REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL CASE NO. 52 OF 2019

BGP......................APPELLANT

VERSUS

REPUBLIC......RESPONDENT

(An appeal from original conviction and sentence in lower court criminal case no. SO 67 of 2017 in the Principal Magistrates Court at Kilifi before Hon. R. K. Ondieki (SPM) in chambers dated 27th July 2018)

Coram: Hon. Justice R. Nyakundi

M. N. Mwanyale Advocates for the appellant

Mr. Alenga for the respondent

JUDGMENT

The appellant **BGP** was tried, convicted and sentenced to twenty (20) years imprisonment for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. The brief particulars which constituted the indictment were that on diverse dates between 26th December 2016 and February 2017 within Kilifi, appellant intentionally caused his penis to penetrate the vagina of **SMK** a minor aged 14 years old. It is against this background the prosecution prosecuted the appellant for the offence of defilement.

Being aggrieved with both conviction and sentence, his counsel **Mr. Mwanyale** preferred an appeal to the High Court based on grounds that:

(a). The conviction was unsafe, due to the inconsistencies and contradictions with the prosecution case.

(b). The sentence of 20 years was also unlawful.

Background and procedural history

In this case its alleged that between 26.12.2016 and February 2017, the victim who testified as **(PW3) SMK**. accompanied her father to the beach. Thereafter she went to the beach at Kiwandani and on the following day went to Watamu. According to **(PW3)** at Watamu she also went to the video show where apparently they met with the appellant.

At the end of the video event she was asked by the appellant whether they could go to his house which she dutifully consented. It is at the home of the appellant they had sexual intercourse for over two months.

Thereafter, differences arose and she went back to her parents home who initiated police action. Investigation commenced in earnest on 28.12.2016 as a result of which **(PW4) – Cpl Philip Nzombo** recorded statements from the father and other witnesses. Its in the course of investigations **(PW2) DM**. – the mother to the victim **(PW3)** received a telephone call allegedly stated to be from the appellant. Finally, at some stage **(PW4)** effected an arrest against the appellant and another man not before Court as culprits of the offence.

According to **(PW4)** the other source of information to corroborate his investigations was the safaricom call data in respect of mobile No. 0725-[xxxx] registered in the name of appellant. On the age of the victim **(PW3)** a birth certificate exhibit 3 was produced indicating her date of birth to be on 11.1.2003. So for the fact of safaricom call data, **(PW4)** produced it on behalf of the witness as exhibit 4 (a), (b). **(PW1) –Dr. Zena** testified on behalf of **Dr. Daisy** who had filled the P3 on examination of the victim. According to **Dr. Zena** there were no

injuries to the genitalia save for broken hymen. Nevertheless, the assessment of the clinical results on injury was apportioned as harm. Having thus disposed of the evidence for the prosecution, appellant was called upon to state his defence. In his statement on oath, the appellant denied any wrong-doing in so far as the sexual act complained of is concerned. The appellant sought to show that the victim **(PW3)** was a girlfriend to another man by the name **Elvis.** Further appellant also told the Court that he still stays with his parents. Taking the defence further, **(DW2) – HPN** said that he is married with children who included the appellant. The essence of **(DW2)** testimony was to the effect that at all material times if the victim ever lived with the appellant it could have been possible to positively identify her at the homestead. **(DW2)** therefore sequenced his evidence that the appellant never accommodated the victim at anyone time, within the family home between the alleged dates.

The other relevant evidence called by the appellant came from **(DW3) – Suleiman** an owner of the video shop referred to by **(PW3)** in her evidence in chief and on cross examination. **(PW3)** told the Court he knows both the appellant and the victim in this case. Turning to the alleged offence against the appellant **(DW3)** – weighed in to set out the record that the victim had a relationship with Elvis and not the appellant. **DW3** – maintained that the appellant repairs mobile phones and he had never seen the appellant with the victim.

