REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 301 OF 2015

WYCLIFF LUMALA ....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of Hon. Kagendo CM delivered on 16th November 2015 in Molo Chief Magistrate's Court Criminal Case Number 2117 of 2014)

J U D G M E N T

1. The appellant Wycliff Lumala was charged together with Jonathan Komen in **Molo Criminal Case Number 2117 of 2014** with;

COUNT I

DEFILEMENT CONTRARY TO SECTION 8(3) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006 LAWS OF KENYA

WYCLIFF LUMALA: Between the 19th day of February 2014 and 21st day of February 2014 at [particulars withheld] in Molo District within Nakuru County, intentionally and unlawfully caused his penis to penetrate the anus of DKC a boy aged 14 years.

Alternative Charge to Count I

INDECENT ACT CONTRARY TO SECTION 11 (1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006 LAWS OF KENYA

PARTICULARS OF OFFENCE:-

WYCLIFF LUMALA: Between the 19th day of February 2014 and 21st day of February 2014 at [particulars withheld] in Molo District within Nakuru County, intentionally and unlawfully touched the anus of DKC a boy aged 14 years.

COUNT II

DEFILEMENT CONTRARY TO SECTION 8(3) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006 LAWS OF KENYA

WYCLIFF LUMALA: On the night of 26th July 2004 at [particulars withheld]a in Molo District within Nakuru County, intentionally and unlawfully caused his penis to penetrate the anus of DKC a boy aged 14 years.

Alternative Charge to Count II

WYCLIFF LUMALA:- On the night of 26th July 2004 at [particulars withheld] in Molo District within Nakuru County, intentionally and unlawfully touched the anus of DKC a boy aged 14 years.

COUNT III

STEALING CONTRARY TO SECTION 268 AS READ WITH SECTION 275 OF THE PENAL CODE.

JONATHAN KOMEN: On the 27TH day of July 2014 at Lawina in Molo District within Nakuru County, stole 26kgs of dry beans valued at Kshs. 910/= the property of Harolin Koima.

Alternative Charge to Count III

HANDLING STOLEN PROPERTY CONTRARY TO SECTION 322 (1) (2) OF THE PENAL CODE.

PARTICULARS 2:-

JONATHAN KOMEN:- On the 30th day of July 2014 at Lawina in Molo District within Nakuru County otherwise than in the course of stealing, dishonestly retained 1kg of dry beans knowing or having reasons to believe it to be stolen property.

2. The prosecution called five (5) witnesses, the two (2) accused were put on their defence. The trial magistrate acquitted the 2nd accused, but found the 1st accused, appellant, guilty of two (2) counts of defilement, sentenced him to twenty (20) years imprisonment on each count to run concurrently. This was in the judgment delivered on 16th November 2015.

3. The appellant was aggrieved by the conviction and sentence and filed appeal on 2nd December 2015 on the grounds:-

1. THAT the trial magistrate erred in law and fact by appreciating the family based evidence full of contradictions, simultaneous illusions, exclusion and bare insertion of facts.

2. THAT the trial magistrate erred in law and facts be entertaining a motion in arrest of judgment exhumed by PWs's claiming that I the accused has had a negative impact in PW2's life and ought not to be acquitted due to the fact that the accused's negative character and conduct would prevail if acquitted.

3. THAT the trial magistrate erred in law and facts by constituting unreliable un-credible evidence to act as a bar to heightening the suspicion on accused to warrant a conviction.

4. THAT the trial magistrate erred in law and facts by failing to note the contradictory evidence surfaced between the oral testimonies and the documentary evidence and

5. THAT the trial magistrate erred in law and fact by failing to consider the defense of the accused alongside with the evidence of DW4.

4. He later appointed counsel M/S J.A Simiyu & Co Advocates who filed Supplementary Petition together with written submissions on 28th March 2019;

1. THAT the learned trial magistrate erred in law and fact when she failed to put into consideration the contradicting evidence.

