**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 69 OF 2017**

**EMMANUEL JAPALA ELIAKIM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in judgment of 19th June 2017 and 27th June 2017, respectively, in Butere Principal Magistrate's Court Criminal Case No. 59 of 2016)**

**JUDGMENT**

1. The appellant herein had been charged, before the Butere Principal Magistrate's Court in Criminal Case No. 59 of 2016, with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. He was tried, convicted and sentenced accordingly.

2. Being dissatisfied with the conviction and sentence to serve life imprisonment, the Appellant lodged an appeal vide a petition of appeal dated 7th July 2017 and a Supplementary Petition of appeal. In his petition of appeal, the appellant raised seven grounds of appeal which are as follows -

a) that the learned trial magistrate grossly erred in law and facts in relying on the suspicious and fictitious evidence of PW1 and without noting that PW1 was subjected to duress thus incriminating the appellant;

b) that the learned trial magistrate grossly erred and /or misdirected herself in law and facts in holding that the medical evidence tendered as truthful and free from the error and doubt without critically observing that the same was not credible in light of the delay taken before obtaining the same;

c) that the learned trial magistrate erred in law and fact in convicting on mere allegations and presumptions and holding the testimonies of the prosecution witnesses as truthful and free from doubtful without the benefit of properly conducted deoxynucleic acid (DNA) required under section 2 of the Sexual Offences Act;

d) that the learned trial magistrate gravely misdirected herself in law and fact in finding the appellant guilty as charged in the absence of corresponding medical evidence of sexual activeness on the part of the appellant;

e) that the learned trial magistrate heavily misdirected herself in law in shifting the burden of proof to the appellant and further ignoring the defense of the appellant without proper evaluation;

f) that the learned trial magistrate failed to test the evidence of the prosecution witnesses and caution the circumspection thereby convicting on flimsy, inconsistent and evidence that was not watertight enough;

g) that the learned trial magistrate grossly erred in law and fact in placing weight on the evidence PW4, PW5 and PW6 without observing that their evidence contravened the provisions of article 50(4) of the Constitution and section 36 (1) as read with section 36 (5) of the Sexual Offences Act;

h) that the learned trial magistrate erred in law and fact without observing that there were no substantive investigations by the investigating officers thereby basing the conviction on mere allegations and fabrication;

i) that the leaned trial magistrate erred in law and fact in believing the testimonies of the witnesses on record without considering that they mentioned witnesses were not called to testify; and

j) that the learned trial magistrate grossly erred in law and facts in convicting the appellant against the weight of the evidence.

3. The duty of the first appellate court was set out in the *Okeno vs. Republic* [1972] EA 32, where court stated that

> *'The primary duty of an appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions.'*

The same was reiterated in the case of *David Njuguna Wairimu vs. Republic* [2010] eKLR, where the court of appeal stated: -

> *'The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.'*

4. It is thus the court's duty in this case to re-evaluate the evidence produced by the prosecution in support of the charges and by the defense, and make its conclusion whether the commission of the offences by the appellant in the main charge of defilement or the alternative charge of indecent act with a child with respect to the complainant had been proved and whether the appellant was responsible.

5. In my view, the main issues for determination are -

> a) whether the appellant's rights as envisaged under the provisions of article 50(4) of the Constitution and section 36 (1) as read with section 36 (5) of the Sexual Offence Act were contravened; and
>
> b) whether the conviction of the appellant for the offence of defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2006 is sustainable going by the evidence adduced in the trial court.

6. On whether the appellant's rights as envisaged under the provisions of Article 50(4) of the Constitution and section 36 (1) as read with section 36 (5) of the Sexual Offence Act were contravened. It is the appellant's position that his DNA was taken by the investigating officer without the leave of court as prescribed in law and as such the same evidence ought not to have been considered by the trial court.

