REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 42 OF 2017

(From Original Conviction and Sentence in Criminal Case No. 799 of 2015

of Senior Principal Magistrate's Court at Mumias)

JOHNSTONE O. ONYANGO.....1ST APPELLANT

JOSEPHAT NYAKUNDI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellants were convicted by Hon. FM Nyakundi, Resident Magistrate, of vandalism of electrical apparatus contrary to section 64(4) (b) of the Energy Act No. 12 of 2012, stealing contrary to section 268 as read with section 275 of the Penal Code Cap 63 Laws of Kenya and handling stolen goods contrary to section 322(1) as read with section 322(2) of the Penal Code. They were accordingly sentenced to serve three (3) years imprisonment on all three counts.

2. The particulars of the vandalism charge were that on the night of 2nd and 3rd day of November 2015 at Mukhuyu Market in Nabaja, Nabakholo Sub-County within Kakamega County, they and others not before court jointly and willfully vandalized transformer S/No. 50120647 50KVA make PME valued at Kshs. 1, 000, 000.00 the property of Kenya Power under the control of the said Kenya Power the licensee. The second count charged that on the same date and at the same place stated in the vandalism count, the appellants with others not before the court stole 40 litres of transformer oil and two transformer winding all valued at Kshs 310, 000.00 the property of Kenya Power. The particulars of the last count being that on the same date and at the same place stated in the vandalism count, the appellants, with others not before the court, otherwise that in the course of stealing, dishonestly retained stole 40 litres of transformer oil and two transformer winding knowing or having reason to believe them to be stolen goods.

3. The appellants pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called four (4) witnesses.

4. Corporal Daniel Otieno Ogache, testified as PW1. He explained that he was on duty on 7th November 2015 at Bulila Administration Police Post, when he was informed, at about 7.30 AM, by members of the local community, that some people were stealing transformer oil and cables within the vicinity. He and his fellow officers went to the scene, where they found the second appellant, Josephat Nyakundi, within the scene receiving the transformer wires that had burnt. The first appellant, Johnstone Omondi Onyango, came to the scene on a motorcycle. They impounded the motorcycle and assorted tools and jerricans that were on the motorcycle. They arrested the second appellant and took him to the Bulila AP Camp, while the first appellant was arrested on a later date at Malachi. PW2, Erastus Matete, worked with Kenya Power. He said that on 3rd October 2015, he was on duty at their Kisumu office when he received information from Kakamega about vandalism of a transformer at Makuyo market. He went to the scene and confirmed that indeed the transformers had been interfered with, and its oil and wires were missing. He later made a report at the Nabakholo Police Station on 3rd November 2015. Police made recoveries on 10th November 2015 and he went to the police station and confirmed the oil and the wires were for the transformer. He said that the appellants were arrested on 7th November 2015 in Busia.

5. Corporal Felix Mutai testified as PW3 He was a police officer attached to Kenya Power, and the investigation officer in charge of the instant case. He testified that he received information on 3rd October 2015 at 9.00 AM about vandalism of a transformer at Mukhuye market, and he visited the scene with a Peter Mutithe. They went to the scene and confirmed the vandalism. He stated that the vandalism occurred on the night of 2nd. They made a report at the local police station. He said that he conducted investigations on 3rd October 2015 and 4th October 2015 at Busia. He was eventually informed of arrests having be done on 7th October 2015. He stated that he did not conduct any arrests, and

that the suspects were arrested by other officers and handed over to him. He further stated that it was an informer who saw the appellants in the act of vandalism. He said that he followed the signals of the telephone of an informer which directed them to where the appellants and the stolen items were to be found. Richard Langat took the stand as PW4. He was a government analyst, who conducted tests on the liquid in the recovered jerricans and confirmed the same to be transformer oil.

6. The court found that the appellants had a case to answer and put them on their defence. They both gave unsworn statements. They denied committing the offences, both saying that they were not anywhere near the scene of the alleged crime.

7. After reviewing the evidence, the trial court convicted appellants of all the tree counts charged and sentenced them as mentioned in paragraph 1 of this judgment.

