REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 3 OF 2019

KENGA HISA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the conviction and sentence of the trial court

dated 4.8.2017 by Hon. L. Juma (SRM) of Kilifi Law Courts)

CORAM: Hon. Justice R. Nyakundi

Mr. Gicharu for the appellant

Ms. Sombo for the State

JUDGMENT

The appellant was charged, tried, convicted and sentenced to life imprisonment for the offence of defilement contrary to Section 8(1) and 8 (2) of the Sexual Offences Act. Being aggrieved with the decision, he has appealed to this court through legal counsel **Mr. Gicharu.**

The brief particulars are that on the 20.7.2016 at [particulars withheld] village, within Kilifi County, intentionally and unlawfully caused his penis to penetrate the anus of **RC** a child aged seven (7) years. The state was represented by prosecution counsel **Ms. Sombo**.

Evidence at the trial

The complainant **R.P.C. (PW1)** gave his unsworn statement that the appellant did bad things against him and with that his anus was injured. According to the complainant, it all happened in the night when appellant took him into the room, undressed his clothes and inserted something through the anus. Thereafter, the complainant left the scene and did report to his mother **PW2 (EC).** Taking that explanation in regard to the incident **PW2** told the court that the appellant on the material day picked the complainant from among the other children who were engaged in physical activities. He came to learn from the complainant that the appellant had committed a sexual act when they went to his house.

PW3 –Dr. Mohammed gave evidence on behalf of **Dr. Suchira** with regard to the medical examination and the findings in the P3 Form involving the complainant. As regards aspects of examination PW3 confirmed that there were no bruises on the anus, but a scar scratch mark on the buttocks. The doctor found no evidence of bruises to the anus save for presence of moderate spermatozoa as a positive indicator of sexual intercourse. PW3 on behalf of his colleague produced the Post Care Rape form and P3 Form as exhibits.

According to **PW4 – CPL. Charo Bango**, the defilement complaint was investigated by Kilifi Police Station which came to the conclusion that the complainant had been sexually assaulted by the appellant. In his evidence an age assessment of the complainant was done and found to be approximately five (5) years old as supported by the medical report – **exhibit 3**.

Defence

The appellant on his defence denied the elements of the charge. The Judgment of the trial court was based on the above underlying evidence. On appeal, the appellant relied on the following grounds in the Memorandum of Appeal dated 20.1.2019 thus:

(1). That the Learned trial Magistrate erred in fact and Law in convicting the appellant when there was no proof of penetration of the offence.

(2). The Learned trial Magistrate erred in Law and fact in convicting the appellant without recording the reasons in the proceedings, why the court was subjected by a single witness' evidence which was not corroborated contrary to Section 124 of the Evident Act.

(3). The Learned trial Magistrate erred in fact and Law by failing to acknowledge and appreciate the glamming contradictions on the prosecution's case which definitely created reasonable doubt in the prosecution case.

(4). That the Learned trial Magistrate erred in fact and Law by not considering the appellant's defence as the same was reliable.

The appeal was disposed of by way of written submissions from **Mr. Gicharu** for the appellant and **Ms. Sombo** for the state.

The thrust of the submissions on behalf of the appellant centered around the question of proof of the elements of defilement as postulated in Section 8 (1) as read with Sub-Section (2) of the Sexual Offences Act. That apart from the inconsistencies in the testimony of the complainant it was clear from the medical evidence that the medical doctor observed that there were no bruises to the anus.

Learned counsel **Mr. Gicharu** further attacked the evidence of the complainant on grounds that besides being inconsistent and contradictory that he suffered sexual intercourse, the medical evidence was not able to positively confirm at the time of examination, the act of penetration, against the complainant.

As there was no other circumstantial evidence argued **Mr. Gicharu** the doubt could have been resolved in favour of the appellant. Learned counsel submitted and urged this court to be guided by the principles in the cases of **Twehangane Alfred v Uganda CR Appeal No. 139 of 2001, Sawe v R {2003} KLR 364, Bukenya & Others v R {1972} E.A. 349.** Based on the foregoing Learned counsel contended that the appeal ought to be allowed and the Judgment of the trial court set aside on both conviction and sentence.