7. Article 50(4) of the Constitution provides that -

> *'Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.'*

Section 36 (1) of the Sexual Offence Act provide that -

> *'(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.'*

8. Is it only the courts that can grant leave to carry out DNA testing in such circumstances as urged by the Appellant? It would appear that that is not so. section 122A (1) of the Penal Code, Cap 63, Laws of Kenya, provides that -

> *'A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.'*

In *George Muchika Lumbasi vs. Republic* [2016] eKLR the court was of the view -

> *'Section 122A of the Penal Code allows the police to order a suspect to undergo medical examination where the offence is serious.'*

9. The charges facing the appellant were very serious in nature: they attracted a sentence of life imprisonment, thus the prosecution had a mandate to carry out the DNA testing to establish the truth.

10. In *Boniface Kyalo Mwololo vs. Republic* [2016] eKLR, The Court of Appeal was of the view that -

> *'Section 36(1) should be read together with Article 5(2) of the Constitution which underscores that in every matter involving a child, the child's best interest is of paramount consideration.'*

It further reiterated the provisions of section 4(2) of the Children Act which provides that: -

> *'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be of primary consideration.'*

The court further determined the issue as to whether obtaining DNA samples was a breach or infringements of an accused rights and stated that -

> *'In the face of the above provisions of the Constitution and the law, is applicant's constitutional right to a fair trial going to be breached before the appeal is heard and determined if the trial proceeds. That is obviously a question to be answered in the appeal but on our part at this preliminary stage, we are not convinced. This is because even in ordinary criminal matters, investigations are normally carried out and the outcome is used in evidence. Such investigations include, mentioning just a few; finger printing, sometimes items belonging to a suspect are taken away for further scrutiny which may include forensic examination, this is not always done with the approval of an accused person, but it is gathering of evidence to be used in a criminal trial. In this scenario it has never been alleged that, by a suspect availing their fingerprints, they incriminate themselves in the trial. As we pen off this ruling, we may also add, all courts of law are created by the Constitution and unless a party can point out very blatant breach of the Constitution, a court of law that is mandated to undertake a prosecution cannot merely be stopped.'*

11. It therefore goes without saying the DNA tests in this case were done as part of the investigations to be able to ascertain the truth for the benefit and in the interest of justice.

12. It is however the appellant's case that the prosecution did not seek his consent before taking specimens from him and that in any event, PW 4 was below the rank of an Inspector who is empowered to take specimens in accordance with section 36 (5) of the Sexual Offences Act and consequently, the evidence was inadmissible. It is indeed true that the manner in which the blood samples were taken and the DNA tests carried out was not in accordance to the law.

13. Section 122A (1) and 122C (1) of the Penal Code gives guidelines on how DNA evidence should be procured. They read as follows: -

> *'122A (1) A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence to confirm or disprove that the suspect committed the alleged offence…*
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> *122C (1) Nothing in Section 122A shall be construed as preventing a suspect from undergoing a procedure by consent, without any order having been made: Provided that every such consent shall be recorded in writing signed by the person giving the consent.'*

14. From the foregoing provisions, a DNA sampling can only be procured if a police officer from the rank of an inspector orders for it or a court gives an order that the sample be procured from a suspect or the suspect himself consents to the giving of the samples.

15. From the evidence adduced by the prosecution such consent was not obtained from the appellant and the police officers who were involved in its extraction were not of the rank of an inspector as provided by the law. No letter instructing them to do so was produced neither. This means that the authority to extract the DNA sample came from a police officer below the rank of an inspector thus contravening Section 122A (1) of the Penal Code and section 36 of the Sexual Offences Act. There is also no evidence that the trial court gave an order for the sampling of the appellant's DNA or that the appellant consented to the sampling. It is therefore my humble finding that the evidence adduced regarding the DNA results was inadmissible.

16. It should, however, be noted that contrary to the appellant's claim the DNA evidence was used by the trial court as a basis to convict him, the trial court in its judgment placed no reliance on the findings to reach her determination. It is in fact clear that the evidence itself was to the appellant's advantage as it stated that there was nothing to connect him to the complainant thus grounds 3 of the petition of appeal and ground 1 of the supplementary appeal cannot stand.