Submissions on appeal

It is submitted by the appellant counsel that before the trial Court took the extreme step of convicting and sentencing him to twenty years imprisonment material contradictions could have been settled in his favour. Feeling aggrieved with such a misdirection with the decision of the Learned trial Magistrate he moved the Court to find that this was a true account and accuracy of the incident.

The real core of this appeal turns upon whether or not the prosecution proved the guilt of the appellant beyond reasonable doubt. That it was the appellant who committed it. **Mr. Mwanyale** for the appellant submitted that the Learned trial Magistrate erred in Law and fact in convicting the appellant based purely on the testimony of the victim. Counsel argued and submitted that the evidence of the victim **(PW3)** was not sufficient to discharge the burden of proof to warrant a conviction for the offence.

He pointed out that analysis of the victim testimony shows substantial inconsistencies and contradictions incapable of proving the essential elements of the offence. He argued that the evaluation of the evidence on record including that of the medical doctor who filled the P3 Form found no credible evidence of penetration. Therefore, the applicant should have benefited from those contradictions. Counsel went ahead to rely on the case of **George Kioji v R CR No. 270 of 2012**. On the other hand, counsel submitted that this was a victim who on her own admission to a large extent seemed to have demonstrated complicity in the commission of the offence by attending discos, videos and going to look for whiteman in Watamu. **(See Joseph Kimnayi v R {1979} eKLR).**

Further in counsel's contention it is not conclusive that the appellant committed the sexual act.

On ground 2 counsel submitted that the sentence of (20) twenty years meted out by the trial Court runs contrary with the predominant principles in **Francis Karioko Muruatetu v R {2017} eKLR** on mandatory sentences. He proposed that the sentence be considered as being punitive and excessive. He therefore invited the Court to allow the appeal. In response **Mr. Mkungo** for the state conceded to the appeal on both grounds argued by the appellant.

Prosecution counsel submitted that the entire prosecution evidence is inconsistent and contradictory in connecting the alleged offence with the appellant. She relied on the case of **J. N. N. v R Criminal Case No. 71 of 2013.**

Referring to these two Judgment of the High Court prosecution counsel submitted that the evidence of **(PW3)** was of a nature that impeaches her character and conduct throughout the episode which tries to connect the appellant with the commission of the offence.

According to the prosecution counsel, it is perfectly clear that there was no sound direct or circumstantial evidence to prove the guilt of the appellant beyond reasonable doubt.

Determination

Thus, that being the foundation it's the duty of this Court to be guided by the principles in **Okeno v R {1972} EA 32.** As a first appellate Court, I am obliged to subject the trial Court evidence to a fresh evaluation and scrutiny independently with a view to draw my own conclusions on the matter.

Though the state concedes to this appeal, it does not lessen the duty of the Court to subject the entire evidence to a fresh and exhaustive scrutiny to be satisfied that prosecution counsel opinion is right.

As the Law stands under Section 8 (1) and (3) of the Sexual Offences Act the prosecution was duty bound to prove the following elements of the offence:

(a). That the victim (PW3) was aged below 18 years.

(b). That the appellant sexually penetrated her genitalia.

(c). That the appellant was the person directly or indirectly held accountable for the sexual act.

(d). Finally, the prosecution positively identified and placed the appellant at the scene of the crime with regard to the age of the victim.

In **Kaingu Elias Kasomo v R CR Appeal No. 504 of 2010** the Court of Appeal held:

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

In the instant appeal, the strand of evidence led by **(PW2), (PW3)** and finally the birth certificate produced as exhibit 3 conclusively determined that the victim was aged 15 years old at the time she alleges appellant committed the sex act. Incidentally this is not a contested issue.