2. THAT the learned trial magistrate fails to consider the inconsistencies and lack of evidence flow.

3. THAT the charge sheet was defective.

4. THAT the learned trial magistrate so much concentrated on the appellants here acquitting a purported accomplice.

He relied on the following cases;

1. HCR Appeal (Nakuru) 41 of 2013

Moses Maina Mwangi v Republic

2. Alphonce Odhiambo Olwa v Republic [2017] eKLR

5. The appellant and his co-accused denied the charges.

6. PW1 DCK, testified on 19th November 2014. He said he was born on 3rd November 1999 and had just sat his Kenya Certificate of Primary Education (KCPE). That both accused were known to him, that the appellant was working for a neighbour and the 2nd accused had a hotel at the shopping centre. He testified that he was defiled twice, first in February and then in July that year 2014.

7. He testified that the February incident happened this way, he had been sent to deliver some photos to a neighbour. He did not find the said neighbour. He decided to go back home. On the way he met the Wycliff and another man.

"We started walking together. Suddenly Wycliff held my hands. The other person sprayed something in my face. I lost consciousness. When I regained consciousness I found myself in a maize plantation. I had no trouser on. Wycliff arrived with

> Mogaka. They made me get up. I was still dazed. They took me to a house where I was given a dish of rice. Mogaka took a condom, wore it and sodomised me. I could not fight back. Then Wycliff did the same things. Accused did not wear a condom .While I was in the house my father arrived. He took me home. I did not tell him what had happened to me because I was feeling ashamed. On 27th June 2014, I was at a grazing field. Accused 2 who is called JD appeared. He had a scarf. Suddenly he put the over my head. Wycliff was there too. He held my hands. The scarf had a drug and I lost consciousness again. When I regained my senses I felt myself being sodomised by a person, then another. The drug dazed me. After that I went home. JD took some beans which he went with. I must have strayed out of the home as a man stopped me and took me to my father. My father asked me what was wrong. That is when I told him what had been happening to me. I was taken to hospital."

On cross examination be denied that his father had chased him away and he had been hosted by the appellant, he said that appellant and one Mogaka, whom he was seeing around but had not been arrested had sodomised him in turns. That he never reported that incident. On cross examination by accused 2 he said that he knew him as JD and he too had sodomised him together with the appellant.

8. PW2 HK, Assistant Chief at [particulars withheld] Sub-Location testified also on 19th November 2014. He said that PW1 was his son. The appellant and his co accused were known to him. He said that in February- March "this year" his son was sent by his wife (PW2's) to take some photos to a friend. He never came back.

> "I looked for him to no avail. I alerted neighbours, **one of them** told me that he had seen D in the home of Wycliff. Early in the morning I went to Wycliff's home. I found my son**, Mogaka** and **Sitiana's worker.** They were on one bed. I asked the boy what he was doing. He looked and appeared absent minded. He could not answer my questions. There were allegations reported to my office that accused 1 (appellant) was defiling boys. **We** searched the house. **I** found several condoms in the house. I asked D if he had been sodomised. He denied this. I went with him."

9. Regarding the 2nd incident the witness said that in July, the child

> "**…**failed to come home from school".

He did enquiries but did not find him.

> "After 2 days Ezekiel alerted me that he had seen my son in suspicious state of mind. I went to where he was. I found Ezekiel, Wilson and my son. My son appeared absent minded. He looked unkempt. He had muddy clothes. I asked him where he had been but he did not respond. I called the police. They went with the boy. Upon interrogation D narrated how he had been sodomised by the accused persons after being drugged. He also admitted to have given accused 2 some beans from my store. The boy was taken to hospital for examination."

On cross examination by appellant he said that he had found his son in the house of the appellant; that they were four (4) of them, that at that time had no evidence to pin the appellant. Cross examined by the 2nd accused he said accused 2 was his neighbour and he found his beans in his (accused 2's store) in his (PW2's) sack.

10. PW3 JK the Chief [particulars withheld] testified that on 29th July 2014, PW2 alerted him that his son D was at Elburgon Police Station. He went there. He says,

> "We grilled the boy who claimed that the 2 accused had sodomised him. We traced the accused persons and I had them arrested. The alleged offence took place in Wycliff's house. In Jonathan's house we found some beans which my assistant chief claimed were his property."

In cross examination by appellant he said he knew where the appellant worked and that he was the one who had arrested him. That D is the one who identified him. Cross examined by accused 2, he said he had beans which he PW2 claimed were his.