17. On whether the conviction of the appellant for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act is sustainable on the strength of the evidence adduced in the trial court, it would worthwhile to recite section 8(1)(2) of the Sexual Offences Act, which provide that: -

> *'8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.'*

18. Section 8(1) cited above provides the key elements of the offence of defilement. These are 'penetration' and 'child.' The Act defines 'penetration' as partial or complete insertion of the genital organs of a person into the genital organs of another person; while 'child' has the meaning assigned thereto in the Children's Act. In *Dominic Kibet Mwareng vs. Republic* [2013] eKLR the court stated that -

> *'The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.'*

19. In determining this appeal, the court has to establish

a) whether the age of the complainant was proved,

b) whether penetration was proved, and

c) whether the accused was positivity identified by the minor as her assailant.

20. On proof of the age of the complainant, it was the complainant's evidence that she was aged seven years at the time of the alleged defilement. PW 2, her guardian, stated that the complainant was seven years old, which evidence was corroborated by PW 4, Douglas Maonga, a clinician who confirmed that age assessment of the complainant was done and that it revealed that she was aged seven years at the time of the alleged offence. The appellant on his part did not raise any issue with regard to the age of the complainant.

21. In *Hilary Nyongesa vs. Republic* Eldoret Criminal Appeal No 123 of 2009 the Court of Appeal stated that: -

> *'Age is such a critical aspect in Sexual Offences that it has to be conclusively proved … And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.'*

In *Kaingu Elias Kasomo vs. R* Malindi Criminal Appeal No. 504 Of 2010 the Court of Appeal stated that -

> *'The age of the minor is an element of a charge of defilement which ought to be proved by medical evidence … Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the Sexual Offences Act, the practice has been that age assessment of defilement victim is carried out by dentists. The said assessments while useful and in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial court heard the minor's evidence and saw her. The court was convinced that she spoke the truth.'*

In *Joseph Kibet Seet vs. Republic* [2014] eKLR, the court stated that -

> *'It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence.'*

The same was adopted in *Musyoki Mwakavi vs. Republic* High Court Criminal Appeal No. 172 Of 2012, where the court was of the view that -

> *'…apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense…'*

The same was echoed in the case of *Francis Muthee Mwangi vs. Republic* [2016] eKLR.

22. It is clear from the authorities cited that a birth certificate, the medical records and the evidence adduced by the complainant herself provide conclusive proof of the age of the complainant. The trial court made reference to the evidence of the minor, her guardian and other medical reports to make the same assessment of age. It is therefore sufficient to say that the prosecution proved the age of the minor.

23. On proof of penetration, it is the complainant's evidence that she was defiled by the appellant. She stated that the appellant covered her mouth, took her to his bed took his 'thing' and used it to hurt her private parts. She stated clearly that the appellant put his genital organs inside her vagina and that she felt pain. PW2, her guardian, stated that the minor had informed her about what the appellant had done to her after she realized that she was bleeding. Her evidence was corroborated by that of the clinical officer who produced evidence to prove that the complainant's hymen had been broken. He also confirmed that she had blood on her genitalia with bruises and lacerations on her vagina.

24. Section 2 of the Sexual Offences Act provides that: -

> *'" Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person ...'*

25. In the case of *Mark Oiruri Mose vs. Republic* [2013] eKLR the court held that -

> *'All that was required is proof of penetration in the victim's vagina by the appellant. Penetration may be partial or complete under the Act.'*

In *George Owiti Raya vs. Republic* [2013] eKLR it was held that: -

> *'There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane.'*

In the case of *Erick Onyango Ondeng vs. Republic* (2014) eKLR the court of appeal held as such on the aspect of penetration: -

> *'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.'*

26. The complainant categorically stated that the appellant put his thing in her private parts. Her evidence was corroborated by the contents

of the P3 form, the PRC form and the treatment notes put in evidence as P. Exhibits 3, 1,2 and 8, respectively. All these pieces of evidence corroborated the complainant's evidence that the appellant penetrated her vagina with his genital organ.

