REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 81 OF 2019

EMMANUEL KIPCHIRCHIR KOGO.....APPELLANT

-VERSUS-

REPUBLIC..RESPONDENT

(Being an appeal from the conviction and sentence in Kapsabet Senior Principal Magistrate's Criminal Case No.1521 of 2017 by Hon. Wachira, SPM, dated 14 May 2019)

JUDGMENT

[1] The appellant was initially charged, before the lower court, with the offence of rape contrary to **Section 3(1)(a) and (b)** of the **Sexual Offences Act, No. 3 of 2006**. It was alleged that on **20 June 2017** at [Particulars Withheld] Village within Nandi County, he intentionally and unlawfully caused his penis to penetrate the vagina of **IC**. without her consent. In the alternative, he was charged with committing an indecent act with an adult, contrary to **Section 11(A)** of the **Sexual Offences Act**, in that on **20 June 2017** at [Particulars Withheld] Village within Nandi County, he intentionally and unlawfully caused his penis to come into contact with the vagina of **IC** against her will.

[2] The appellant denied the charges and, in time, the Charge Sheet was amended, whereupon the charge of rape was substituted with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act;** and the alternative charge of committing an indecent act with an adult was similarly replace with a charge of committing an indecent act with a child, contrary to **Section 11(1)** of the Sexual Offences Act. The appellant maintained his plea of not guilty and upon trial of the facts, the learned trial magistrate found the appellant guilty of the principal charge and convicted him thereof. He was consequently sentenced, on **14 May 2019**, to 15 years' imprisonment pursuant to **Section 8(3)** of the **Sexual Offences Act.**

[3] Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on **22 May 2019** on the following grounds:

> **[a]** That the trial magistrate erred in law and fact by failing to hold that no age assessment was done to establish the age of the complainant.
>
> **[b]** That the trial court erred by relying on the evidence that was riddled with contradictions;
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> **[c]** That the learned magistrate erred in law and fact by not observing that the genesis of the allegations was a grudge occasioned by a land dispute.
>
> **[d]** That the learned magistrate erred by relying on evidence which was largely hearsay.
>
> **[e]** That the learned magistrate erred by relying on evidence of the expert, which evidence did not link the appellant with the offence,
>
> **[f]** That the appellant was not subjected to a fair and impartial trial.
>
> **[g]** That the learned magistrate erred in law and fact by not considering the appellant's defence.
>
> **[h]** That the learned trial magistrate erred in law and fact by failing to hold that penetration was not positively proved.

[4] Consequently, the Appellant prayed that his appeal be allowed; that the conviction be quashed and that the sentence passed against him

by the lower court be set aside. Thereafter on **5 March 2020**, the appellant sought and was granted leave to file Supplementary Grounds of Appeal pursuant to **Section 350(2)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. In his Supplementary Grounds of Appeal, he contended that:

> **[a]** The trial court erred in law and fact as it failed to hold that the Charge sheet was defective.
>
> **[b]** That the trial court erred in law and fact as it failed to accord the case a fair trial.
>
> **[c]** That the learned trial magistrate erred in law and fact as he failed to observe that penetration was not conclusively proved.
>
> **[d]** That the trial court erred in law and fact as it failed to observe that identification and recognition of the appellant was unreliable because he lived in the same neighbourhood with the complainant.
>
> **[e]** That the trial court erred in law and fact as it did not observe that the evidence tendered was inconsistent with the circumstances under which the offence was alleged to have been committed.
>
> **[f]** That the learned trial magistrate erred in law and fact as he failed to hold that the Prosecution evidence did not prove its case beyond reasonable doubt.

[5] The appellant urged his appeal by way of written submissions, and contended, in respect of Grounds 1 and 2 that the charges filed against him remained defective despite the amendment. He accordingly submitted that it was the responsibility of the trial court to find that the charge was defective under the provisions of **Section 214** of the **Criminal Procedure Code.** In particular, the appellant contended that the evidence was at variance with the particulars of the charge in that it supported the offence of rape as opposed to defilement under **Section 8(1) and (3)** of the **Sexual Offences Act**.

[6] It was further the contention of the appellant that the trial court failed in its responsibility to accord his case a fair trial as required by **Article 50(1) and (4)** of the **Constitution,** when it failed to order for age assessment to ascertain the exact age of the complainant, since no Certificate of Birth was produced. The appellant relied on **Criminal Appeal No. 504 of 2010: Kaingu Elias Kasomo vs. Republic** for the proposition that the age of a victim of sexual assault under the **Sexual Offences Act** is a critical component that must be proved by credible evidence. He also faulted the lower court for failing to accord him an opportunity to plead afresh to the charge as amended and submitted that this failure had the effect of nullifying the entire proceedings of the lower court.