11. PW4 No. 77842 PC Charles Ochieng of Elburgon Police Station was the investigating officer. He testified that on 29th July 2014 was called by the OCS to his office where he found PW1 and PW2. He was told that D had disappeared earlier and was now claiming that he had been sodomised by one Luwela and Jonathan and others not before court. That D also claimed that Jonathan had taken their beans. He took D to hospital where P3 was filled and PW3 recovered the beans. On cross examination by appellant he said he took him to Molo Hospital for examination.

12. PW5 was **Dr. Geoffrey Biket** from Elburgon Hospital. He produced the P3 on behalf of Doctor Valentine whom he said had gone for further studies abroad. He said D was examined on 12th August 2013 complaining that he had been "*forced to inhale a powder after which he was sodomised.*" That P3 was filled sixteen (16) days after the alleged offence. The doctor went on to state that;

> "**…**a blunt object, a penis was used… At the anal area it was painful and bruises. There was also some discharge. Anal swab was done. Moderate epithelial cells were seen. No spermatozoa seen."

He produced the treatment card and the P3. He said that bruises and discharge "*may indicate use of force."*

On cross examination he said that it was D who said he had been drugged but no drugs were found. That D was examined on 29th July 2013 but P3 filled on 12th August 2013. That anal discharge is any substance from the anus and a patient could also be sick. That there were also

bruises but that did not necessarily mean there had been sexual intercourse. The prosecution closed its case.

13. In his defence the appellant testified of how he was arrested on 30th July 2014 at 5.00 a.m. together with accused 2. They were taken to Elburgon Police Station. He said he and the chief (PW2) had disagreed because the chief wanted to employ him and he refused because he was ok where he was working. That he even asked to employ his brother but he told him only his mum would release his brother, and this was an ongoing grudge. He said D's testimony shocked him. The same testimony came from PW2.

14. DW2 and **DW3** testified for both appellant and accused 2. DW1 said he was aware the PW2 had a grudge with the appellant. That is why the story of this case was inconsistent. That at first it was about sodomy, then rape, then beans, all with the one aim to have both accused locked up. He said he was with the accused persons. DW2 said he heard that the two (2) were being accused of going to the chief's home and stealing beans and also doing other things. That the chief (PW2) said that it was his son D who told him what had been done to him.

15. This being the first appeal, the appellant is entitled to a re-assessment and review of the evidence for this court to arrive at its own conclusions always bearing in mind that the court never heard, saw the witnesses, **Okeno v Republic, (1972) EA 372**

> "The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTITLAL M RUWALA V R, [1957] EA 57*). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."*

16. Mr. Simiyu for the appellant both in oral and written submissions urged the court to find that the prosecution had not proved their case beyond a reasonable doubt in the first instance. That the trial magistrate failed to note anomalies in the charge sheet which he argued was defective. That the judgment was discriminatory as the two (2) accused persons were brought before the court on the same facts but one was acquitted and one was convicted. That the court failed to take into consideration the appellant's defence that there was a grudge between him and the minor's father, which evidence was buttressed by that of DW1 and DW2. That a very crucial witness had not been called to testify. That this should have been a case of gang rape but the 2nd accused was given the benefit of doubt.

17. In opposing the appeal Ms. Nyakira she argued that on the alleged discrimination of the appellant, the issue was whether there was sufficient evidence against the appellant. That indeed there was sufficient evidence and that is why he was convicted. That there was no defect in the charge. The offence of defilement and theft of beans happened in the same transaction and by virtue of **Section 382** of the **Criminal Procedure Code** there was no failure of justice for the appellant. That he understood the charges he was facing and aptly cross examined the witnesses. That the trial court considered the appellant's defence and found it to be unmerited. That though corroboration was not required, in this case it was there, the PW1 described how the defilement happened, and the doctor confirmed that PW1 had been defiled.

18. In response Mr. Simiyu argued that this ought to have been a case of gang rape but for some reason the police chose to charge only the appellant with the sexual offence, why? That indeed there was a miscarriage of justice which could lead to a retrial.