8. The appellants being dissatisfied with the convictions and sentences appealed to this court. The grounds of appeal on record are not very clear. What I have deciphered is that the appellants are averring that the trial court failed to consider the charges to be defective and incapable of warranting a conviction, it was not established that the recovered items belonged to the complainant, the charges were defective to the extent they did not mention the names of the complainant owner of the property, that his constitutional rights were violated and that the testimonies of the prosecution witnesses were contrary and inconsistent. They sought that the appeals be allowed, convictions quashed and the sentences sets aside. They also propose retrial for the purpose of hearing.

9. Being a first appeal, I have re-evaluated all the evidence on record and drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

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

10. The appeal was canvassed on 31th January 2019. The appellants relied on written submissions that they had placed before me, whilst Mr. Ng'etich, Senior Prosecution Counsel, made oral submissions. At the oral hearing, the first appellant said that he had nothing to say, while the second appellant said that although the trial court had stated that the sentences were to run concurrently the prison authorities were treating them as consecutive.

11. In his written submissions, the first appellant raised only the issue of the sentence running consecutively rather than concurrently on account of a defective warrant. On his part, the second appellant addressed several issues. He submitted that the trial was unfair for Article 50 of the Constitution was violated. He submitted that Article 50(2)(j) was not complied with to the extent that he was not given reasonable access to the evidence the prosecution was to rely on during trial. He submitted that the prosecution was under duty to supply the same, while the court was under a duty to ensure that the right was not infringed. He submitted that the trial court commenced the trial before the prosecution had supplied him with the charge sheet and investigation diary. He complained that Article 50(2) (g)(h) had also been violated. He also cited Article 49(1)(f) of the Constitution and submitted the same had been infringed to the extent that no reasons for why he was delayed between 7th November 2015 and 14th November 2015. On the language used at the trial, he submitted that PW1, PW2 and PW4 testified in a language other than English or Kiswahili, and there was no interpretation which was contrary to the provisions of the Constitution and the Criminal Procedure Code, Cap 75 Laws of Kenya. He submitted that the language used was not recorded and was therefore unknown. He submitted that the failure to record the languages used at the trial was fatal to the proceedings. On the actual offences, he submitted that there was no evidence to prove vandalism and theft, and the production of photographic evidence did not comply with section 78 of the Evidence Act, Cap 80, Laws of Kenya. He asserted that the officer producing the photographs did not demonstrate that he had been properly appointed by the Director of Public Prosecutions for that purpose. On the question of the stolen items allegedly recovered from them, the submitted that it had not been proved that they belonged to the complainant. On recovery of the stolen items, he submitted that the same was not reliable as the ownership of the house where the recovery was allegedly done was not properly established, no inventory was produced, and there were inconsistencies and contradictions on the dates when the alleged recovery happened. He further submits on the defective warrant which had resulted in the prison authorities treating their sentences as consecutive rather than concurrent.

12. I will consider the issues raised sequentially. I will first start by looking at whether or not there had been violations of the Constitution. The second appellant cited violation of Article 49 (1)(f) of the Constitution. He complains of a delay that is not very clear from his documents. Article 49 states the rights of an arrested person. Paragraph (f) of Sub-Article (1) provides for production of an arrested person in court within a given period of time, and it states as follows:

> *"49(1) an accused person has the right –*
>
> *(f) to be brought before a court as soon as reasonably possible, but not later than—*
>
> *(i) twenty-four hours after being arrested; or*
>
> *(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day …"*

13. The provision requires that the suspect be brought to court with twenty-four hours of arrest. I understand the second appellant to be arguing that he was arrested on 7th November 2015 and was not presented in court until 14th November 2015. The calendar for 2015 shows

that 7th September 2015 was a Saturday and 14th November 2015 was a Saturday also. I do not see the relevance of these dates to the instant proceedings. The charge sheet indicates that the second appellant was arrested on 7th November 2015 and was presented in court on 9th November 2015. That was clearly with the constitutional prescriptions in Article 49(2)(f)(ii). The second appellant has therefore not demonstrated that his rights as to being presented in court within the time stipulated in law were violated. As I stated at the outset, the submission itself is not clear as to the violation complained about was. It is couched in language that is vague and imprecise. I shall therefore leave the matter at that.

