



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCRA NO. 107 OF 2019**

**(CONSOLIDATED WITH HCCRA 111/19, 112/19, 113/19 & 114/19**

**JOSEPH MUTUA MUTUKU.....1<sup>ST</sup> APPELLANT**

**JAMES MULI KIMILU ..... 2<sup>ND</sup> APPELLANT**

**PAUL MUTUKU MUTUA ..... 3<sup>RD</sup> APPELLANT**

**DOMINIC NYAMASYO MUTUA .....4<sup>TH</sup> APPELLANT**

**JOSEPH KIMILU MUENDO .....5<sup>TH</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of the Senior Principal Magistrate Hon. Mwaniki J. dated 06/06/2019 in Makueni SPMCR No. 16 of 2015.)*

**JUDGMENT**

1. **Joseph Mutua Mutuku, James Muli Kimilu, Paul Mutuku Mutua Dominic Nyamasyo Mutua, and Joseph Kimilu Muendo** herein referred to as 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants respectively were jointly charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars being that all the Appellants on the 29<sup>th</sup> day of December 2014 at Kyuasini village Ukia location in Makueni district within Makueni county jointly with others not before court being armed with dangerous weapons robbed **Peter Somba Mutuku** Kshs.5,000/= national identity card, KCB ATM card and at or immediately before or immediately after the time of such robbery used actual violence to the said **Peter Somba Mutuku**.

2. They denied the charge and the matter proceeded to full hearing with the prosecution calling three (3) witnesses. Each of the Appellants gave sworn evidence for defence. The trial court found the charge of robbery with violence not proved. It however found the charge of grievous harm contrary to section 234 of the Penal Code and convicted each of the Appellants of the same and fined each Kshs.50,000/= in default two (2) years imprisonment.

3. They were aggrieved by the judgment and each filed an appeal through the firm of Mulwa Isika & Mutia advocates. The appeals were later consolidated with HCRA No. 107 of 2019 as the lead file. They raised the following common grounds of appeal:

- a) **That**, the learned trial Magistrate misdirected himself when he convicted the Appellants on a charge other than what they were charged with.
- b) **That**, the learned trial Magistrate erred in law and fact in disregarding the fact that the prosecution did not prove the elements/ingredients of the substituted charge beyond reasonable doubt.
- c) **That**, the learned trial Magistrate erred in law and fact by relying on a defective P3 form.
- d) **That**, the learned trial Magistrate erred in law and fact when he relied on hearsay medical evidence to arrive at his findings.
- e) **That**, the learned trial Magistrate erred in law and fact in failing to take into consideration the Appellants' defence.

- f) **That**, the trial Magistrate made an error by making a finding to substitute the main charge against the weight of evidence.
- g) **That**, the learned trial Magistrate erred in law and fact when he relied on extraneous matters to convict the Appellants.
- h) **That**, the sentence meted against the Appellants is harsh and excessive in the circumstances of the case.

4. The prosecution case is that Pw1 **Peter Somba Mutuku** a teacher by profession bought land in 1989. The land had been surveyed and a road of access registered. The access road was blocked forcing him to file a case at Makueni law courts. He was successful and orders for opening up the said road were made in 2014.

5. On 29<sup>th</sup> December 2014 at around 10:00 am, him and others went to the site to construct the access road as per the court order. The access road runs through the farm of the Appellants. While working they heard shouts to the effect that the road could not be constructed and anybody going against that would be killed.

6. The land through which the access road passes belongs to Ndiva Kimitu and Kithuka Kilokya who are brothers to the 1<sup>st</sup> Appellant and uncles to the rest of the Appellants. On sensing danger, Pw1 went to Mukuyuni police station and reported the matter. He went home at around 4:00 pm accompanied by Athnus Mutuku who did not testify. They met the 1<sup>st</sup> Appellant who stopped him and told him he had disturbed them for a long time and warned him to count that as his last day to be alive.

7. Upon informing him that he had reported the matter to the police the 1<sup>st</sup> Appellant started stoning him and a stone hit him on the head. He (*1<sup>st</sup> Appellant*) further screamed and eleven of his family members came including his wife (*Priscilla Mutua*) and another who disappeared to Nairobi. They jointly assaulted him using stones, clubs and machetes. The 1<sup>st</sup> Appellant hit him with a stone on his right eye and he fell down. In the process he bled and dislocated his left hand upon losing consciousness. The area assistant chief **James Mutiso Kamwana** came to his rescue, but he was beaten and chased away. It's then that he got a chance to flee and locked himself in Peter Mutua's shop which he found open and was being manned by Mrs. Mutua.