Learned prosecution counsel in her submissions opposed the appeal. According to **Ms. Sombo** although there might have been inconsistencies as alluded to by the defence, the prosecution discharged the burden of proof beyond reasonable doubt. In addition to this, Learned prosecution counsel submitted that the prosecution evidence by the complainant was corroborated with that of PW2 and PW5.

Finally, **Ms. Sombo** submitted that both conviction and sentence were well founded on watertight evidence by the prosecution which need not be disregarded by the court.

It is against this background the court proceeds to evaluate and analyze the evidence keeping in view the grounds of appeal raised by the appellant.

Analysis

The crux of the matter which arises is whether or not the trial Magistrate had evidence before her upon which to convict the appellant. Secondly, whether there were unique features of the trial that could have infringed on the right to a fair trial of the appellant under Article 50 of the Constitution.

Being a first appellate court, in the well known case of **Ruwala v R {1957} EA 370, Okeno v R {1972} EA 32,** I am entitled to examine the evidence, to re-hear the case, reconsider the material before it and make my own decision therein without disregarding the Judgment of the trial Magistrate but carefully weighing the evidence and final findings made thereon in the matter.

For reasons that will emerge in the course of my analysis and final determination, the manner in which this case was handled at the trial court, by both the prosecution counsel and more fundamentally the Learned trial Magistrate has caused me a bit of discomfort.

The Law

On appeal upon this conviction against the appellant, its consistent to recapitulate that the burden of proof in criminal cases remains and still is proof beyond reasonable doubt. The evidence before the trial court would be weighed with greatest care on its relevance, admissibility and materiality to the charge in the underlying provisions of Section 107 (1) of the Evidence Act and the principles in **Woolmington v DPP {1935} AC 462.**

The charge in question is that of defilement contrary to Section 8 (1) of the Sexual Offences Act. The offence is stated to be proved by the prosecution when the following elements are established beyond reasonable doubt:

(a). The act of penetration of the male sexual organ into the sexual organ of the victim, in this instant appeal, that of the complainant.

(b). The age of the victim must be proved to be under 18 years. For purposes of this appeal, the prosecution must proof that the complainant was aged 7 years at the time he was defiled.

(c). That it was the appellant who unlawfully and carnally knew the complainant on the 20.7.2016.

It is undisputed fact that the trial court based its findings in the testimony of the complainant (PW1) in respect of proof of the act of penetration.

The competency of the complainant to give evidence in court therefore, becomes the first point of entry under Section 19 of Oaths and Statutory Declarations Act Cap 15 in determining the competency and intelligence of children witnesses of tender years. The proper procedure on voire dire inquiry to establish whether the child witness understands the meaning of an oath and thus should be sworn or simply appreciates the importance of telling the truth and should therefore adduce unsworn testimony was adequately addressed by the Court of Appeal in **Peter Kariga Kiune v R CR Appeal No. 77 of 1982.**

In the trial court such voire dire examination was conducted by the Learned trial Magistrate who exercised discretion that the complainant was possessed of such intelligence capable of appreciating the duty to tell the truth in a court of law. Towards this end, Learned trial Magistrate permitted the complainant to give unsworn evidence.

On the other hand, the Learned trial Magistrate order apparently is at variance with the final decision which allowed the complainant to adduce unsworn evidence. It goes like this:

> **"voire dire examination confirms that the minor witness does not understand or know what truth is because of his tender age as such he will give unsworn evidence, however pursuant to Article 50 of the Constitution, he can be cross-examined."**

I have considered the decision by the Learned trial Magistrate in line with Section 19 of the Oaths and Statutory Declarations Act (Cap 15) unfortunately her decision is incompatible with the provisions and the principles in **Franscico Matove v R {1961} EA** which states interalia that:

> **"in conducting a voire dire the Learned trial Magistrate must form the opinion whether the child is possessed of sufficient intelligence to justify the reception of evidence and understands the duty of speaking the truth."**

The court therefore failed to make a finding as required in Section 19 of the Act with respect to the competency of the complainant to give unsworn evidence. The test applied was not sufficient enough to establish whether or not the child was competent enough to give evidence. Evidence in court is about the truthfulness and falsify of the facts in issue and before a witness is allowed to take the witness box, Its imperative that on the face of it the honourable court does process that the witness understands the solemn duty of speaking the truth to aid it as the trier of facts in the administration of justice. Conviction on this case based on the complainant's testimony was thus imperiled and the basis on the voire dire inquiry as reflected in the record was vague.