14. Regarding the infringement of Article 50 of the Constitution, he raises several issues. He, in particular, complains of violations of Article 50(2)(g)(h) and (j) of the Constitution. The same state as follows:

> *"50(2) every accused person has the right to a fair trial, which includes the right –*
>
> *(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;*
>
> *(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*
>
> *(i) …*
>
> *(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence …"*

15. Article 50 generally states the rights of an accused person. Article 50(2)(g)(h) states the right to legal representation. For (g) it is about choosing an advocate of one's choice and to have that advocate represent him at the trial. There is also the limb that the accused person be informed, no doubt by the court, of that right to representation by an advocate of one's choice. I have carefully perused through the record of papers before me. There is nothing in there which refers to the right to legal representation. The appellants were not represented by an advocate, and there is nothing on record to indicate that the court informed them of the right to choose an advocate to represent them at the trial.

16. The provision no doubt guarantees the right to be represented by an advocate of one's choice. Related to that question is the right to be informed of the right to an advocate of one's choice, the duty of the trial court to inform an accused person of that right and the effect of the omission of the trial court to so infirm an accused person of that right. The court in *Jared Onguti Nyantika vs. Republic* [2019] eKLR, had occasion to wrestle with the issue, where it held that that is a fundamental issue in the trial process and to deny it or failure to facilitate it amounts to an injustice. The court emphasized that the accused person ought to be notified of that right at the earliest opportunity, and failure to inform of the right was a denial of a right to fair hearing. The court linked Article 50(2)(g) with Article 25(c) which states that the right to fair trial shall not be limited. In *Daniel Mpayo Ngiyaya vs. Republic* [2018] eKLR it was held with regard to Article 50(2)(g), that where an accused person faced a serious charge or a sentence that would materially prejudice him the court is bound to inform him of the right to legal representation, and that it would amount to miscarriage of justice to fail to do so. The importance of legal representation cannot be gainsaid; it well summarized in the English case of *Pett vs. Greyhound Racing Association* [1968] All ER 545.

17. The same issue taxed the mind of the court in *Joseph Kiema Philip vs. Republic* [2019] eKLR, where it stated that before it is determined whether or not Article 50(2)(g) was complied with, particularly with regard to the accused person being informed of his right to an advocate of his own choice, the court ought to look at the provisions of the Legal Aid Act, No. 6 of 2016, whose objective is to give effect to Article 50(2)(g) of the Constitution so as to facilitate access to justice and social justice. Section 48 of the said Act imposes duties on the court with respect to unrepresented persons, which include a duty to promptly inform him of his right to legal representation, if substantial injustice is likely, to inform him of his right to an advocate to be assigned to him by the state and to inform the service to provide legal aid to the accused person. The court stated that trial courts, as a matter of constitutional duty and in the interest of justice must give the information to the accused person and make a preliminary enquiry at the earliest possible time to determine whether the accused person would require legal representation. It was also stated that the trial record ought to indicate that the rights under Article 50(2)(g)(h) were communicated to the accused person.

18. It was emphasized in *David Njoroge Macharia vs. Republic* [2011] eKLR and *Karisa Chengo & 2 others vs. Republic* [2015] eKLR, although premised on Article 50(2)(h) of the Constitution, that one of the factors that makes it critical that the court must inform an accused person of the right to legal representation is the seriousness of the offence or the gravity of the sentence to be imposed upon conviction. The appellants herein were charged with vandalism, stealing and handling stolen property, offences which attracted penalties of up to one years imprisonment for vandalism, three years for stealing and fourteen years for handling stolen property. The last charge was a serious one which would have required the court to inform the appellants of their right to legal representation.