8. The police came at 8:00 pm and took him to Wote police station. It's then that he discovered that his wallet containing Kshs.5,000/= identity card and a KCB ATM card was missing. He was taken to Makueni county referral hospital for treatment. The Appellants were thereafter arrested. He did not know the person who hit him with a club.

9. At the hospital it was found that his left hand was dislocated, and it was placed in plaster. He developed high blood pressure after the incident and the injured area above his right eye was still painful. He was able to identify the blood soaked shirt (EXB1) and the blood stained trouser (EXB2) which he wore on that day plus the P3 form (EXB3) filled for him.

10. In cross examination he said he was admitted for one day only. He is the one who gave the Appellant's names to the police the next day. He denied passing where there was no road as it had been demarcated by surveyors in August 2014. He confirmed not having served the court order on the Appellants but the land owners were aware of the court order. During the incident he was with Mutuku Mutuku plus another. He had no idea as to who took his wallet. He could not tell why some of his attackers were not arrested.

11. He denied having been attacked by people from Kyuasini market after he had committed a wrong.

12. Pw2 **James Kamwana Mutiso** is the assistant chief of Ukia. He said on 29<sup>th</sup> December 2014 he was at Kyuasini market when he heard noise and went to the scene. He found about eight people assaulting Pw1. He intervened but was threatened. They chased Pw1 who went and hid in a shop. He is the one who called the police. He identified the Appellants as being among the assailants and he led police to arrest them. He confirmed there being a boundary dispute between the Appellants and Pw1 over a road of access. He said the 1<sup>st</sup> Appellant is his village elder.

13. In cross examination he said among those not arrested was Mbelete Mutua who is the 1<sup>st</sup> Appellant's sister. He said the 1<sup>st</sup> Appellant was boxing Pw1 while the 2<sup>nd</sup> Appellant tried to protect Pw1 from the others. That the 3<sup>rd</sup> Appellant was the most violent and was armed with a stone and piece of wood. The rest did assault Pw1.

14. Pw3 **No. 67157 Corporal Cleophas Nyongesa** was the officer in charge of Mukuyuni police patrol base. On 29<sup>th</sup> December 2014 Pw1 reported an incident of attack by the Appellants over a boundary dispute, and theft of his wallet containing Kshs.5,000/=, KCB ATM and identity card. He produced the P3 form by Dr. Emmanuel Loiposha in respect to Pw1 (EXB2). He did not interrogate Pw1.

15. In his sworn defence the 1<sup>st</sup> Appellant denied the charge saying Pw1 had lied to the court. He said on 29<sup>th</sup> December 2014 they had a prayer ceremony at the home of Kimiru Mutuku his brother and it ended at 4:30 pm. Pw1 came there and he inquired from him why he came there as there was no route. Pw1 started a fight and threw a stick at him which he dodged and it hit a house. That Pw1 was with two others and he armed himself with a stone. Pw1 threw a piece of brick which hit him on the back. He screamed and they took off. People came and chased after them.

16. He denied beating Pw1 nor seeing anyone beat him. He confirmed that the 2<sup>nd</sup> Appellant is his nephew; 3<sup>rd</sup> Appellant "his son; 4<sup>th</sup> Appellant his grandson while 5<sup>th</sup> Appellant is his son. He said none of them was present during the incident. He said all of them were arrested on the same day by the police in the company of Pw2. He said Pw1 had earlier in the day cut trees on their land claiming they had denied him an access road.

17. In cross examination he said there was no path on the land. He agreed to there having been a case over an access road over the land. Pw1

brought a surveyor who said there was an access path that they had refused to open. He reported about Pw1's assault on him but he was not given a P3 form. He denied there having been a court order over the road.

18. The 2<sup>nd</sup> Appellant while under oath denied witnessing the incident. He adopted the 1<sup>st</sup> Appellant's evidence and said he had no grudges with Pw1.

19. The 3<sup>rd</sup> Appellant in his sworn defence stated that on 29<sup>th</sup> December 2014 he heard screams from his uncle's home where they had had prayers. He then saw people running to the market place. He found them surrounding Peter Mutua's shop. Police officers came and Pw1 emerged from the shop. He was arrested by the assistant chief. He denied having any grudges with Pw1 but he confirmed there being land differences. He wasn't aware of any court orders. In cross examination he said Pw1 has always insisted on having an access path against their land.

20. The 4<sup>th</sup> Appellant also sworn said he left after the prayers and was arrested in the evening. He did not know the reason for his arrest.