19. I have carefully considered the evidence, the submissions, and the issues to be determined appear to be;

> **i. Whether the charge was defective?**
>
> **ii. Whether the evidence was inconsistent, contradictory?**
>
> **iii. Whether the prosecution proved its case against the appellant beyond reasonable doubt.**

20. On the issue of defective charge sheet, the appellant's view is that the appellant and accused 2 ought to have been charged with gang rape because that is what was alleged by PW1. By failing to do so, then that was a defect. Secondly, the charging of appellant with defilement, the accused 2 with theft of beans in the same charge sheet also created a defect. It is also noted that the charge of defilement is brought under **Section 8(3) of the Sexual Offences Act** instead of **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act. Section 134** of the **Criminal Procedure Code** provides;- **Offence to be specified in charge or information with necessary particulars**

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

In this case there is a specific statement of the offence: defilement. The particulars with regard to the appellant were clear. He was alleged to have *"… caused his penis to penetrate the anus of DKC a boy aged 14 years"*. Even though the specific **section 8 (1) of the Sexual Offences Act** was not cited, but the particulars of the charge provided sufficient information for him to understand the nature of the offence he was facing. It was defilement, meaning penetration with his penis, of the anus of the fourteen (14) year old boy. That is clear. See **Isaac Nyoro Kimuta v Republic, Nairobi. Court of Appeal Criminal Appeal Number 187 of 2009** where the court found the charge to be defective but held that the appellants were not prejudiced. Similarly in this case, no prejudice can be seen against the appellant.

21. On the issue that the charge ought to have been gang rape, that was supported by the complainant's allegations. He alleged that the two accused and others before the court had sodomised him in turns on two occasions. This information was received by the Officer Commanding Station (OCS) and the investigating officer. For some strange reasons the investigating officer chose to charge only the appellant with that offence, and chose not to arrest the other suspect who was roaming free in the village according to the complainant. The trial magistrate noted, the fact that the complainant alleged that both accused sodomised him, and that the prosecution ought to have raised a charge of gang rape, but felt that it was too late in the day for that to happen. Does that render the charges brought against the appellant

defective? They may be other things but they are not defective in substance.

22. Regarding the theft of beans charge, the prosecution view was that the two (2) offences were committed in the same transaction. A look at the charge sheet shows that the charges are specific and there is no confusion.

23. On this first issue, I find no defect in the charges.

24. Was the evidence consistent and credible? According to the testimony of PW1 the appellant worked for a neighbour. On the first day, another man sprayed his face but appellant held his hands. He lost consciousness, and came to in a maize plantation without his trousers. That the appellant and one Mogaka came, took him to a house. He specifically states that Mogaka wore a condom and sodomised him. With regard to appellant he says- *he did the same things* except he did not wear a condom. What did the appellant do to the complainant? There was no description of what the two persons did. The use of the term 'sodomised' leaves it to the imagination of the court of what Mogaka did, so that the court can draw an inference of what the appellant is supposed to have done? That is cannot be evidence to support the allegation of penetration. The appellant is the one who was before the court. What ought to be on record is the complainant's testimony telling the court what the appellant did that amounted to 'sodomy'.

25. Who was this other man who sprayed his face while appellant held his hands? If the idea was to drug him to defile him? Why would the attackers spray him to unconsciousness abandon him without his trousers, then come back when he was already conscious. Did they take him to the house while he was half naked? He ate the rice while half naked? Did he find his trousers? Where were they found?

26. PW2 said he was alerted by a neighbour whom he did not name that the PW1 was at Wycliff's house. He went to Wycliff's house and found PW1 in the same bed with Wycliff, Mogaka and Sitiana's worker. As the assistant chief he already had information that the appellant was defiling children, which information formed the basis for his action. He says "*We searched the house and found several used condoms."* Let us pause here. He says his son appeared absent minded. He had just found him in bed with a suspected child defiler. He had found several used condoms. Though he does not name the others but he specifically says *"we searched the house'* so he has independent evidence of eye witnesses of this damning scenario. Why did he not report the matter to police for investigations? Why did he not take action then? These questions and their answers are what make this story incredible. His son may have denied that anything had taken place, but the scenario he paints speaks volumes and ought to have compelled him to swing into action. So, what did he do with the used condoms? Did he book this report anywhere? Was it normal for his son to go sleeping in other people's houses? What were the four (4) doing in one bed? Is it incredible that a suspect would be found "red handed" so to speak and be left just like that.