As regards appellant's appeal on penetration, Section 2 of the Sexual Offences Act defines the act to be complete when evidence led proves the partial or complete insertion of the genital organs of a person into genital organs of another person, in this case the female victim **(PW3).**

The **Court in Uganda in Basita Hussein v Uganda CR Appeal No. 35 of 1995** held interalia:

> **"That sexual intercourse or penetration may be proved by direct or circumstantial evidence."**

Further in **Erick Onyango Ondeng v R {2014} eKLR** thus:

> **"In sexual offences, the slightest penetration of a female sex-organ by a male sex-organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."**

Looking at the facts again in light of the charge and grievances by the appellant. It is clear from the trial Court Judgment the testimony of the victim **(PW3)** and that of the medical doctor **(PW1)** weighed heavily on the findings of Court to convinct the appellant. According to **(PW3)** testimony it all started with an outing on 25.12.2016 of her father to the beach. As confirmed by **(PW2) DM** – mother to the victim it occurred that the father lost sight of the whereabouts of the victim in the course of the walk. A telephone call apparently from the father to **(PW2)** became the first sign to advance the narrative of the victim missing at the beach and within the homestead.

Nevertheless, it should be noted that **(PW2)** acknowledges the presence of the victim (PW3) at their home on 26.12.2016 but left soon thereafter when the father took a stick to punish her for not returning back home from the beach. Apparently, the record shows that parents took no further step to search for the victim save for the booking of the incident to the police on 28.12.2016.

However, on 15.2.2017, **(PW2)** received a telephone call from the victim reliably from a mobile number **0725-[xxxx]** believed to be registered in the name of the accused. At that time the victim informed her that she was working but the nature of employment or employer was not specified. That mobile contact became the source of tracing the victim and the likely culpability of the accused with offence. The balancing act by the trial Court of giving due weight between the victim and the accused, was therefore necessary in establish the truth of the matter.

According to **(PW2)** she reported the matter to the police and as **(PW4)** testified further investigations culminated in the arrest of the appellant. What happened thereafter was to subject the victim to a medical examination as stated in the evidence of **Dr. Zena**.

The appellant reply to all these was that he never committed the act of penetration in view of the prevailing circumstances that he still lived with his parents. He also relied heavily on the evidence of **(DW1)** and **(DW2)** corroborating his denial of the whole incident. What the defence postulates is the fact of the victim not anywhere at the *locus criminis.* The appellant defence was to the effect that the victim had never been seen before or within the alleged period of two months at their family home.

In my considered view, though taken lightly I appreciate that cases of this nature are often difficult to prove beyond reasonable doubt. This is more so when it comes to placing reliance substantially on the testimony of a single identifying witness. In **Ogeto v R {2004} KLR 19,** the Court highlighted the point in these words:

> **"It is trite that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken. (See also Abdala Bin Wendo v R {1953} 20 EACA 166)**

Having set out the guidelines, I must ask myself whether the testimony of the victim **(PW3)** evaluated against the totality of the other prosecution witnesses evidence, the charge of defilement was proved beyond reasonable doubt as required of the Law under Section 107 (1) and 108 of the Evidence Act.

I am especially concerned in the present case, on the reliability of the evidence given by **(PW2)** and **(PW3)** on the chain of events starting from the point when **(PW3)** left for a walk with her father on 25.12.2016. I have on record the evidence of **(PW2)** who told the Court that the victim never came back home on that evening of 25.12.2016 until the 26.12.2016 when the father became outraged and took a piece of wood to punish her for misbehaving. This is in contrast with the evidence of **(PW3)** who testified that she never went back home but stayed with the appellant for over two months enjoying the sexual act life. It is only after a while when she refused to have sex with the appellant a conflict arose to prompt him to be chased away from that home. She therefore had to return back to her parents homestead, causing **(PW2)** to report to the police. The other salient features on what happened from the 25.12.2016 to weeks and months establishes that the victim set out on a mission to attend discos at Kiwandani, thereafter started to look for an opportunity to befriend whitemen at Watamu. According to **(PW3)** she did not know the appellant before the incident until an opportunity arose when they met at video show. That is when an offer

came from the appellant with a nod for them to go to his house to play sex.