21. The 5<sup>th</sup> Appellant gave a sworn defence denying the charge. He stated that on the date in issue he left to go and fetch water after prayers. He later heard screams and rushed to the market where he found people surrounding Peter Mutua's shop. He left and was later arrested at home. He said he was 19 years at the time he testified on 23<sup>rd</sup> March 2018.

22. Dw6 **Agnes Mutua** runs a shop at the Kyausini market place. On 29<sup>th</sup> December 2014 Pw1 ran into her shop and she closed it until police came. She closed it since there were people chasing Pw1 who was bleeding.

23. Dw7 **Redempta Ndambuki** was at Kyausini market on 24<sup>th</sup> September 2014 when she saw people chasing each other. They were armed with stones and they surrounded Peter's shop. Its Pw1 who was being chased. Those baying for his blood were saying he was disturbing a widow. Police came and Pw1 emerged with his hand tied. The widow being referred to is 1<sup>st</sup> Appellant's sister-in-law and mother to the 4<sup>th</sup> Appellant.

24. In cross examination she said that on that morning some trees had been cut at Nthenya's land by Pw1's workers and Pw1 was present. She had seen people at Nthenya's home including the Appellants except the 3<sup>rd</sup> Appellant. The people carried jembes to make a road. She further stated that the place was at Kimilu's home where there were prayers. The making of the road had taken the whole day and the chasing had started from Kimilu's home. She confirmed that it was a mob which had chased Pw1.

25. The appeal was canvassed by way of written submissions.

26. The Appellants' submissions are by learned counsel Elizabeth Isika. On grounds 1 and 6 counsel submits that a person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both offences are related or alike, or are of the same genus or species. On this she cited the case of **Robert Mutungi Muumbi –vs- Republic (2015) eKLR** - Court of Appeal Malindi) which stated thus:

*“As is apparently clear, section 179 of the Criminal Procedure Code empowers a court in some particular special circumstances, to convict an Appellant person of an of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the Appellant was charged with indecent assault of N.K for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the Appellant of an offence with which he was not charged.*

*An Appellant person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate: that is to say, both are offences that are related or like; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the Appellant person notice of all the circumstances constituting the minor offence of which he is to be convicted. Spry J. explained the essence of the first consideration as follows in **Ali Mohammed Hassani Mpanda –vs- Republic (1963) EA 294**, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:*

*Subsection (10 envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.*

*That conclusion is reached at the stage of judgment when it is not practical to require the Appellant person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial.*

*The second consideration arises, of necessity, precisely because the Appellant person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the Appellant person was not prejudiced, and that by being charged with the major offence he had sufficient notice of all the elements that constitute the minor offence.*

27. She also refers to the case of **David Mwangi Njoroge –vs- Republic (2015) eKLR** where **Ngenye Macharia J** stated that:

*“... The issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an Appellant was initially charged with.*

28. On whether grievous harm is a cognate offence to that of robbery with violence she submits that there is no relationship or similarity between the two and the Appellants were prejudiced in their defence by the substitution.

29. On grounds 2, 3, 4 and 7 she submits that there was no evidence to prove the substituted charge. The P3 form relied on, had errors on the finding and the doctor who filled it was not called as a witness. That even the medical/treatment notes were not produced to support the finding. The P3 form was produced by the investigating officer (Pw3) which was improper as it did not comply with section 77 of the Evidence Act. On this counsel referred to the cases of **Sibo Makovo –vs- Republic (1997) eKLR; Julius Karisa Charo –vs- Republic (2005) eKLR** among others.

30. On the evidence she contends that the evidence of Pw1 is not clear on who caused the injuries because at first he said it was all the eleven (11) family members then the 1<sup>st</sup> Appellant. He did not state what the other four (4) Appellants did to him. Later in cross examination he said he did not know who hit him on several parts of his body. She argues that the evidence of Pw1 and Pw2 is contradictory and its not known as to who assaulted the complainant. To her, grievous harm was not established as there was no destruction or permanent disability.

31. Counsel submits on ground 5 saying the defence was not considered. That even Pw2 exonerated the 2<sup>nd</sup> Appellant from the accusation by Pw1.

32. On the sentence counsel has submitted that the same was excessive considering that the parties were neighbours. That there were other viable options.

33. Mrs. Monica Owenga filed submissions on behalf of the Respondent in which she concedes the appeal on the ground that the charge of robbery with violence was not proved but the Appellants were convicted of the same and given unlawful sentences. That the offence demonstrated was that of grievous harm and the Appellants had initially been charged with assault before substitution to robbery with violence. She therefore prayed for the release of the appellants.

