REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 36 OF 2019

MOHAMED HARET MAALIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, 2006. Particulars of the offence are that on 12th August 2018 in Habaswein Sub-County within Wajir County he intentionally caused his penis to penetrate the vagina of ZNI a child aged 13 years.

2. In the alternative the appellant was charge with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act 2006. Particulars of the offence are that on 12th August 2018 at Bulla Ndege Sub-Location in Wajir County he intentionally touched the buttocks, breasts and vagina of ZNI a child aged 13 years.

3. The State lined up 6 witnesses. FAD (PW1) testified that at a time that she does not remember she learnt that her daughter ZNI was pregnant. It was her testimony that her daughter was aged 13 years of age. At the time Z was with her aunt L in Garissa. PW1 testified that L took her to hospital in Garissa and after several tests she was found to be pregnant. PW1 told the court that she reported the matter to the chief and the chief in turn reported the matter to the police. She was called by the police for an interview. PW1 testified that after 3 days she took Z to the police. It was her testimony that the police took her to Habaswein Sub-County Hospital for examination.

4. According to PW1, Z told her that a man by the name Bonow had visited her at their home. The man told her that he would buy her a wrist watch. After that he raped her. PW1 testified that at the time she was at her place of business. PW1 told the court that Z did not tell anyone of the incident. PW1 identified the appellant as Bonow.

5. ZN (PW2) testified that she was aged 13 years old. It was her testimony that on 12th August 2018 around 7.00 pm she was at their home alone. While there a man she identified as Bonow paid her visit. It was her testimony that she did not know any other name. However, she told the court that she used to see him at a relative's home. PW2 testified that Bonow promised her a wrist watch and proceeded to defile her. She explained that he removed her underwear and then raised her dress. He proceeded to insert his private part into her vagina. PW2 testified that she was defiled while lying on a bed. According to PW2 she did not tell anyone of the incident.

6. According to PW2, at one point she visited her aunt L in Garissa. While there she started experiencing headaches and backaches. The aunt took her to a private hospital in Garissa where she was informed that she was pregnant. PW2 testified that after she went to Habaswein it was her testimony that she was taken to Habaswein Police Station and then Habaswein Sub-County Hospital. At the hospital it was confirmed that she was pregnant. PW2 testified that she pointed out the appellant to the police as the person who had defiled her.

7. In cross examination PW2 testified that she did not report the matter to anyone because the appellant had told her not to. PW2 told the court that she had seen the appellant severally at night.

8. Haret Ahmed the Assistant Chief Habaswein Central Sub-Location (PW3) testified that on 10th November 2018 around 7.30 am PW1 paid him a visit. She reported to him that her daughter (PW2) was pregnant. PW3 testified that PW1 told him that the daughter had been impregnated by the appellant. PW3 testified that he reported the matter to the police and the appellant was arrested. PW3 testified that he knew the appellant. He told the court that the appellant was resident of his jurisdiction.

9. Reuben Okumu Oeke a clinical officer at Habaswein Sub-County Hospital (PW4) testified that on 12th November 2018 PW2 visited their facility alleging to have been defiled. On examination no discharge or tears were noted. Also, there was no sign of discharge. PW4 testified that a pregnancy test turned out to be positive. The HIV and venereal diseases tests were negative. Epithelial cells were seen. PW4 filled a P3 form after the examination. The P3 form was produced as exhibit 2. An outpatient record was produced as exhibit 3.

10. LMA (PW5) testified that towards the end of October 2018 while visiting Habaswein she noted that PW4 was unwell. She invited her to her place in Garissa. After the schools were closed PW2 was taken to her by her grandmother. PW5 testified that on 8th November 2018 she took her to a hospital called Alliance. PW5 testified that tests were conducted and PW2 was found to be fine. It was PW5's testimony that PW2 indicated that she had missed her periods for 3 months. She was taken to Sister Maternity Home where it was found that she was pregnant. PW5 took her to Armale Medical where she was also found to be pregnant. PW5 testified that after the findings she informed PW1.