19. It should not be assumed in all circumstances that every accused person hauled before the courts is aware of his rights with respect to fair hearings, and particularly the rights set out in Article Article 50(2)(g)(h). Most of the accused persons who come before our courts are ordinary persons of average or fairly low education, and who are not well exposed on matters to do with the law. The Court of Appeal has on occasion stated that the trial court plays the role of an educator of the accused person so far as these matters are concerned. See *Elijah Njihia Wakianda vs. Republic* [2016] eKLR. The right to a fair hearing can only be actualized where the accused persons are made aware of their rights, for it only after they are notified of and sensitized about those rights that they will be able to make informed decisions. That right includes the right to inform them that they can appoint an advocate to act for them in the proceedings if they so wish, and that they have a right to choose one of their own choice.

20. With respect to the right to legal representation it has been stated that the same is not absolute. However, the issue here is about the right to being informed about the right to being represented by an advocate of one's choice in criminal cases, and thereafter to choose one of one's choice. That is what this is about. For an accused person to choose an advocate of their choice, they should first be made aware of that right, for they cannot exercise it unless they are aware of it. It is the duty to convey that information that is imposed on the court. It is a fair hearing

issue, for failure of an accused person to participate fully in criminal proceedings could have something to do with lack of legal representation, and the failure to alert him of his right to have an advocate of his choice to represent him in the proceedings amounts to an injustice. Criminal proceedings have grave consequences for accused persons, should they be found guilty. They face jail, which is itself a denial of a right.

21. In the instant case, I have noted from the record that the appellants were not represented by an advocate. There is no indication from the record that they were ever informed of their right to be represented by an advocate in the proceedings, so that they could make decisions on whether or not to appoint one of their own choice. The duty to inform an accused person is a constitutional and legal imperative stated in Article 50(2)(g) and section 48 of the Legal Aid Act. Failure to inform the appellants of that right violated their fair hearing rights and amounted to injustice. A trial where fair hearing rights have been violated in this manner cannot possibly stand.

22. Then there is Article 50(2)(j), which is about accused persons being informed in advance of the evidence the prosecution intends to rely on at the trial and the said evidence being made accessible to them. That would mean the accused persons being furnished with the charge sheet, which is essentially the pleadings in the criminal matter, as well as the evidence itself. The evidence would be the statements of the witnesses to be presented at the trial and any documents that are proposed to be placed before the court. This should crucially be done before arraignment or at arraignment but before the accused takes the plea. A criminal case commences when the pleadings are lodged in court, and the trial itself begins when the accused is presented in court for the purpose of taking plea. The evidence that the prosecution wishes to rely on should be given to the accused before he takes plea. It would assist him, after evaluating it, in deciding how to plead, and, should he decide to plead not guilty, the defence that he should mount, including the direction that his cross-examination of the witnesses should take.

23. The courts have pronounced themselves very loudly and clearly on this. In *Joseph Ndungu Kagiri vs. Republic* [2016] eKLR, the Court of Appeal said:

> *"Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with Sub-Article 2(c) which provides that every accused person has a right to a fair trial which includes the right to have adequate time and facility to prepare a defence."*

24. The court went on to state:

> *"The latter cannot be met if the accused is not furnished with the evidence the prosecution intends to rely on ahead of the trial. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling the Constitution and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated."*

25. I have carefully perused through the record herein. I have noted that at the time of the taking of plea on 9th January 2015, Article 50(2)(j) had not been complied with, for the record indicates that the prosecution pledged on 7th January 2016 to supply the accused with statements on 21st January 2016. That was not complied with as the appellants on the said date asked to be furnished with the statements and investigation diary. That application was renewed on 5th February 2016, 11th February 2016. It would appear that the statements were supplied on 23rd February 2016. The appellants eventually stated that they were ready to proceed on 26th April 2016 and the first witness took the stand on 24th August 2016. I hold that the appellants were not furnished with the prosecution evidence at the appropriate time, that is to say before they took plea, and therefore that constituted a breach of Article 50(2)(j). However, I will find that they were not altogether prejudiced as they had already pleaded not guilty to the charges and the statements were supplied to them before the actual hearing commenced on 24th August 2016.