I reiterated at the beginning of this Judgment that the prosecution ought to proof each element of the offence beyond reasonable doubt (See **Charles Karani v R CR Appeal No. 72 of 2013**) As regards penetration Section 2 of the Sexual Offences Act sets the tone that the act may be either partial or complete insertion of the male genitalia with that of the female or in rare circumstances penetration of the anal orifice of the victim who may be, in this case a male.

The Law also asserts that penetration can be proved without assistance of medical evidence (**Kassam Ali v R CR Appeal No. 84 of 2005), Martin Nyongesa Wanyonyi v R CR Appeal No. 661 of 2010**).

On penetration, in the instant case, the Learned trial Magistrate on conviction relied on material evidence of PW1, PW2 and PW3. In the circumstances of the case which raised the standard of proof of beyond reasonable doubt, for example, the complainant claims on the unlawful intention and acts done which culminated in the act of penetration. As the prosecution endeavored to demonstrate PW2 saw the appellant carry away the complainant from the playing field on this the challenge paused by PW2 testimony, was that she duly identified the complainant being taken away but never explained to the court why she never restrained the appellant from going away with a five (5) year old child.

A subsidiary issue is the right to security of the complainant protected by the Law and yet PW2 as the mother never took steps to minimize the risk of exposure to criminal acts.

It is apparent that PW2 came to the scene after the fact of defilement, in response to the distress call by (PW1). There is doubt as to whether, the appellant was the one who picked the complainant from where he was playing with other children to commit the crime as alleged by PW1 and PW2 respectively.

Why do I say so, for reasons found in the record, the Learned trial Magistrate opined that the complainant was not capable of telling the truth. It was inappropriate to place reliance on his evidence to make positive findings as to his culpability and commission of the crime. It is plain from PW2 that the complainant was with other children when the appellant carried him away to his house. Therefore, having ascertained that (PW2) took no step when her child aged 5 years was being removed from amongst other children, the identification of the appellant would have been corroborated by calling the evidence of the known children in company of the complainant at the time.

As matters stand on this appeal, the Law upon this issue is plain in the case of **Bukenya & others v R {1972} EA 349:**

> **"The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

On considering all the various matters which were set out and to which the trial court based its decision the conclusion, I reach is that the

complainant was defiled but a shred of doubt exists as to the positive identification of the perpetrator. In any case the testimony of PW2 in reference to the appellant remains doubtful to the extent that she perfectly asked the court to believe that her child of 5 years old was carried away by the appellant and made no desperate attempt to protect and secure his safety.

At the same time, the complainant voire dire examination was in violation of Section 19 of Cap 15 of the Laws of Kenya. On account of the medical evidence and the reducible minimum in the P3 Form, PW3 informed the court that there were no lacerations to the anal orifice but a genital swab positively showed presence of spermatozoa suggestive of sexual intercourse.

From the above extract there is variance as to whether the anal orifice was even partially penetrated by the perpetrator of the offence. There is no indication whatsoever on the P3 report that the alleged person made attempt to penetrate the anus and in the course deposited spermatozoa into the genitalia of the complainant.

As the appellant happened to be arrested soon thereafter a medical test should have been conducted to place him at the scene of the crime. These discrepancies needed to trouble the trial court because they were inconsistent as to whether the appellant in actual sense sexually assaulted the complainant.