11. PW5 testified that PW1 told her that she had been impregnated by the appellant. PW5 told the court that she knew the appellant as he used to live with their family in Habaswein. PW5 produced a laboratory request form from Armale Medical Clinic, medical notes dated 6th November 2018 Alliance Medical Centre, medical notes dated 10th November 2018 from Lancet as exhibits.

12. No. 92502 PC Josphat Okello of Habaswein Police Station (PW6) testified that on 10th November 2018 PW1 reported to him that PW2 had been defiled and that she was pregnant. PW6 recorded the report and took her statement. It was his testimony that PW2 was taken to the station on 11th November 2018. PW6 testified that when he interviewed PW2 she told him that the appellant had lured her with a promise to buy her a watch. He then defiled her. PW6 testified that he took PW2 to Habaswein Sub-County Hospital where she was examined and found to be pregnant. A P3 form was filled for her. PW6 then charged the appellant. According to PW6 the minor was born on 15th April 2005.

13. The court found the appellant with a case to answer and placed him on his defence. The appellant gave a sworn statement and lined up 4 witnesses.

14. In his defence the appellant told the court that on 11th November 2018 he was at his place of work when he was arrested. He was informed by the officers who arrested him that a certain girl had reported that he had defiled her. The appellant testified that he did not commit the offence. It was his defence that he was being framed. Finally, he testified that no one saw him commit the offence.

15. In cross examination the appellant testified that at the time the offence was allegedly committed he was at Bulla Ndege. It was his testimony that he did not know PW2. However, he estified that he knew her mother. According to the appellant he has never gone to their home. The appellant told the court that on 12th August 2018 he was in Nairobi. He explained that he went to Nairobi on 4th July 2018 and returned to Habaswein on 25th August 2018.

16. Noor Hassan Abdi (DW2) testified that he was not sure if the appellant committed the offence. Samow Mohamed Adan (DW3) testified that the appellant has never committed an offence. Muktar Sabow (DW4) testified that he knew nothing about this case. Abdisalan Abdikadir (DW5) testified that the appellant has never committed an offence. However, he was doubtful that the appellant committed the present offence.

17. The trial court found appellant guilty after hearing the matter, convicted him and sentenced him to serve 20 years imprisonment.

18. Being aggrieved by the above decision the appellant lodged instant appeal and set out the grounds as follows:-

a. That the trial court erred in law in failing to record the questions of the voire dire in the record.

b. That the trial court erred in law in failing to enquire whether the complainant understood the importance of testifying under oath during the voire dire.

c. That the trial court erred in law and facts in failing to find that the long duration it took for the incident to be reported after it had occurred created doubt on the prosecution's case.

d. That the trial court erred in law in failing to accord the appellant a chance to submit at the close of the prosecution case contrary to section 210 of the Criminal Procedure Code.

e. That the trial court misdirected itself on facts by dismissing the defendant alibi which was cogent and plausible.

f. That the trial court erred in law by failing to record the reasons for believing the complainant, a child of tender age whose evidence was not corroborated, as prescribed under section 124 of the Evidence Act Cap. 80.

g. That the trial court erred in law by failing to find that the prosecution's case did not meet the threshold of proof.

19. Parties were directed to put submissions to canvass the appeal.

APPELLANT'S SUBMISSIONS:

20. On voire dire, the court having noted that the complainant was a child, it went ahead to direct that a trial within a trial be conducted to determine whether she understands the meaning of an oath. The trial court did not record the questions put to the complainant; it only recorded her answers. The court did not expressly ask the complainant whether she understands the meaning of an oath. The court ruled that the complainant appreciated the meaning of an oath and directed that she gives sworn evidence.

21. It is submitted that this is an error of law as the court did not take sufficient steps to determine whether the complainant was capable of giving sworn evidence. In ***Kivevelo Mboloi vs Republic [2013] eKLR, S.*** **N. Mutuku** and **W. Koror JJ** quoted a passage from Peter Kariga Kiune vs Republic Criminal Appeal No. 77 of 1982:

"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an appellant person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, Oaths and Statutory Declarations Act, Cap 15. The Evidence Act (section 124, Cap. 80).