26. They have also raised the issue of language. There are constitutional and statutory provisions in the Constitution and the Criminal Procedure Code on the language to be used in a criminal trial. The relevant provisions are Article 50(2) of the Constitution and section 198 of the Criminal Procedure Code, Cap 75, Laws of Kenya. According to the law, the language of the court is English and Kiswahili. However, where an accused person is not conversant with either of the two, the court is obliged to avail the accused with an interpreter at state expense. Therefore, to ensure that there is full compliance with the law and to ensure that the record clearly indicates such compliance, it is required that the court should indicate the language used at the trial.

27. The Court of Appeal was confronted with the issue under the old Constitution in *Kiyato vs. Republic* [1982-88] KAR 418, where it allowed an appeal on account of failure to observe the law governing language at trial. It was held (1) that the Constitution and the Criminal Procedure Code required evidence should be translated to an accused person, (2) that it was standard practice that the court recorded the nature of the interpretation used or the name of interpreter, and (3) that in that case there was no compliance with the law. See also *Abdalla vs. Republic* [1989] KLR 456 and *Swahibu Simbauni Simiyu & another vs. Republic* [2006] eKLR. Under the new Constitution we have such recent decisions such as *Gilbert Kipruto Korir vs. Republic* [2017] eKLR, where the court quashed a conviction and ordered retrial as the trial court had not indicated the language used at trial, holding that there was a chance that the trial was conducted in a language that the accused did not understand. See also *Joshua Njiri vs. Republic* [2017] eKLR and *Titus Okumu Tito vs. Republic* [2015] eKLR.

28. The record before me indicates that the plea was taken in Kiswahili, the language that the appellants indicated that they understood. They are recorded to have responded to the charges in the same language. The surety is also recorded to have been examined in the same language. However, when PW1, PW2 and PW4 testified the language used at trial on those occasions was not recorded. I note that the appellants did cross-examine the witnesses, and at the appeal they have not complained that the trial was conducted in a language that they did not understand. They have also note indicated the language or languages that they understand, and which they feel should have been used at the trial. I am persuaded that the omission to indicate the language used at the trial when PW1, PW2 and PW4 testified suggests that the proceedings were in a language other than Kiswahili the language that they had used at plea taking. I am persuaded therefore the appellants

did not receive a fair trial with respect to observance of the rules on the language to be used at the trial as there is a chance that the trial was conducted in a language that they did not understand.

29. The other issues turn basically on the substance of the charges that they faced. They raised the issue that the charges were defective. They did not point out the defects they had in mind, neither did they address the issue in their written submissions nor in their oral submissions. I have perused through the charges and I have not noted any defects in them.

30. The other issue raised relates to proof of the vandalism alleged and alleged ownership of the goods allegedly stolen. Was there proof of vandalism? PW1, PW2 and PW3 visited the scene and noted what they described as evidence that the transformer had been interfered with. That would amount to evidence of vandalism, where the transformer oil is syphoned off, and wires or cables removed. There is also the issue of stolen items. They were recovered at the scene. Individuals brought a motorcycle to the scene in the presence of PW1, when they saw the police officers they took off, and left items on the motorcycle, the alleged recovered stolen items. The motorcycle rider was later arrested and charged together with the appellants but acquitted at the trial. The second appellant was arrested at the scene, some of the alleged stolen items were recovered then. The appellants raised issue with production of a photograph, but the record only reflects that the photograph was only marked for identification, it was never produced. There is no reason for me to consider whether section 78 of the Evidence Act was complied with.

31. The appellants also raised issue with the fact that ownership of the recovered items was not established. I note that the second appellant was arrested at the scene with some of the items that PW1, PW2 and PW3 identified as removed from the transformer, the property of Kenya Power. The evidence from the witnesses was sufficient to establish ownership of the same.