Needless to mention that certain material aspects of (PW3) evidence does not point towards the direction of credible and cogent evidence to prove existence or non-existence of fact to obtain Judgment in favour of the prosecution to sustain a conviction against the appellant. It is recognized that the behavior of **(PW3)** to attend discos, look for whitemen to be-friend and visit to video shows had nothing to do with the appellant. Worse still the prosecution had the opportunity to process and carry out investigations to confirm or controvert the victim assertion of cohabiting with the appellant. What is more puzzling precisely **(PW3)** on placing a call to **(PW2)** on 25.2.2017, she informed her that she was working. This was against the background of her missing from the 25.12.2016 having left for a walk in company of the father.

The trial Court was not told the circumstances in which they both parted ways to force the father to place a telephone call to **(PW2)** for her to confirm whether she had already arrived at home. The Court was therefore, entitled to take into account the evidence of the father being the last person seen with the victim as well as the particulars and turn of events which lasted for more than two months to bolster the case against the appellant. There was also evidence from **(DW2)** that as part of the appellant personal circumstances he still lived with parents. This was once more a substantial fact which needed to be rebutted by the prosecution as part of the chain of circumstances to disapprove the defence that **(PW3)** lived with the appellant. I note as well that **(DW2)** and **(DW3)** denied to have seen the victim at the house of the appellant which explanations the Learned trial Magistrate clearly did not synthesize appropriately.

In the case of **Lutterod v Commissioner of Police {1963} 2 GLR 429** the Supreme Court of Ghana held:

> **"Where the determination of a case depends upon facts and the Court forms that a primafacie case has been made, the Court should proceed to examine the case for the defence in three stages:**
>
> > **(1). First it should consider whether the explanation of the defence is acceptable, if it is, that provides complete answer, and the Court should acquit the defendant.**
> >
> > **(2). If the Court should find itself unable to accept, or if it should consider the explanation to be true, it should then proceed to consider whether the explanation is nevertheless reasonably, if it should find it to be, the Court should acquit the defendant and**
> >
> > **(3). Finally, quite apart from the defendants, explanation or the defence taken by itself, the Court should consider, the defence such as it is together with the whole case i.e. prosecution and defence together and be satisfied of the guilt of the defendant beyond reasonable doubt before it should convict, if not, it should acquit."**

This case also falls within the principles in the well-known case of **Bukenya & others v Uganda {1972} EA 549** which is relevant to the facts in this appeal thus:

> **"(i). The prosecution must make available all witnesses necessary to establish the truth even their evidence may be inconsistent.**
>
> **(ii). The Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.**
>
> **(iii). Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.**

The principle as elaborated upon does not imply that the prosecution is obliged to lead evidence which may undermine their case but the right to a fair hearing under Article 50 of the Constitution requires that material in their possession be investigated to inquire into the credibility of a particular witness. In the present case besides the prosecution failure to call the father to the victim, I would point out that the account given by **(PW3)** of her recollection of events comes with it contradictions and inconsistencies that negatively impacted her credibility and reliability.

A statement made on oath by the victim **(PW3)** deposes in Court that certainly, she engaged herself with other social activities including looking for whitemen at Watamu to befriend before she met the appellant. Nothing in her evidence seems to put into perspective exactly when she joined the appellant in his house.

For the present purposes the prosecution charge taken down in writing as aforesaid indicates that on diverse dates between 26.12.2016 and February 2017 at Watamu Township appellant intentionally and unlawfully caused his penis to penetrate **SMK** a girl aged 14 years. From the stand point of **(PW3)** testimony part of the particulars in the charge sheet are not relevant to the indictment against the appellant.