27. In the case of *GOA vs. Republic* [2018] eKLR the court in holding that penetration was proved stated that -

> *'The lacerated vaginal walls, the presence of the used condom in her vagina and the missing hymen corroborated the testimony of the complainant that a penis had penetrated her vagina. There was also the evidence that the complainant could not walk properly due to the pains. PW2 corroborated that evidence of the complainant. Further, the clear narration by the complainant described a male-female genital sexual intercourse. There is therefore sufficient evidence on record to prove that the complainant's vagina was penetrated by penis since the then status of the complainant cannot reasonably be explained otherwise in the face of the evidence. I find and hold that penetration was proved.'*

28. It is thus my finding that the evidence produced by the prosecution was sufficient to prove penetration and that the trial magistrate finding on the same was proper. It should also be noted that the complainant gave a vivid description of what happened to her.

29. The Court of Appeal in acknowledging the use of euphemisms by children when describing acts of sexual intercourse in *Muganga Chilejo Saha vs. Republic* [2017] eKLR stated that:

> *'Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya", (IE v R, Kapenguria HCCr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M v R Voi HCCrA. No. 35 of 2014, EMM vs. R Mombasa HCCr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her.'*

30. The words she used can clearly be construed to mean that there was penetration. It is therefore my finding that the prosecution proved beyond reasonable doubt that there was penetration as was held by the trial court.

31. On whether the appellant was positively identified by the minor as her assailant, it was the Complainant's evidence that the appellant was their neighbor's *shamba*-boy and that he was well known to her. She informed her grandmother PW2 and PW3 that the appellant had defiled her she referred to him as" Emmanuel." She maintained the evidence and also identified the appellant as her assailant in court. She did not at any time waiver in her identification of the appellant. Given that the appellant was a man well known to the child there exists clear evidence of recognition.

32. On evidence of recognition, the Court of Appeal in *Anjononi & Others vs. Republic* [1989] eKLR said that it was *"…more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the person's knowledge of the assailant in some form or other.'*

33. The complainant knew the appellant so well that mistaken identity could not have arose. In the absence of any evidence to the contrary, it is my humble finding that the complainant sufficiently identified the Appellant as he assailant.

34. From the fore going it is clear that the prosecution proved all the elements of defilement as required by law and it is therefore my finding that grounds 2 and 4 of the supplementary appeal cannot succeed.

35. The appellant vide ground 3 of the supplementary appeal contends that the leaned trial court erred in law and fact in believing the testimonies of the witnesses on record without considering that they mentioned witnesses who were not called to testify. In his submissions he stated that there were several witnesses that had been mentioned that were not called to testify. it is his argument that the failure to call the witnesses raised the assumption that their testimonies would have been adverse to the prosecution's case.

36. With regard to the choice of witnesses, the Court of Appeal in *Sahali Omar vs. Republic* [2017] eKLR stated that:

> *'Section 143 of Evidence Act provides that: -*
>
> *"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."*
>
> *The principle used to determine the consequences of failure to call witnesses was succinctly stated in Bukenya & Others v Uganda [1972] EA 549; where the Court held that: -*
>
> > *"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.*

*(ii) That Court has the right and 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 tended to be adverse to the prosecution."*

*The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. Keter v Republic [2007] 1 EA 135). In this case, the testimony and evidence adduced by the five prosecution witnesses was sufficient to prove that the complainants had been defiled by the appellant. As such, the situation hardly called for the drawing of an adverse inference with regard to the 'missing' witnesses.'*

In *Benjamin Mbugua Gitau vs. Republic* [2011] eKLR court of Appeal held that -

*'This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 of the Evidence Act Cap 80 laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys.'*

37. As stated in the aforesaid authorities, the prosecution reserves a right to decide which witness to call. The appellant had no right to elect which witnesses he deemed as crucial or not to the prosecution's case. The trial court when faced with the evidence made a conclusive determination on the case. From the proceedings it is my finding that the prosecution had built its case to the required standards with the evidence of PW1, PW2, PW3, PW4 and PW5 and that the evidence of the witnesses not called or presented to testify was not crucial.