[7] In support of Grounds 3 and 4, the appellant discredited the Prosecution evidence, contending that no eyewitness was called to corroborate the evidence of the complainant; and that he was merely implicated by the complainant because of an existing grudge between them. Hence, in his view, the evidence of identification and penetration fell below the requisite standard for such cases. The appellant relied on **Nairobi HCCRA No. 471 of 2001: Ben Mwangi vs. Republic** and **Martin charo vs. Republic** [2016] eKLR to support his argument that the evidence of the doctor did not link him with the alleged crime and therefore that the main charge was not proved against him beyond reasonable doubt.

[8] Mr. Chacha, learned Counsel for the State, opposed the appeal contending that the Prosecution case was proved beyond reasonable doubt. He pointed out that the victim suffered such serious injuries in the ordeal that she had to undergo surgery for purposes of vaginal repair. In his view therefore, there was sufficient proof of penetration presented before the lower court. It was further his submission that the identity of the perpetrator of the offence was also proved and urged the Court to note that the complainant lived in a tea farm and were neighbours with both the appellant and **PW5**, who was the first responder; and therefore that their evidence of identification was not only credible but also corroborative.

[9] Counsel however conceded that, there was no proof that the complainant was under 18 years of age. He therefore urged the Court to be guided by **Section 179** of the **Criminal Procedure Code** as well as a purposeful interpretation of **Section 186** of the Criminal Procedure Code. He expressed regret that the main charge was amended from rape to defilement; and otherwise prayed that the appeal be dismissed.

[10] I have given careful consideration to the appeal and taken into account the written and oral submissions made herein by the Appellant and Learned Counsel for the State. This being a first appeal, I am mindful of the obligation to subject the evidence to a fresh analysis, while giving allowance for the fact that I did not have the benefit of seeing or hearing the witnesses. This approach was well explicated in **Okeno vs. Republic [1972] EA 32** by the Court of Appeal for East Africa thus:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

[11] In the premises, I have perused and considered the evidence adduced before the lower court, which is that the complainant **(PW1)** was at home at about 9.30 a.m. on **20 June 2017**. She was going about her household chores when the appellant showed up and asked to be served with some tea. The complainant told the court that she told the appellant that there was no tea, whereupon the appellant pushed her on the bed, threatened her not to make any noise and then proceeded to gag her before raping her. She testified that she bled profusely to the point of losing consciousness, but not before yelling for help. When she regained her consciousness, she found herself at **Lelwak Hospital**, from where she was referred to **Nandi Hills Referral Hospital** and then to **Gynacare** in Eldoret because she continued bleeding. **PW1** mentioned that she was hospitalized for one week during which she was operated on. Upon her discharge, she reported the matter to the

Police for action and was issued with a P3 Form which was duly completed and returned to the Police Station.

[12] **PW2, James Tallam**, told the lower court that he was then serving as the village elder for Kamuti Central; and that the complainant is his niece while the appellant is a neighbour. His evidence was that at about 8.00 p.m. on **20 June 2017**, he received instructions from the area chief, **Robert Barno**, for the arrest of the appellant on allegations that he had raped the complainant. He knew the accused and therefore, with the assistance of the village elder of the appellant's area, he effected his arrest and escorted him to the police station.

[13] **Tom Kelel Kipkosgei (PW3)** was then serving as a senior clinical officer at Nandi Hills Hospital. It was in that capacity that he filled the P3 Forms for both the complainant and the appellant. **PW3** also made reference to the treatment documents issued to the complainant at **Nandi Hills Referral Hospital**, including her Discharge Summary. He therefore confirmed that the complainant was admitted at their facility having been allegedly raped; and that she had a very deep linear laceration in her vagina and was still bleeding at the time of admission. He also confirmed that all that was done for her was to contain the bleeding by packing the patient with gauze and referred her for specialized care. Thus, **PW3** produced the Discharge Summary issued at Nandi Hills Referral Hospital as the **Prosecution's Exhibit 2** as well as the other medical documents evidencing the complainant's treatment at **Lelwak Medical Clinic** and **Gynocare Women and Fistula Hospital**, where the surgery in respect of the complainant was undertaken, as **the Prosecution's Exhibits 3 to 5.**

[14] Regarding his examination of the appellant, **PW3** testified that he noted the presence of bloodstains on his vest and brown jacket; but that he was in fair general condition Nothing abnormal was noted on his genitalia or urine. He produced the P3 Form that he filled in respect of the appellant as **the Prosecution's Exhibit 8** before the lower court.