I respectfully agree with the dictum in the comparative jurisprudence in **Mritunjoy Biswas v Pranab Qekuti Biwas & Another {2013} 12 SCC 796** in which the Court held:

> **"It is well settled in Law that the discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place if a material omission and, therefore, minor contradictions inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about**

> **the truthfulness or creditworthiness of a witness. It is only serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission."**

From the foregoing discussion the evidence by **(PW2)** and that of **(PW3)** simply contradicts and are at variance with to each other on account of the unlawful and intentional acts of defilement causing penetration of the victim by the appellant. The omissions and inconsistencies that there are as believed by the Learned trial Magistrate placed on the justice scale is heavier in creating a doubt in favour of the appellant in regard to the admissible, relevant, credible, cogent and conclusive evidence to proof a fact beyond reasonable doubt.

In this appeal, besides an initial report made to the police by **(PW2),** its explicit that no efforts were made to contact the local administration i.e. the village elders and Assistant Chief to trace the whereabouts of the victim. Again as noted the prosecution entirely relied on the call data as the criteria to place the accused at the scene and the testimony by the victim **(PW3).** I think the call data on the face value was meant to inform her parents she was alive and for any other reason on the commission of the offence this first report did not necessarily proof participation of the appellant herein with the defilement of **(PW3).** In my view that evidence of identification has to be treated with caution.

As I mentioned earlier, she never claimed to have been with the appellant. To that extent the appellant put forward a strong defence. In fact, it was open to the prosecution to investigate the claim whether their witness was telling the truth. It may be assumed that they did not know the whereabouts of the victim but their version lacks credence concerning the occurrence and act of defilement in respect of the appellant, with this view it was important for the Learned trial Magistrate to establish the materiality of **(PW3)** testimony and inferences to be drawn from **(PW2)** evidence. Further there are also pointers to the thrust of evidence likely to have been given by the father as the last seen person to be with **(PW3)** before taking flight to unknown destination.

In the case of **S v Chabalaha {2003} ISACR 134** the Court held:

> **"the trial Court's approach to the case ought to be in line with the following guiding principles "the correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides, and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an expose facto, determination and a trial Court (and counsel) should avoid the temptation to hatch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence."**

This is one such evidence that was not evaluated and its likely probative value and velacity or rehability to the testimony of **(PW3)**. I have looked at the Lower Court record, I find that although the Learned trial Magistrate gave in to the testimony of **(PW3)** and the medical report on the specifics of the broken hymen that by itself did not meet the case against the appellant. The Learned trial Magistrate did not infact analyze it to make definitive findings on contradictions and failure by the prosecution to call the key witness being the father of the victim. I find that the safaricom call data broadly relied upon to corroborate the victim evidence on identification did not ascertain where the truth lies to draw an inference on the alleged scene of the crime. Further, it was the victim who called through that mobile number to inform **(PW2)** that she was working, and not in any danger in the present case to implicate the appellant.

This is a case the diverse and multiple dates of the offence demanded further scrutiny to find at what particular time and day did the incident of the alleged defilement occur. In **Kagwa v R 14 MLR 138**:

> **"where the prosecution evidence on particular matter by two witnesses or more and that evidence is contradictory, and doubt raised by such contradictions must be resolved in the accused's favour." (See Philip Nzaka v R {2016} eKLR)**

So, the question I ask myself is whether there exist strong corroborative evidence to persuade this Court to affirm the impugned Judgment. To pursue our illustration, the evidence of **(PW3)** in its restyled version tends to show low likelihood probability. Why do I say so? There is a strand with strong weight on the alleged victim's behavior and the probabilistic narrative by the appellant that she had never been to his home. A further condition that ought to be satisfied is whether in the two months period the prosecution evidence is capable of casting light on the alleged scene to prove the appellant being responsible for the offence.

