but must be more than transient and trifling.[28] The House of Lords in DPP v Parmenter[29] held that the mens rea of this offence is the same as that for battery; all that need be proved further is that actual bodily harm in fact followed.

29. In DPP v Smith[30] the appellant used kitchen scissors to cut off the complainant's ponytail and some hair off the top of her head without her consent. The court stated that in ordinary language, "harm" is not limited to "injury" but extended to hurt or damage, and that "bodily," whether used as an adjective or an adverb, is "

30. Psychological harm that involves more than mere emotions such as fear, distress or panic can amount to Actual Bodily Harm. However psychological injury not amounting to recognizable psychiatric illness does not fall within the ambit of bodily harm.[31] In R v Chan-Fook[32] the court held that the phrase "actual bodily harm" can include psychiatric injury where this is proved by medical evidence but it did not include emotions, such as fear or panic, nor states of mind that were not themselves evidence of some identifiable clinical condition. Any allegation of actual bodily harm based on psychiatric injury, which was not admitted by the defence, should be supported by appropriate expert evidence.

31. It is generally agreed that the essential ingredients of any crime are (1) a voluntary act or omission (actus reus), accompanied by (2) a certain state of mind (mens rea). The following classic statement by Sir William Holdsworth in the History of the English Law[33]is worth quoting: -

> " The general rule of the common law is that crime cannot be imputed to a man without mens rea. It is, of course, quite another question how the existence of that mens rea is to be established. The thought of man is not triable by direct evidence; but if the law grounds liability upon intent, it must endeavour to establish it by circumstantial evidence. Much of that circumstantial evidence will be directed to showing that a man of ordinary ability, situated as the accused was situated, and having his means of knowledge, would not have acted as he acted without having that mens rea which it is sought to impute to him. In other words, we must adopt an external standard in adjudicating upon the weight of evidence adduced to prove or disprove mens rea. That of course, does not mean that the law bases

27 {1997 ed}.

28 See *R v Donovan* {1934} 2 KB 498.

29 {1992} 1 AC 699.

30 {2006} EWHC 94.

31 *R v D* 2006} EWCA Crim 1139.

32 {1993} EWCA Crim 1.

33 Vol. III, page 374.

criminal liability upon an external standard. So to argue is to confuse the evidence for a proposition with the proposition proved by that evidence."

32. The natural and probable consequences of a man's act is only one of the factors from which his intention as to the result may be gathered. It is no doubt a very important factor and might sometimes be the only available factor from which the inference of intention is to be drawn. Still, there is no "must" about it, only "may" and the Court is not bound in law to infer that a man intended the result of his actions by reason only of its being a natural and probable consequence of those actions. The intention is to be gathered from all the circumstances appearing in the evidence.

33. As Denning L. J.[34] stated: -

> " When people say that a man must be taken to intend the natural consequences of his acts, they fall into error; there is no 'must' about it; it is only 'may'. The presumption of intention is not a proposition of law but a proposition of ordinary good sense. It means this: that as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to Infer that he did foresee and intend them. But, while that is an inference which may be drawn, it is not one which must be drawn. If on all the facts of the case it is not the correct inference then it should not be drawn."

34. Whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt. The Supreme Court of Nigeria in Ozaki and another v The State[35] stated that for a defence to be rejected it must be incredible and that the defence must be weighed against the evidence offered by the prosecution. In Uganda v Sebyala& Others,[36] the court had this to say: -

> " The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin, an alibi which is not particularly strong may very well raise doubts."

35. The accused has only what is referred to as the evidential burden which means the duty of adducing evidence or raising the defence of alibi.[37] Once an accused person discharges the evidential burden of adducing evidence of alibi, it is the duty of the prosecution to disprove it. The duty of the court is to test the evidence of alibi against the evidence adduced by the prosecution and if there is doubt in the mind of the court, the same is resolved in favour of the accused.

36. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating the accused is true. The correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses. It is acceptable in totality in evaluating the evidence to consider the inherent probabilities and improbabilities.