[15] The investigating officer, **Cpl. Nicolas Agure** testified as **PW4** and stated that he took over the investigating from **Cpl. Mutinda** who had proceeded on transfer; and that by then the case was pending before the lower court and most of the witnesses had testified. The last Prosecution witness was **Florence Chepkogei (PW5).** She told the lower court that, on the **20 June 2017**, she was plucking tea in the morning at 7.30 a.m. when she saw the accused person passing. That shortly after that she saw the complainant lying unconscious and bleeding from her private parts; and that she raised a distress call to which the neighbours responded and had the complainant taken to hospital.

[16] In his unsworn statement of defence before the lower court, the appellant conceded that he is a tea plucker, and that he knows the complainant. He otherwise adopted his written statement of defence that he filed before the lower court, wherein he narrated the circumstances under which he was arrested on the night of **20 June 2017** by the area village elders. That he was handed over to the area chief who escorted him to **Kipkeikei Police Post** without informing him of the reason for his arrest. He added that he was transferred to **Nandi Hills Police Station** on the same night and that he was later, on **22 June 2017**, charged and arraigned before court for an offence he did not commit.

[17] It is manifest from the foregoing therefore that, in so far as the allegations of rape are concerned, the evidence presented by the Prosecution before the lower court was unrebutted. The account given by the complainant that she was at home at about 9.30 a.m. and that she was raped is not contested. In particular, there is not controversy about the medical evidence as presented by **PW3**, particularly as to the serious injuries that the complainant sustained, that necessitated surgical intervention. The Discharge Summary issued by **Gynocare Women's & Fistula Hospital** confirms that the complainant arrived there with a note from **Lelwak Medical Clinic,** Nandi Hills, having alleged to have been raped by a person well known to her. The document further shows that it was confirmed that she had suffered vaginal tear and was still bleeding on admission at **Gynocare Hospital**; and that she was operated on and the tear repaired.

[18] Likewise, the P3 Form marked **the Plaintiff's Exhibit 6** before the lower court, does confirm, in Section C thereof, that the complainant suffered a tear of her genitalia that was stitched; and that the injury was caused by forceful penetration. Given the line of defence adopted by the appellant, and particularly the fact his statement was restricted to the circumstances surrounding his arrest, I am satisfied that penetration, in respect of the complainant, was proved before the lower court beyond reasonable doubt.

[19] The foregoing notwithstanding, a predominant issue in this appeal is the technical point as to the validity of the charge, given its variance with the evidence that was adduced before the lower court, which was conceded to by the State. It is imperative therefore for this technical issue, to be considered upfront as it has the potential of disposing of the appeal. The Charge Sheet, as amended, shows that the appellant was charged with defilement pursuant to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act;** and authorities abound that, for purposes of the **Sexual Offences Act,** the age of the victim is a crucial ingredient which must be proved beyond reasonable doubt in pretty much the same way as penetration.

[20] Hence, in <u>**High Court Criminal Appeal No. 34'B' of 2010: John Otieno Obwar vs. Republic**</u> it was held by **Hon. Makhandia, J.** (as he then was) thus:

> **"Defilement is a strict offence whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence. Accordingly, it is important that the age of the victim to be proved by credible evidence..."**

[21] Similarly, in <u>**Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010**</u> the Court of Appeal stressed this point thus:

> **"Age of the victim of 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".**

[22] How is this to be done? The answer is in **Rule 4** of the **Sexual Offences Rules of Court Rules.** It provides that:

> **"When determining the age of a person, the court may take into account evidence of the age of that person that may be**

contained in a birth certificate, any school documents or in a baptismal card or similar document."