As I have stated above, the appellant felt aggrieved that the Learned trial Magistrate incorporated evidence which was inconsistent and contradictory to exercise discretion in favour of the prosecution. I think in my view that decision on conviction was a misdirection on the evidence. In the case of **State of U.P. v M. K. Anthony AIR 1985 SC 48** the Court held:

> **"Appreciation of evidence, the approach must be whether the evidence of the witness read as a whole, appears to have a ring of truth. Once that impression is formed, the Court should scrutinize the evidence keeping in view, the deficiencies draw backs and infirmities and evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences turn out of context, or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole."**

From the evidence of **(PW1) – (PW4)** the prosecution failed to prove the unlawful and intentional acts of sexual acts against the victim **(PW3)** that on diverse dates between the 26.12.2016 – February 2017 appellant committed the crime. As demonstrated the material contradictions and inconsistencies tilts in favour of the appellant. Given the contradictions **(PW3)** testimony, the overall impression on her honest and truthfulness in recounting the events of the alleged dates of the offence was embellish.

In addition, I have looked at the trial Court record, with a bias on the evidence of **(PW2)** and **(PW3),** its common knowledge that sex predators do not go around asking their victims to disclose respective ages before determining whether to commit the crime or not as it is a

tricky matter at that stage. There is also a danger in saying that all young girls out there in social places are aged below 18 years, therefore one has to be careful to seek sex favours or otherwise. Where objective information is unavailable the suspect has to draw on the background and reference characteristic of the victim to correlate the matter under inquiry to Judge in one way or another the age of his victim. Assume further that there is evidence which establishes the alleged victim to be in a social place like a club, always unaccompanied to unique incident of video shows and or evidence of her infidelity and material events put forward by the appellant to strongly challenge her testimony, it's something to be quantified by the trial Court.

On the other end of the spectrum, the Law requires the Court to apply a high standard of proof of beyond reasonable doubt to ascertain the guilt or innocence of the accused. The evidentiary value attached to the crime in question was partly circumstantial. In my conceded view, it was unsafe to convict the appellant of the offence as there were plausible possibilities that someone else would have committed the sexual act.

It is easier for the trial Magistrate to discern whether an accused met a victim who held herself out as an adult or a minor as defined under the Children's Act.

This distinction also boils down to the trial Magistrate views of the victim participation and the important consideration of her motive to lie. General guidelines as to motive was discussed in **Palaver v The Queen {1998} 193 CLR 1, 6** thus:

> **"When a serious allegation is made against a person, out of the first inquiries most persons make in testing the truth of the allegation is to ask whether, the person making the allegation has nay motive for fabricating it. Any facts that suggest a motive are regarded as throwing light on the probability of the integration being untrue."**

In the present case one has to bear in mind the evidence of **(PW3)** experiences in Watamu and the details of the offence emerging when she made that telephone call, informing **(PW2)** that she was working.

From the facts of **(PW3)** account there is an indication of connivance and acting under social pressures of life compelling her to engage in improper conduct. As evidenced by her testimony in the course of her social activities she may have come into contact with the appellant but the extent to which her evidence proved the charge beyond reasonable doubt remains in the realm of possibilities.

In **Pell v The Queen {2019} VSCA** it was observed interalia:

> **"What is on trial is (A)'s evidence and the extent to which you are prepared to accept it beyond reasonable doubt because, it is his evidence, and it is his evidence not supported by other evidence, and that is something of considerable significance. It is not supported by other evidence in this case. Indeed, the other evidence in this case goes the other way and lends to demonstrate that what he says, in some instances, you might think, practically impossible and in other instances highly improbable and when you compared the sort of practical impossibilities with the improbabilities one of you is a mathematician, you compared all those things, you come to the conclusion that you cannot accept what (A) say is true.**

All these matters go to the quality of evidence placed before the trial Court. I am therefore satisfied that after scrutiny of (**PW3)** evidence and the prosecution not able to call the father of the victim to explain when and how he parted ways with **(PW3)** on that occasion has raised reasonable doubt on the prosecution case against the appellant.

On the other hand, in answer to the charge appellant vitiated the accuracy of **(PW3)** testimony that for the period under review when she went missing he indeed lived and had occasion to commit the offence.

Therefore, the appeal succeeds. The conviction and sentence set aside. It follows that the appellant is hereby set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF NOVEMBER, 2020

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. M. N. Mwanyale Advocate for the appellant

2. Mr. Alenga for the state