27. The 2nd incident, PW1 specifically states that JD had a scarf which he suddenly put over his (PW1's head). With regard to the appellant he states – *Wycliff was there too. He held my hands*. With regard to the offence, he says when he gained consciousness, he felt himself being sodomised by one person then another. Then he went home. He was conscious enough to go home but does not say whether he identified the persons who 'sodomised' him, or at least who was in that place where the 'sodomy' was taking place. At home he only mentions that JD took beans. The appellant is not mentioned.

28. PW2 said his son had been missing for two days. He had looked for him in vain. He was told by one Ezekiel that he had seen his son in a suspicious state of mind. The record does not say where Ezekiel found him, though the complainant says he must have *'strayed out of the home because a man stopped me and took me to my father'*. Where did Ezekiel find the boy? Whose home had he strayed from? Was it the appellant's? If it was his own home as he alleges, were there no other people there? Does the PW2 live alone in his home? The complainant says he went home. He does not say he went home with the appellant and JD but some- how JD happened to be there and took beans or was given beans by D.

29. PW2 says he called the police who took the boy away, and it was on interrogation and grilling that he said that he had been sodomised.

30. According to PW2 the two (2) accused persons defiled his son, then went to his home with him, and that is when was given beans by D from PW2's store. How can that be that the two (2) would defile the boy then go to his home with him?. Especially the appellant after the alleged February incident? Who was at home? The PW2 testified he had alerted neighbours that his son was missing. None of these could have seen the two (2) accused and PW1 going to the PW2's home? How possible is it that the three (3) could have walked in broad day light from wherever they came from to the home of Assistant Chief and no one would have seen them together? PW1 does not even suggest that he went home by a strange route. He just went home. Again it does not add up. It is strange that according to PW2 and PW3 and PW4, the PW1 had had the mind to go home, give the accused 2 beans, or to note and recall that Accused 2 had taken beans from the store but was too dazed under the drugs that after this he just meandered out of the home to be discovered by "Ezekiel".

31. The treatment chit is dated 29th July 2014. It says in the history that the patient was ***sodomised by three (3) known persons on 27th July 2014 at 12.00 p.m***. and he was intoxicated by a drug before the act was done. Tenderness, bruises and discharge on anal region noted. He was sent for filling of P3 on 29th July 2014 but the same was filled on 12th August 2014. In this one dated of alleged offence **'March 2014 and 26/7/2014'**; the brief details of the alleged offence are that ***"alleges to have been defiled on different occasions by people well known to him"***. The general medical history: ***"was attacked and sodomised by a person known to him, had been intoxicated by a powder drug which he had been forced to inhale."***

32. The doctor who examined him sixteen (16) days later recorded with regard to injuries ***'reported to have tenderness on the anal region with bruises and discharge'***. He also recorded a description of injuries to the anus in detail as on 12th August and recorded ***'bruises, tenderness and anal discharge'***. He also added that that the discharge was ***'recent'.***

33. He tells the police he was first sprayed with a substance, then covered with a scarf and became unconscious. He tells the doctor he was forced to inhale a powder. At the clinic, that he was intoxicated with drugs before the act. He tells his father, the police that two (2) people sodomised him, he got to the hospital, tells the first person who treated him that three (3) people sodomised him, and when he appears for P3 examination, that, it was one person who sodomised him. Which is the truth?

34. It all cannot be true. Either it was the appellant who defiled him, or other people or appellant and other people.

35. With regard to when the offences were committed, there is also inconsistent evidence. When he was taken for treatment on 29th July 2014, the record shows told he said the offence was committed against him on 27th July 2014 at 12.00p.m. There is no mention of the previous allegations of defilement. The charge sheet states with regard to the 2nd count that the offence was committed night of 26th July 2014. It does not mention others not before the court. The P3 says for the 2nd count that it was on 26th July 2014, and that it was on 'different occasions' by 'persons' known to him. For the 1st count the charge sheet says it was between 19th February and 21st February 2014, in the P3 it says March 2014, and PW2 . says it was between February and March while PW1 said he could not remember the dates. The question that begs then is, so how did the investigating officer arrive at the dates of 19th and 21st February 2014? The night of 26th July or just 26th July? The while month of March 2014?