It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions.

A similar opinion was expressed by the Court of Appeal in England recently in Regina vs Campell (Times, Decmber 20, 1982):

"If the girl (ten years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration.

Dealing with the question of the girl taking the oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of the nature and solemnity of an oath, the Court of Appeal in R v Lal Khan [1981] 73 Cr. App R 190 made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen..."

22. From the foregoing binding authority, the trial court erred in two ways, firstly by failure to record the questions put to the complainant, this denies the appellate court the chance to appraise the quality of voire dire and secondly by failing to interrogate whether the complainant understood the meaning of an oath.

23. According to PW5, the complainant's aunt, the pregnancy was discovered 3 months after the alleged offence. She also states that she took the complainant to hospital on 8th November 2018. The complainant states that she was allegedly defiled on 12th August 2018, which means the incident was reported 3 months after.

24. The trial court did not make any finding on what effect such delay in reporting the incident would have on the prosecution's case. The appellant in his sworn evidence stated that he was being framed and that he did not commit the offence.

25. The High Court expressed its reservation in convicting based on such late reporting in ***Alois Mwashigadi v Republic [2017] eKLR*** **J. Kamau J** held as follows:

"Undoubtedly, the long duration PW2 took in reporting the matter worked against her because there did exist an opportunity for any other person, other than the appellant to have impregnated her. In addition, in the absence of any explanation for the delay in reporting the incident, the possibility of a grudge having existed between PW2 or her family and the appellant as he had contended did not appear to have been farfetched."

26. The trial court mislead itself on facts and law by making a finding judgment that there was penetration and that it was caused by the appellant and that the only other possible alternative is if there was prove of artificial fertilization. The court must have been making a presumption of fact pursuant to section 119 of the Evidence Act Cap. 80. The section provides as follows:

"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

27. The Court of Appeal in ***Sawe vs Republic [2003] KLR 364*** set the threshold that must be achieved on order for a court to convict based on circumstantial evidence. The court posited as follows:

"In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

28. Therefore the trial court could only make the presumption that the sexual activity leading to the impregnation of the complainant was caused by the appellant if no other plausible explanation existed. The appellant in his sworn testimony stated that he has never gone to the complainant's home. This is where the incident is alleged to have taken place. He further stated that he did not commit the offence and that he was being framed. The trial court failed to analyse this part of testimony and chose to believe the prosecution's case without reasons.

29. In the ***Aloise Mashigadi*** case (ibid) the learned Judge held that the long duration it took to report the incident gives room for the sexual activity to have been performed by anyone else other than the appellant. This reasoning is equally applicable in this matter, it took three months to report the incident, any other person could have had sex with the complainant. Therefore it can be concluded that it was unsafe to make a presumption that it was the appellant who could have caused penetration of the complainant's vagina. This is because there is a reasonable hypothesis that the long duration it took to report gave room for any other person to have sex with the complainant. This distinguishes the trial court misdirection of facts, that the only alternative explanation was artificial fertilization.

30. The prosecution closed its case, the trial court went straight ahead to rule that the appellant had a case to answer. This was an illegality.

Section 210 of the Criminal Procedure Code provides that at the conclusion of the prosecution's case, the court will hear the appellant person's plea on whether he has a case to answer before making a finding. The trial court made an error in law by not according this opportunity to the appellant. The effect of this illegality has in the grant scheme of this appeal is that the appellant should be acquitted.

31. In his defence, the appellant stated that at the time the incident occurred he was in Nairobi. He stated that he left Nairobi on 4th July, 2018 and returned to Habaswein on 25th August, 2018. The incident was said to have taken place on 12th August, 2018. This defence was dismissed by the trial court on the premises that it came too late in the day and that he should have brought it up earlier so that the prosecution could have ordered further investigations.