37. The proper approach is to weigh up all the elements, which point towards the guilt of the accused against all those, which are indicative of his innocence. The court is required to take proper account

34 In 1950-66 TLR 735.

35 Case No. 130 of 1988.

36 {1969} EA 204.

37 See *Ortese Yanor & Others v The State* {1965} N.M.L.R. 337.

of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt.

38. Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[38] Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted of it. In order to avoid that, a court must consider all the evidence with great care, especially when it is the only evidence because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the charged crime have been proven, that the evidence irresistibly points to the accused, and that the evidence is both truthful and accurate.

39. In determining whether the appellant's defence was considered, this court has a legal duty to re-analyse, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify.[39] An appellate court will not interfere with or temper with the trial court's judgment or decision regarding either conviction or sentence unless it finds that the trial court misdirected itself as regards its findings of facts or the law.[40] The appellant's counsel argued that the second complainant was also charged with the offence of assault and argued that the incident was affray. This is an attractive argument. However, it is a departure from the defence tendered in the lower court.

40. I have carefully evaluated the prosecution evidence. First, the appellant was known to the complainants, hence identification is not in issue. Second, the evidence places the appellant at the scene of the offence. Third, the evidence irresistibly points at the appellant as the assailant. Fourth, the complainants established beyond doubt that they were assaulted by the appellant and that both of them sustained injuries as per the medical evidence. Fifth, the complainant's testimony was collaborated by the Doctor's testimony and the evidence of PW5. Sixth, I have considered the defence offered by the appellant. It is a mere denial and does not rebut the evidence tendered by the prosecution. Seventh, I find and hold that the ingredients of the offence of assault causing actual bodily hard discussed earlier were proved as required. Eight, it is my conclusion that the conviction was well founded on evidence and I find no reason to fault the learned Magistrates decision to convict.

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

[38] Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary.

[39] See *Okeno v Republic* {1972) E.A, 32at page 36, *Pandya vs Republic* {1957} EA 336, *Shantilal M. Ruwala vs Republic* {1957} EA 570 & *Peter vs Sunday Post* {1958}EA 424.

[40] See *R v Dhlumayo & Another* 1948 (2) SA 677 (A). The principle was also restated in *S v Mlumbi* 1991 (1) SACR 235(SCA) at 247g.

exercised its discretion capriciously.[41] The above position was enunciated in Shadrack Kipchoge Kogo v Republic[42] in which the Court of Appeal stated: -

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

42. The Supreme Court of India in State of M.P. v Bablu Natt[43] stated that 'the principle governing imposition of punishment would depend upon the facts and circumstances of each case. In Alister Anthony Pareira vs State of Maharashtra,[44] it was held that:-

> " Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances."

43. While exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.[45] Section 251 of the Penal Code[46] provides that a person who is guilty of the offence of assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for 5 years. The appellant was sentenced to two years for each count, both sentences to run concurrently.

44. Having carefully considered the nature of the offence, the manner in which it was committed, the principles of sentencing above and the sentence imposed on the appellant, I am of the view that a one year sentence on each count will be adequate. I therefore uphold the conviction and reduce the sentence imposed on the appellsnt to one year on each count and order that the said sentences shall run concurrently.

Right of appeal explained.

SIGNED, DATED AND DELIVERED (VIRTUALLY) AT MOMBASA THIS_17TH DAY OF DECEMBER 2021.

JOHN M. MATIVO

JUDGE

41 See Makhandia J (as he then was in *Simon Ndungu Murage v Republic*, Criminal appeal no. 275 of 2007, Nyeri.

42 Criminal Appeal No. 253 of 2003 (Eldoret), Omolo, O'kubasu&Onyango JJA)

43 {2009}2S.C.C 272 Para 13

44 {2012}2 S.C.C 648 Para 69

45 See *Soman v Kerala* {2013} 11 SC.C 382 Para 13, Supreme Court of India

46 Supra