36. It was necessary for the prosecution to place the appellant at the scene of crime on a specific date and a specific time. There is no proof that the complainant was with the appellant between the 19th and 21st February 2014 or on the 26th July 2014. If PW2 is to be believed, he said he found his son in the appellant's house. In bed. With three men. He recovered used condoms. The Appellant was a suspected pedophile. That was a very specific day. With very significant findings. Why would he say between February and March?

37. The complainant is said to have missed school for two days on both occasions. Surely there would have been a record. There were other people who accompanied the PW2 to the appellant's house. They were never interrogated. They would have at least narrowed down the period to the specific day or at least corroborated PW2's testimony. The Chief PW3 would have been aware of that first 'raid' where used condoms were found in the appellant's house while three men slept in the same bed with the complainant. The only inference drawable here; it never happened.

38. The investigating officer did not investigate the case. He states simply ***'I did visit the scenes'***. Which scenes were these? Where were they? Who pointed them out? If he did there is nothing on what he saw, or what he found or whether he found out anything at all. Several persons were mentioned specifically. *Mogaka*, whom the complainant said was just free in the village, *Sitiana's worker*, who was this? Why he was not arrested? Inference here; the investigating officer did not visit the scenes.

39. He said he relied on the medical evidence because it proved 'sodomy'. It would be expected that he would know that under the Sexual Offences Act there is no offence defined as sodomy. This is defined as either defilement or rape. Be that as it may, we have already seen how the medical evidence was. The doctor said a blunt object described as a male sexual organ was used to cause the injuries. Nowhere in his testimony did the complainant mention a male sexual organ. According to the P3 some injuries were 16 days old and others were 'recent' as at 12th August. What was the source of this recent 'discharge'? The complainant was also sent to the lab on 29th July. This was within 72 hours of the alleged offence but no seminal evidence was found. There were bruises and tenderness of the anal region on 29th July 2014. Were these caused by the appellant?

40. In my considered view, the trial court did not apply its mind to the evidence in its totality. Granted the alleged offence comes with its own stigma and shame but it is the duty of the investigating officer to examine all the circumstances of the case before presenting it for prosecution, and for the prosecution to ensure the evidence is water tight and does not create gaps that raise doubt in the mind of the court.

41. Let me say something about language. It is important for the trial court to avoid the use of technical terms unless the witness uses them. In any event the court must satisfy itself as to meaning the witness, especially a child, puts to that term. I think the words of the Court of Appeal in **Samson Oginga Ayieyo v Republic [2006] eKLR** clearly allude to this: The court pointed out;.

The trial Magistrate has recorded her as saying:-

> **"The accused person then removed my clothes including my panties and defiled me." (Emphasis supplied).**
>
> **"Defiled" is a technical term. It is quite improper to use such term or any other technical term when recording the evidence of a witness unless the witness himself or herself has used it. The correct approach is to use the words used by the witness. We do not believe that PW1 or any other witness used that term in proceedings before the trial court.**

42. The record shows that PW1 testified in Kiswahili. The record does not have any description of what this 'sodomising' was. It is expected that the PW1 would describe in his testimony what happened. Did he actually use the term "sodomised" what did he say in court and to the police?

43. Clearly the evidence is inconsistent and should not have been relied on to convict.

44. Did the prosecution prove its case to the required standard against the appellant? The age of the complainant was not disputed. The appellant was not a stranger to complainant. The appellant is said to have been found with bruises and tenderness, and discharge in the anal area. However, the totality of the evidence is that the prosecution did not establish that it was the appellant who had committed the said offences.

45. The appeal succeeds. The conviction is quashed. The sentence is set aside. The appellant is to be set at liberty unless otherwise legally held.

Delivered, Dated and Signed at Nakuru this 23rd day of April, 2020.

Mumbua T. Matheka

Judge

In the presence of:- VIA ZOOM

Edna Court Assistant

Ms. Odero for state

Appellant present