#### **Analysis and determination**

34. This being a first appeal, this court is called upon to re-consider and re-evaluate the evidence on record and come to its own conclusion. It must also bear in mind that it did not hear nor see the witnesses. See **Okeno –vs- Republic (19720 E.A 32; Kiilu & Another –vs- Republic (2005) I KLR 174, David Njuguna Wairimu –vs- Republic (2010) eKLR.**

35. I have considered the evidence on record, the grounds of appeal, both parties, submissions and the law. The issues I find falling for determination are:

- i. Whether the offence of robbery with violence was proved against the Appellants.
- ii. Whether grievous harm contrary to section 234 is a lesser and cognate offence of robbery with violence.
- iii. Whether the offence of grievous harm contrary to section 234 was proved against the Appellants.

#### **Issue no (i) Whether the offence of robbery with violence was proved against the Appellants.**

36. The first ingredient or robbery is stealing. For it to be enhanced to robbery with violence the stealing must be accompanied by any one of the ingredients stated in section 296(2) of the Penal Code.

Before looking at the said ingredients the court must first of all satisfy itself that there was a theft in the first instance. This is what the learned trial Magistrate found at page 30 lines 10-17:

*“Complainant said in the course of the attack he lost his wallet containing some items. He was not sure where he lost it. He said he realized the wallet was missing as he boarded the police vehicle. From the evidence on record it would be farfetched to conclude the same was stolen by the accused person which circumstance would give rise to the present offence of robbery with violence. One of the ingredients of the offence charged is missing, that is stealing. The court finds the offence of robbery has not been proved.*

37. After perusal of the entire evidence I find that there was no proof of theft as alleged. If indeed anything had been stolen Pw1 should have noticed that as he waited in Peter Mutua’s shop. I entirely agree with the trial Magistrate on this finding. The offence of robbery with violence contrary to section 296(2) of the Penal Code was not proved.

#### **Issue no. (ii) Whether grievous harm contrary to section 234 is a lesser and cognate offence of robbery with violence.**

38. Mrs. Isika for the Appellants has strongly argued that the offence of grievous harm is not a cognate or minor offence of robbery with violence. She gave a definition of a cognate from the Black Law’s dictionary 9<sup>th</sup> Edition page 1186 as:

*“A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.”*

39. The power to convict for a cognate or lesser offence is derived from section 179 of the Criminal Procedure Code

*“179. (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”.*

40. This power can be exercised by the court after a full hearing (section 179(1)) or at the plea stage after the reading of facts (section 179(2)). If it is done under section 179(1) there is no provision for the reading of the proved lesser charge to the accused person. The reason is that this is a decision made after the court has considered all the evidence including the defence.

41. I also wish to point out that the operative word in both section 179(1)(2) is MAY. It all depends on what has been found from the evidence or facts presented. The court may as well dismiss the charge and acquit the accused person instead of reducing the charge.

42. One of the ingredients in section 296 (2) of the Penal Code is *If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.*

This is clearly an ingredient that encompasses assault or grievous harm.

43. This particular ingredient formed part of the particulars in the charge facing the Appellants. As was clearly stated by the Court of Appeal in the case of **Robert Mutungi Mumbi** (supra) - the reduction of a charge is reached at the judgment stage and its not practical to require the accused to plead afresh to the minor charge. Secondly the ingredient of assault or grievous harm being part of the particulars confirms that the accused person had sufficient notice of all the elements constituting the minor offence at the time of plea taking and hearing of the case.

44. The offence of robbery with violence carries a death sentence. Grievous harm contrary to section 234 of the Penal Code carries a maximum sentence of life imprisonment while assault contrary to section 251 carries maximum sentence of five (5) years. I therefore find that grievous harm contrary to section 234 Penal Code is a cognate and minor offence to robbery with violence contrary to section 296 (2) of the Penal code.

**Issue no. (iii) Whether the offence of grievous harm contrary to section 234 was proved against the Appellants.**

45. This incident is alleged to have occurred within a village market surrounding following an existing land dispute. The Appellants are all members of the same family on whose land Pw1 was constructing an access road following issuance of a court order. The said court order was never produced by the investigating officer or any officer from the issuing court. That was omission No. 1.

46. A P3 form ( EXB3) prepared by Dr. Emmanuel Loiposha and which has an issue at page 2 in respect to the finding was produced by Pw3 the investigating officer. The medical officers who were the first to treat him did not testify or avail the medical or treatment notes. There was no basis laid for the production by a witness other than maker.

47. Section 77 of the Evidence Act provides as follows:

*(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.*

*(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.*

*(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.*

48. Mrs. Isika for the Appellants was present in court but she never raised an issue with this failure to follow the well laid down procedure. It has now dawned on her that she ought to have objected to its production as an exhibit. Even the record does not show that Pw3 at any time sought to produce it as an exhibit. The court just had it marked as PEXB2. I find this to have been the second omission.