32. From the record however, it is apparent that this evidence was not rebutted. The defence was plausible and had the potential of impeaching the prosecution's case. Faced with a similar situation **F. Muchemi J** in ***Elias Kiamati Njeru vs R [2015] eKLR***, held as follows:

> **"It was argued that the alibi defence was not rebutted. The appellant relied on the Court of Appeal case of Victor Mwendwa Mulinge vs Republic [2014] eKLR. The could held that even if the appellant raised the defence of alibi for the first time during the trial, the prosecution ought to have applied to adduce further evidence in accordance with section 309 of the Criminal Procedure Code to rebut the appellant's defence.**

Section 309 of the Criminal Procedure Code provides:-

> **"If the appellant person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."**

33. In the case of ***Kiarie vs Republic [1984] KLR*** the Court of Appeal held:-

> **"An alibi arises a specific defence and an appellant person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reason.**
>
> **The prosecution in the case before me did not apply to the court to obtain evidence for the purpose of rebutting the alibi of the appellant. This puts the case of the prosecution in doubt considering that the evidence tendered cannot be said to be overwhelming."**

34. The trial court erred in law in casually dismissing the alibi defence and by not considering that the State had the opportunity to make an application to call rebutting evidence pursuant to section 309 of the Criminal Procedure Code.

RESPONDENT'S SUBMISSIONS:

35. The ingredients for the instance offence are:

(1) The age of the complainant.

(2) The penetration of the genital.

(3) Identity of the assailant.

36. On age, the charges indicated the minor victim to be 13 years. The mother to the complainant said the minor was 13 years. The minor indicated that she was 13 years. There was a birth certificate indicating the minor was born on 15/4/2005 hence was indeed 12 years at the time of the incident. The birth certificate was produced by the investigating officer.

37. On penetration of the genital, the charges indicated that appellant caused his penis to penetrate the vagina of the complainant. The complainant said the appellant inserted his penis into her vagina. That out of that she became pregnant.

38. The clinical officer PW4 examined the complainant who was subjected to pregnancy test and confirmed to be positive. Epithelial cells were seen.

39. PW5 also produced other medical documents from other facilities confirming the findings by PW4 that the complainant was pregnant. Though not the maker of the documents their production was not objected to.

40. On identity of the perpetrator, the complainant knew the appellant prior to the date of the incident. She used to see him at her relative's home.

41. On the contention that the trial court erred in law in failing to record the questions of the voire dire, there is no hard and first rule on how to record. But section 197 of the Criminal Procedure Code on the manner of recording evidence is illustrative. It provides thus:

"197(1)....

(a) .....

(b) such evidence shall not ordinarily be taken down in the form of question and answer, but in the narrative:

Provided that the magistrate may take down or cause to be taken down any particular question and answer."

42. From the record, it is clear the complainant knew the implications of telling lies. Having given sworn evidence, the appellant was given an opportunity to impeach the evidence through cross examination. As such the appellant was not prejudiced.

43. On the issue of submission under section 2010 of the Criminal Procedure Code, neither the prosecution nor the appellant indicated to the court that they wanted to submit. The trial court cannot be faulted on that.

ISSUES, ANALYSIS AND DETERMINATION:

44. After going through the proceedings on record, and the parties' submissions, I find the issues are; **whether the voire dire conducted by the trial court met the legal threshold? Whether the trial court erred in law in failing to inform the appellant of the right to tender submissions after prosecution closed its case? whether there was compliance with provisions of section 124 of the Evidence act cap 80? whether court validly dismissed the appellant's alibi ? and finally , did prosecution prove case beyond reasonable doubt ?**

45. S**ection 197 of the Criminal Procedure Code** provides on the manner of recording evidence on situation referred to as voire dire. It provides thus:

"197(1)....

(a) .....

(b) such evidence shall not ordinarily be taken down in the form of question and answer, but in the narrative:

Provided that the magistrate may take down or cause to be taken down any particular question and answer."

46. In the case of ***Kivevelo Mboloi vs Republic [2013] eKLR*, S. N. Mutuku** and **W. Korir JJ** quoted a passage from ***Peter Kariga Kiune vs Republic Criminal Appeal No. 77 of 1982***:

"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an appellant person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, Oaths and Statutory Declarations Act, Cap 15. The Evidence Act (section 124, Cap. 80).