The second element of the offence under review has to do with age. In **Kaingu Elias Kasomo v R Malindi Court of Appeal CR Appeal No. 504 of 2010,** the court stated:

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

On age, the trial court drew inference from the medical assessment report produced by PW4 that the minor complainant was defiled at the age of 5 years old. In this particular case the prosecution led evidence placed the age of the complainant at 5 years within the medical assessment report from PW4. Though the trial acknowledged the evidence and proceeded to convict the appellant the variance between the 7 year age in the charge sheet and 5 year old assessed by the medical was never reconciled on conviction of the appellant.

In the appellant case though the age being within the bracket of Section 8 (2) of the Sexual Offences Act he did suffer prejudice from the fact of non - proof of age.

An imprecise assessment of a child's age can have far reaching administration of justice consequences including prejudice and miscarriage of justice on the part of the offender.

In considering this ingredient, discussed in **Kaingu Elias (supra)** the court notes that the template form on assessment is sketchy and lacks the certificate of assessment.

Furthermore, medical age assessment carried out by qualified medical officers/physicians must take the form of x-rays, scans, examination and other characteristics to determine the age of the minor. The availability and authencity of the source of information and documentation acted upon by medical officer who assessed the age of the complainant in this case is called into question.

The major issue to be determined in this appeal is whether the prosecution proved the ingredient of age beyond reasonable doubt. Not surprising, the basic criteria applied by the medical officer which gave rise to the opinion is missing.

The predicament confirming the primacy of medical age assessments report performed by medical practitioners and experts under Section 48 of the Evidence act is the inequality of the parameters applied to come with a particular age assessment. With respect to the medical officers the determination of age assessment must be credible and not based on perceived incorrect instinct or gut feeling as to the age of a minor. A finding of age must be based on correct facts untainted by conjecture or speculation and the scientific opinion be drawn from cogent and legitimate sources substantial to confirm the age of the minor. It must have escaped the attention of the Learned trial Magistrate that age was never proved to entitle her impose life imprisonment sentence.

I will now examine the question whether the appellant was given a fair trial under Article 50 of the Constitution. This lays the foundation for all trials and minimum guarantees, the accused persons are entitled to in so far as ensuring the protection and preservation of the rights embodied in Article 50.

The challenge to the constitutionality of that trial, of the appellant came as a result of the interplay between Articles 50 (2) (b), (g), (h) & (m) and the provisions of the Criminal Procedure Code on trials. The broad band rights under these Articles relate to **(b) right to be informed of the charge, with sufficient detail to answer it. (c) To have adequate time and facilities to prepare a defence. (g) To choose and be represented by an advocate and to be informed of this right promptly (h) To have an advocate assigned to the accused person by the state and at state expertise, if substantial injustice would otherwise result, and to be informed of this right promptly (m) To have assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.**

In Section 208 of the Criminal Procedure Code records as follows:

> **"(1).If the accused person does not admit the truth, of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence if any**
>
> **(2). The accused person or his advocate may put questions to each witnesses produced against him."**

The right to a fair trial is also entrenched as a fundamental human right in a number of international and regional instruments i.e UDHR – Article 10, ICCPR Article 4, African Charter on Human and Peoples Rights Article 7. The motion of a right to a fair trial under Article 50 of the Constitution or in the international or regional instruments embodies broader list of specific rights than those prescribed in the outlined articles.

In the determination of this appeal against the appellant having reviewed the record the specifics of right to a fair trial which I consider to have occasioned prejudice to the appellant constitute the following:

(a). The right to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The key illustration in this case was the disability of the appellant who by no default of his own was born dump or acquired it in the course of his life cycle.

The general requirement of fairness contributed in Article 50 (2) (m) was for the trial court to establish the effective sign interpreter to dialogue and appropriately interpret the proceedings to the appellant. The criminal proceedings ought to have been organized as to respect the best interest of persons with disability. As far as this right to an interpreter is concerned essentials of age, level of knowledge and intellectual and emotional capabilities should be part of the positive steps, appraised to effectively have such vulnerable offenders participate effectively in their trials.

Nevertheless, in this case as far as interpretation is concerned on appeal several sign interpreters were secured to facilitate interpretation in the appeal proceedings. In contrast with the elaborate detailed trial record it became manifestly clear that none of the sign interpreters procured by the Deputy Registrar was capable to equally connect with the appellant to fully answer the case. The matter came up for hearing and was adjourned severally due to non-availability of sign interpreters.