[23] Where, for some reason, there is no such documentary proof as is envisaged by **Rule 4** aforementioned. Nevertheless, it is noteworthy however that the complainant herself alluded to the fact that she was a mother; and the P3 and other medical documents relied on by the Prosecution give the complainant's estimated age as 18 years. It is now settled that age of a victim can also be determined by observation and common sense. In **P.M.M. vs. Republic** [2018] eKLR, it was held thus:

> **"…whilst the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant. Here, the medical evidence adduced by the clinical officer, which was not discredited by the appellant, estimated the age of the victim as 13 years…"**

[24] Granted that the P3 Form was filled way back on **20 June 2017**, indicating the alleged offence as rape, it is inexplicable that the Prosecution found it prudent to effect an amendment of the Charge Sheet and to substitute the correct offence of rape with defilement; and even then opt for **Section 8(3)** of the **Sexual Offences Act**, which caters for the age period between 12 and 15 years instead of **Section 8(4)** which would have been more appropriate for the age bracket of between 16 and 18 years.

[25] Moreover, whereas in the particulars of the main charge it was alleged that the victim was aged 17 years old, there was absolutely no evidence tendered before the lower court to that effect; and although the appellant raised this issue of age in his final submissions before the lower court, it is apparent that no attention was given to it by the learned trial magistrate, who had the duty, in the larger interests of justice, to pay heed to the provisions of **Section 214(1)** of the **Criminal Procedure Code** of ensuring that an amendment of the charge was effected to align it with the evidence. That provision states thus:

> **"Where, at any stage of a trial before the close of the case for the prosecution, <u>it appears to the court</u> that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks to meet the circumstances of the case."**

[26] Hence, even assuming that this variance was brought up by the appellant for the first time in his written submissions, the trial magistrate still had the option, under **Section 179** of the **Criminal Procedure Code**, to convict in respect of the proven offence of rape even though the appellant was not charged with its. **Section 179** of the **Criminal Procedure Code** provides that:

> **"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**
>
> **(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."**

[27] Thus, in the **Criminal Procedure Bench Book**, **February 2018**, examples of cognate offences are provided in paragraphs 19 and 20 of Chapter 4, on pages 113 and 114, to be murder and manslaughter; robbery and stealing; defilement and sexual assault; and robbery with violence and grievous harm; and in the persuasive authority of **Chris Mang'era Arunga vs. Republic** [2017] eKLR, the Court **(Hon. Wendoh, J.)** it was affirmed that rape is indeed minor to defilement, a position that I entirely agree with. The Court held thus:

> **"In this case both defilement and rape are sexual offences. For both offences, one of the ingredients is proof of penetration. Whereas defilement involves children under 18 years, no proof of consent is required. Rape involves adult victims and there has to be lack of consent. Besides, under section 4 of the Sexual Offences Act, upon conviction, one is liable to be sentenced to not less than 5 years' imprisonment but it can be enhanced to life imprisonment depending on the circumstances of the case. Defilement is a more serious offence that attracts a sentence of 15 years to life imprisonment depending on the age of the victim."**

[28] Thus, rape being a minor offence in comparison to defilement in terms, it was permissible for the trial magistrate to convict the appellant of it, pursuant to **Section 179(2)** of the **Criminal Procedure Code**, although he was not charged with the offence of rape; the only safeguard being the need to ensure that all the ingredients of rape, including lack of consent were proved. And, since this Court has powers under **Section 354(3)(a)(ii) of the Criminal Procedure Code** to alter the findings of the lower court, it does not follow that the variance aforementioned and the conviction for defilement under **Section 8(3)** of the **Sexual Offences Act** is necessarily vitiated. There is need therefore to go into the merits of the appeal to determine whether all the ingredients of offence of rape were proved beyond reasonable doubt before the lower court.

[29] **Section 3(1)** of the **Sexual Offences Act** provides that:

> **"A person commits the offence termed rape if—**
>
> **a. He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;**
>
> **b. The other person does not consent to the penetration; or**
>
> **c. The consent is obtained by force or by mans of threats or intimidation of any kind."**

[30] Hence, in addition to penetration, the Prosecution was under duty to prove lack of consent and the identity of the culprit beyond reasonable doubt. As has been pointed out herein above, the evidence of **PW1** was that the offender forcefully got hold of her, forced her onto the bed and tore her clothes before engaging in forceful penetration. That she sustained serious injuries in the process is not in doubt. **PW5** found her unconscious and bleeding profusely. The medical evidence presented by **PW3** corroborated **PW1's** evidence, for it demonstrated the forceful nature of the penetration. Thus, the only other aspect to consider, which is what the appellant disputed, is the issue as to whether he committed this particular crime.