38. The appellant further contends that the complainant and PW2 were under duress to testify and implicate him for the crime he did not commit. it is his argument that the complainant offered evidence that was suspicious and fictitious aimed at incriminating him. in his defense he did not state his whereabouts on the date of the alleged incident. He also did not state why the complainant or anyone close to her would want to implicate him for the said crime. There was nothing in the evidence led by prosecution or by the appellant, to suggest that there existed bad blood or a grudge between the parties, indeed the evidence demonstrates a cordial relationship based on good faith. Thus the appellant's allegation of fabrication cannot stand. see *James Mwangi Muriithi vs. Republic* [2016] eKLR**.** In the circumstances it is my finding that in the absence of the evidence to prove duress it was safe for the trial court to convict the appellant**.**

39. The appellant also contends that the trial court heavily misdirected itself in shifting the burden of proof to the him, and further of ignoring the defense of the appellant without proper evaluation. In its judgment, the trial court analyzed the evidence tendered by the prosecution vis-a-vis the one that was tendered by the appellant. The complainant gave a vivid account of what had happened to her on the date of the alleged incident. The prosecution witnesses corroborated the same. The appellant on his part gave no account of his whereabouts on the date of the alleged incident. It should be noted that the trial court never shifted the burden of proof to the appellant. On weighing the weight of the prosecution case vis-a-vis the *alibi* evidence given by the appellant, it is clear that the evidence adduced by the prosecution has more weight. It is thus my finding that the trial court's findings were proper and that evidence given by the appellant could not hold water in light of the evidence of PW2, PW3 and PW4.

40. In the upshot it is my finding that the prosecution proved all the elements of defilement as prescribed by law and thus the conviction of the trial court was proper and the same ought to be upheld and affirmed.

41. On the sentencing, it is the appellant's appeal that the learned trial court erred in law and fact in imposing a sentence that was manifestly excessive given the circumstances of the case.

42. Section 8(1) & (2) of the Sexual Offences Act provides that: -

*'8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

*8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.'*

43. The court in *Francis Muthee Mwangi vs. Republic* [2016] eKLR was of the view that -

*'Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.'*

44. However, it must be noted that the Court of Appeal distinguished the penalties prescribed under the Sexual Offences Act and other offences. It was its view in *Dennis Kinyua Njeru vs. Republic* [2017] eKLR that

*'The penalties under the SOA, may be described as "straight jacket" penalties leaving no room for the exercise of any discretion by the sentencing court … Our view, on the above legal approaches to sentencing under the SOA, is that, since the penalty provisions under the SOA do not call for the exercise of discretion in sentencing, interference by an appellate court is limited to the*

*determination as to the lawfulness or otherwise of the sentence under review...'*

The same was held in *Stephen Ngwili Mulili vs. Republic* [2014] eKLR where the court was explicit that:

> *'The Sexual Offences Act removed discretion in sentences particularly where the victims are minors. The sentence provided for is therefore, mandatory and not discretionary.'*

45. In the circumstances it is clear that the sentence is prescribed by law and the trial court could not have granted a sentence lesser than the one prescribed by law. It is therefore my finding that the sentence was lawful and ought to be upheld.

46. In an upshot, it is my holding that the appeal on both the conviction and sentence fails, and the same is hereby dismissed, the conviction is upheld and the sentence confirmed. The appellant has a right of appeal to the Court of Appeal.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10th DAY OF April 2019**

**W MUSYOKA**

**JUDGE**