As this court maintained that the appellant had a right to proper interpretation to fully prosecute his appeal against the respondent it had to rely on the initial interpreter before the Lower court while in my view she made frantic efforts to interpret the communication between the court, the defence counsel and the appellant, without a doubt it was dismal performance.

The sign interpreter failed to interpret in a manner that enabled the appellant fully understand the proceedings to make full disclosure of his defence against the charges on appeal.

In the comparative decision of **Hacioghu v Romania APP NO. 2573 OF 2003** the court outlined the fundamental principles of the right to interpretation under Article 6 (3) (a) of the European Commission of Human Rights a replica of our Article 50 (2) (b) (j) & (m) of the Republic Constitution the court stated:

> **"The court reiterates that paragraph 3 (e) of Article 6 states that every defendant has the right to the free assistance of an interpreter. That right applies not only to oral statements made at the trial hearing but also to documentary material and the pretrial proceedings. This means that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements."**

The right to interpretation and translation and right to information under Article 35 of the Constitution underlies the entire fair trial rights in the entire criminal process. Ensuring substantive equality , the value and importance of interpretation of proceedings to an appellant in the proceeding trial cannot be underscored more so where proceedings were required to be in the sign language. Language being the core foundation for justice deliverables is a right that must be secured for the accused.

Guided by this and the criteria set by the trial court proved that there was inadequacy of quality of interpretation accorded to the appellant. The more I interacted with the appellant on appeal and the measure taken to have this crucial right guaranteed by making available a sign interpreters, the more I appreciated that the criminal proceedings were interpreted by an interpreter with insufficient command of the sign language. Notably the appellant was prejudiced and the events in the court room though sanctioned by the presiding Magistrate were in all practical purposes ineffective rendering the trial to me a mistrial.

The other obvious ground in the proceedings arises in respect of Article 50 (2) (h) & (g) of the Constitution on legal representation. It provides:

> **"Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly."**

The compendium of the criteria on legal services by the state is outlined in Section 29 (1), 30, 35 & 36 under the Legal Aid Act No. 6 of 2016. Although the duty and mechanism against the state to offer legal aid is well spelt out in the Legal Aid Act its enforcement and implementation is still at an infant stage on compelling reasons of budgetary, constraints.

Notwithstanding, that position, like other legal rights under Article 50 of the Constitution it commands no more than the performance and the duty of the court to redress and guarantee the right in a particular manner succinctly put in the Constitution. The case in Advocates Sans Frontiers (on behalf of **Bwam Panye v Burundi, African Commission on Human Rights Comm No. 213/99/2000** the nature of this right was expounded as follows:

> **"Legal assistance is a fundamental element of the right to a fair trial, more so where the interest of justice demand it. It**

holds the view that in the case under consideration, considering, the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case." The right to equal treatment by a jurisdiction, especially in criminal matters means, in the first place, that both the defence, and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. They must in other words be able to argue their cases on equal footing."

On the basis of Constitutional and Statutory Law fair trial rights and recognized right to legal counsel are considered as part of the corpus of Customary International Law guaranteeing the right to legal representation and the underlying determinants the court in **Pett v Greyhound Racing Association {1968} 2 ALL ER 545** stated:

"It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it everyday. A magistrate says to a man: 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?"

As regards to the facts of this case the appellant was charged with a serious offence of defilement and upon conviction he was to be sentenced to life imprisonment. It is quite evident that the appellant is vulnerable person by virtue of his disability. In analyzing his personal circumstances the common thread is similar with the test outlined by the Court of Appeal in the case of **David Njoroge Macharia {2001} eKLR** where the court stated:

"Any accused person, regardless of the gravity of their crime, may receive a court appointed lawyer if the situation regards it. Such cases may be those involving complex issues of fact or Law; where the accused is unable to effectively conduct his or her own defence due to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence."

For all the above considerations, this right to legal representation was never communicated to the appellant promptly immediately after indictment and arraignment for plea on the charge of defilement. The present case factual matrix are indisputably worth to conduct an inquiry under Article 50 (h) of the Constitution on substantial injustice and grant leave for legal counsel to be provided for the appellant at state expense.