49. Coming to the evidence itself, Pw1 said he was attacked by eleven family members led by the 1<sup>st</sup> Appellant. He was specific that the 1<sup>st</sup> Appellant threw stones at him, and a stone hit him on the head and later he hit him again with a stone above the eye and he fell down. He fell down unconscious and dislocated his left hand after the fall. The rest assaulted him using stones, clubs and machetes save for the 3<sup>rd</sup> Appellant who he says had a machete. He does not say what the others had and what they did with what they had.

50. It was also his evidence that when he was attacked he was with Albanus Mutuku and his friend. These two people were not called as witnesses. He managed to escape to the shop when the assistant chief (Pw2) appeared.

51. In his evidence Pw2 said he was attracted to the scene at Kyasini market by noises. He found eight (8) people assaulting Pw1 and he intervened but was threatened. The people chased Pw1 to a shop. Again Pw2 is not specific on what the Appellants did. He generally said

they were assaulting Pw1. He said the 3<sup>rd</sup> Appellant was armed with a stone and piece of wood and was the most violent. The 4<sup>th</sup> Appellant had a stick and he assaulted Pw1 same to 5<sup>th</sup> Appellant but he does not say what he was armed with. He saw the 1<sup>st</sup> Appellant boxing Pw1 and not hitting him with stones.

52. Surprisingly he said the 2<sup>nd</sup> Appellant was trying to protect Pw1 from the others. So then why did he lead the police to arrest the 2<sup>nd</sup> Appellant? What is clear is that Pw2 was not present when this incident started. Considering where the scene of incident was many people besides Albanus Mutuku and his friend must have witnessed what happened. Failure by the investigating officer to record statements from them and have them testify did not augur well for the prosecution.

53. Section 143 of the Evidence Act provides.

***“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.”***

This does not however prohibit the prosecution from calling more than one witness to prove a fact especially in instances where the already adduced evidence is not sufficient. In this case, there is so much insufficiency and inconsistency in the evidence adduced by Pw1 and Pw2 as to the role played by the 2<sup>nd</sup> – 5<sup>th</sup> Appellants in the assault of Pw1.

54. The grievous harm is a result of the dislocation of the left arm of Pw1 which was in a plaster of paris. Pw2 did not say who caused this injury. Pw1 said he sustained the injury when he fell after being hit with a stone by the 1<sup>st</sup> Appellant on his right eye.

55. The Appellants in their defence said they had been in for prayers in one of their homes when Pw1 went there and there was an encounter which only involved the 1<sup>st</sup> Appellant. Infact the 1<sup>st</sup> Appellant claims to be the one who was injured. Dw6 and Dw7 confirm that there was an incident where Pw1 was chased into the market and he entered Dw6’s shop. The 1<sup>st</sup> Appellant’s claim of having been injured is not true as it was not supported by any medical evidence or any other evidence.

56. It is also true that at the time of incident there existed a boundary dispute between the two families and the investigating officer should have carried out proper investigations before rushing to charge the Appellants with the offence of robbery with violence. It is clear that as a result of the scuffle Pw1 suffered injuries. Not all who were involved were arrested and charged and it was not clear from the evidence the role each one of the Appellants played save for the 1<sup>st</sup> Appellant. The 2<sup>nd</sup> Appellant should never have been arrested and charged in the first place.

57. Upon critical analysis of the evidence and the submissions, I find that the offence of grievous harm was not proved against any of the Appellants. I however find that the 1<sup>st</sup> Appellant was properly identified as having assaulted Pw1 above his right eye.

58. In conclusion, I allow the appeal, quash the conviction and set aside the sentence in respect to 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants. For the 1<sup>st</sup> Appellant I quash the conviction and substitute it with one for assault contrary to section 251 of the Penal Code. The sentence of a fine of Kshs.50,000/= in default two years is set aside.

59. As already established above, Pw1 and the Appellants are neighbours. The cause of conflict is a boundary dispute which should be amicably sorted out to enable them live in harmony.

60. I therefore substitute the sentence against the 1<sup>st</sup> Appellant with a discharge under section 35(1) of the Penal Code on condition that he remains of good conduct for the next twelve (12) months. This condition is explained to the Appellant.

61. The Appellants are hereby set free unless otherwise lawfully held under separate warrants. Any cash bail deposited to be released to the depositors.

Orders accordingly.

**Delivered, signed & dated this 30<sup>th</sup> day of September 2020, in open court at Makueni**

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**H. I. Ong’udi**

**Judge**