32. They raised too the issue of contradictions and inconsistencies in the testimony of the prosecution witnesses. PW1, the principal witness, who allegedly arrested the second appellant at the scene of the crime, alleged that the crime was committed on 7th November 2015. He got information about it at 7.30 AM when it was actually in progress. He repeated the date and time of the alleged commission during cross-examination, and no effort was made at reexamination to have the witness confirm the date. PW2, the Kenya Power employee who went to the scene in the morning of the alleged offence, said that he got a report of the incident on 3rd October 2015. He reported the crime to the police on 3rd November 2015. During cross-examination, he repeated the date of 3rd October 2015. Again, no effort was made by the prosecution to have the witness confirm the date. PW3 also talked of the offence happening on 3rd October 2015, and of investigations being conducted at Busia on 3rd October 2015 and 4th October 2015, and of him going back to Kisumu on 5th October 2015. He also talked of receiving information on 7th October 2015 about arrests at Busia.

33. The charges in counts I and II relate to events that allegedly happened on the night of 2nd and 3rd November 2015. It is critical that the prosecution's principal witnesses – PW1, PW2 and PW3 –lead evidence pointing to commission of the offence charged in the two counts. Their testimonies touched on events that occurred on dates other than what was alleged in the charges. Indeed, it would appear as if PW1, on one hand, and PW2 and PW3, on the other, were talking of two separate events, which occurred on 3rd October 2015 and 7th November 2015, respectively. Whereas contradictions and inconsistencies in prosecution evidence may be overlooked in some instances, I am persuaded that the inconsistences and contradictions herein are fundamental. None of the witnesses referred to the date stated in the particulars of the charges. I am persuaded that the prosecution did not establish the case they had charged the appellants with in counts I and II.

34. The appellants complain that although their sentences were to run concurrently according to the court order, the prison authorities have been treating the sentences as consecutive. I have gone through the record. The appellants are right, the order made by the trial court on 21st March 2017 was that the three custodial sentences imposed were to run concurrently and not consecutively.

35. The appellants have not raised issue with the fact that the court convicted them of stealing and handling stolen property at the same time. Handling stolen property is always charged as an alternative to stealing. One cannot be a thief and at the same time the receiver of goods stolen during the theft, for he cannot receive stolen items from himself. The thief and the receiver must be two different individuals. The two offences cannot be charged in the same charge sheet as main offences, for the accused cannot be a thief and receiver at the same time, he either has to be the thief or the receiver of the stolen goods. It was with that in mind that the court in *Stephen Viljoen & 2 others vs. Republic* [2006] eKLR said:

> *"… to put it simply, there can be no handling under section 322 of the Penal Code if there was no theft of the item alleged to be handled. The prosecution in support of a charge of handling stolen goods must first and foremost prove that the goods were stolen, and then only would the prosecution be required to prove that the accused person" received' or 'retained" them, the accused knew or had reasons to believe that they were stolen."*

36. The corollary is that an accused person cannot be convicted of both theft and handling stolen property. Once the trial court convicts the accused person of theft, it ought to dismiss the handling stolen goods charge against the accused found guilty of theft, and where it is persuaded that the accused was not the person who stole the subject goods, but is convinced that he received them while knowing them to be stolen, it ought to convict of handling stolen goods and dismiss the theft charge. It was improper therefore for the trial court to entertain the count on handling stolen goods as a substantial charge rather than an alternative to the theft charge, and to go ahead and convict the appellants of both theft and handling stolen property. The convictions and sentences cannot accordingly stand.

37. Having considered all the issues raised in the appeal, I am of the considered view that the convictions of the appellants in Mumias PCMCCRC No. 779 of 2015 were not safe. Upon finding that the appellant's constitutional right to be informed of their right to legal representation had been violated, I should ideally order a retrial, but I consider that the appellants are serving three years imprisonment that were imposed 21st March 2017. I am also persuaded that if I were to determine the appeal only on merit I would quash the convictions for the reasons that I have given above, and set aside the sentences imposed. The appeal herein is hereby allowed. The appellants shall be set free from prison custody unless they are otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS…28TH ….DAY OF …JUN... 2019

W MUSYOKA

JUDGE