It cannot therefore be doubted that in the preceding criminal trial conducted by a qualified prosecution counsel and an illiterate appellant was in violation of the doctrine of Equality of arms in Article 50 of the Constitution. Legal counsel in a court room context is of fundamental importance as well indispensable element of a fair trial.

As a consequence, the ramifications of the fair trial rights to the extent that they were infringed was a misdirection and wrong exercise of discretion by the Learned trial Magistrate.

So far so good, I echo the passage from the **Constitutional Court of South Africa in S v Jaipal {2005} 2ACC 1 SA 582** thus:

"The right of an accused to a fair trial requires fairness to the accused, as well as to the public as represented by the state. It has to instill confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime."

But here is where the brokenness of the system makes justice for the poor virtually impossible. In this context one thing I know for sure lawyers do make a difference to the marginalized, the vulnerable and the legally challenged members of society who find themselves in the court system.

As I pen off I am inspired by the passage in **Reginald Heber Smith, Justice and Poor , 8, 15 (Palterson Smith Publg, 30 Ed 1972):**

"Smith noted that barriers to access to justice harms the poor and actions their oppressors to wield the legal system as a weapon against them. The law permits every person to try her own case, but the lay vision of every man his own lawyer has been shown by all experience to be an ill vision. It is a virtual impossibility for a person to conduct even the simplest sort of a case under the existing rules of procedure, and this fact robs the informa pauper's proceeding of much of its value to the poor unless supplemented by the providing of counsel. We can end the existing denial of justice to the poor if we can secure an administration of justice which shall be accessible to every person no matter how humble, and which shall be adjusted so carefully, to the needs of the present day world that it cannot be dislocated or the evenness of its operation be disturbed, by the fact of poverty."

In my view shifting the center of gravity on equality before the Law under Article 27 of the Constitution, right to interpretation and translation, and right to information for the accused are pillars in the administration of justice to be fully financed by the state. Indeed the critical question of legal representation to the accused persons under Article 50 (h) of the Constitution according to the dictates of the case where substantial injustice would otherwise result be significantly enhanced to safeguards the right to a fair trial.

Thus my reading of Article 50 (H) of the Constitution extends right to counsel as part of fair trial rights if the interest of justice required without any costs payable by him as part of the eligibility criteria. To what purpose the right is limited the court in **Slaveski v Smith {2012} 34 VR 206 – 220 – 1** held:

"Given the similarities between s 24(1) of the Charter and art 6 (1) of the Convention [ECHR], we are disposed to construe s 24 (1) of the Charter in similar fashion. In that sense, it may be said that s 24 (1) creates a right to legal representation in limited circumstances. It is, however, no more than reflective of the position of common law. An indigest person does not have a right at common law to be represented at the State's expense on a serious criminal offence. he has a right to a fair trial, more accurately expressed in negative terms as a right not to be tried unfairly. Depending upon the circumstances of the particular case, including the background of the person, lack of representation may mean that the person is unable to receive a fair trial."

In my view, given our history we must not lose sight that a large part of our citizenry are not endowed with knowledge on how courts work. It is for the Judges and Magistrates to ensure minimum rights enshrined in the constitution particularly to a class of defendants like the appellant who seldom might find themselves on the wrong side of the Law are protected and enforced **(See Section (2) of the Constitution).**

It must follow from this that trial courts should purpose to give effect to Article 50 (h) on legal representation where substantial injustice would otherwise result. Further, notwithstanding, advances made by the judiciary to enhance capacity on right to interpretation more needs to be done to pursue an affirmative action in connection with sign interpreters for the benefit of vulnerable witnesses and defendants in the administration of criminal justice.

At the end of the day, I am satisfied the grounds of appeal put forward by the appellant raised fundamental matters of Law and fact against the conviction. The appeal is allowed on both conviction and sentence. It is ordered that the appellant be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 10TH DAY OF MARCH 2020

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R. NYAKUNDI

JUDGE