[31] A careful consideration of the evidence adduced before the lower court shows that the inculpating evidence was basically that of visual identification and it is imperative, in such circumstances, to bear in mind the caution expressed by the Court of Appeal in **Paul Etole & Another vs. Republic** [2001] eKLR regarding such evidence. It held that:

> **"…Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."**
>
> **All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger…"**

[32] In this case, the incident took place in broad daylight and, quite apart from the fact that the appellant was also seen leaving the scene by **PW5**, there is no dispute that the appellant and the complainant were neighbours and were earning a living in the vicinity as tea pickers. The appellant conceded as much. Moreover, the evidence of **PW1** was that before the incident, there was a conversation between her and the appellant in which the appellant asked to be served with some tea. This was therefore a case of recognition of a person hitherto well known to the complainant and PW1 in fairly favourable circumstances. In in **Anjononi & Others vs. Republic [1980] KLR 59** the Court of Appeal held that:

> **"...recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another."**

[33] There was therefore credible evidence placing the appellant at the scene of this particular crime and therefore the trial magistrate cannot be faulted for so finding. It is also evident from the record that the plea of the appellant was taken afresh upon substitution; and therefore that his complaint that he was not accorded a fair trial is untenable. As to the complaint that the village elders who arrested him were not called before the lower court, it is noteworthy that the appellant's arrest was not in issue. He gave an elaborate account in that regard, confirming that he was arrested at night on **20 June 2017** by two village elders and therefore no detriment was visited on the prosecution by their failure to testify. Moreover, **Section 143** of the **Evidence Act, Chapter 80** of the Laws of Kenya, provides that:

> **"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."**

[34] Accordingly, in **Daniel Muhia Gicheru vs. Republic Criminal Appeal No. 90 of 2007 (UR)** it was held that:

> **"The often trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond any reasonable doubt. How many witnesses is it expected to call to satisfy that burden? In BUKENYA AND OTHERS V. UGANDA [1972] EA 349 the Court of Appeal for Eastern Africa held that the prosecution has the discretion to decide as to who are the material witnesses..."**

[35] I have also paid attention to the various instances of what the appellant deemed contradictions as set out at pages 5 to 7 of his written submissions. For instance, he challenged the medical evidence as being contradictory, in that in the P3 Form, it was indicated that the external genitalia was normal, yet it was also alleged that there was forceful entry. There is no contradiction as the medical evidence clearly shows that the injury was a fornix tear, and therefore an internal one. He also questioned how the complainant could say she saw and recognized him and yet he lost consciousness. Again, a keen consideration of the evidence of PW1 reveals that she had no inkling that the appellant would rape her when he first approached and asked for some tea. He obviously was therefore in a position to see and recognize him before she fell unconscious.

[36] Hence, having considered all the perceived contradictions, I am unable to find that they in any way detracted from the main theme of the Prosecution case or caused any prejudice to the appellant; bearing in mind the determination by the Court of Appeal in **Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1992**, that:

> **"An appellate court in considering those discrepancies must be guided by the wording of section 382 Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence".**

[37] Similarly, in ***Philip Nzaka Watu vs. R*** **[2016] eKLR** the Court of Appeal held that:

> **"...it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people**

perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

[38] In the result, it is my finding that there was sufficient evidence to prove beyond reasonable doubt that the appellant committed the offence of rape against the complainant. By virtue of the powers conferred on this Court by **Section 354(3)(a)(ii) of the Criminal Procedure Code,** his conviction for the main charge of defilement under **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** is hereby quashed and replaced with a conviction for rape under **Section 3(1)** as read with **Section 3(3)** of the **Sexual Offences Act**. Likewise, the sentence of 15 years' imprisonment is hereby set aside and replaced with imprisonment for 10 years, to be reckoned from the date the appellant was sentenced by the lower court.

[39] Lastly, I note that, in respect of the alternative charge the trial magistrate made remarks to the effect that **"…The alternative charge fails…",** the proper thing to do in circumstances where a conviction is recorded on the main charge, is to make no finding in respect of the alternative charge. The rationale for this was well explicated by the Court of Appeal thus in **Robinson Mwangi Maina vs. Republic [2006] eKLR**:

> **"The trial court found that the alternative charge was part of the robbery and therefore acquitted them of the same charge of handling stolen property. That was not really correct. Where an accused person is convicted on the main charge, the usual practice is to make no findings on the alternative charge so that if on appeal the court thinks that the main charge was not proved but the alternative one was, the court can substitute a conviction on the alternative charge which would still be available on the record..."**

[40] In the result, and except for the alterations aforementioned, the appellant's appeal is devoid of merit and is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF APRIL, 2020

OLGA SEWE

JUDGE