It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions.

47. A similar opinion was expressed by the Court of Appeal in England recently in **Regina vs Campell (Times, Decmber 20, 1982):**

"If the girl (ten years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration.

Dealing with the question of the girl taking the oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of the nature and solemnity of an oath, the Court of Appeal in R v Lal Khan [1981] 73 Cr. App R 190 made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen..."

48. The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voire dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence.

49. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful.

50. Was the child herein of tender years? The definition of a child of 'tender years' differs; for under section 2 of the Children Act No. 8 of

2001, a child of tender years is defined as a child under the age of 10 years. However, for purposes of criminal trial and practice, a child of tender years is a matter determined on a case by case basis, the essential element being that the trial court must satisfy itself that the child understands the meaning of oath.

51. If not, voire dire must be conducted regardless of whether the child is as young as 10 years old or as old as 14 years (see. In **Kibangeny Arap Kolil vs. Republic [1959] EA 92** where Court held that the term 'tender years' could include a child as old as 14 years. See also **Patrick Kathurima vs Republic [2015] eKLR)** where the term 'tender years was also given a wide berth and not limited to the 10 years stipulated under the Children Act).

52. That said, the child testified in the present case, and was aged 13 years and who gave sworn testimony. The trial court adjudged her to understand the meaning of oath and following their voire dire examination, gave evidence on oath. However, the record shows though not mandatorily prescribed, the questions put to her are not stated. Secondly the record does not reflect that she understood the nature of an oath.

53. Before being sworn the court indicates to have conducted voire dire in the following manner:

"Court: Voire dire examination on the complainant. The court puts questions to her and she answers as follows:

> ***'My name is ZN. I attend*** *Particulars Withheld]*. ***Academy. I am 13 years old. I know why I am before the court. I have come to tell the court what happened to me. I know I am supposed to tell the truth. If I lie I will burn in court. It is a crime to lie to a court."***

54. It is a well-established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. ***Patrick Kathurima vs Republic (supra) and Johnson Muiruri vs Republic, (1983) KLR 445*** and also ***John Otieno Oloo vs Republic [2009] eKLR).***

55. Thus the fundamental utility of the voire dire procedure can be discerned in the circumstances of the instant matter.

56. From the foregoing binding authorities, the trial court erred in two ways, firstly by failure to record the questions put to the complainant, this denies the appellate court the chance to appraise the quality of voire dire and secondly by failing to interrogate whether the complainant understood the meaning of an oath.

57. The foregoing irregularities justify nullification of the proceedings of the trial court, without going into the other grounds/issues. The next question is whether a retrial should be ordered.

58. Having nullified proceedings by the trial court, the next question is where a retrial should be ordered?

59. I have anxiously considered whether or not to order a retrial. The relevant principles to consider when faced with such a matter have been stated severally by the courts. In the case of ***Muiruri vs Republic*** the court held inter alia as follows:-

> **"Generally whether a retrial should be ordered or not must depend on the circumstances of the case....It will only be made where the interests of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having lapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not"**

60. In **Laban Kimondo Karanja vs Republic** discussing grounds for ordering a retrial, reviewed several court of appeal decisions on the subject and concluded as follows:-

> ***"At the end, ...the principles an appellate court should apply in determining whether to order a retrial are as follows:-***
>
> ***A retrial may be ordered only when the original trial, was illegal or defective.***
>
> ***Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interest of justice require it and where it is not likely to cause an injustice to an injustice to an accused person.***
>
> ***A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result."***

61. To appreciate the above principles it is important to understand the meaning of the expression ***"where the interests of justice require it and where it is not likely to cause an injustice to an accused person."*** For a re-trial to be ordered the interests of justice must require it and secondly it must not cause an injustice to the accused person.

62. The phrase "in the interests of justice" potentially has a broad scope. It includes the right to fair trial, which is a fundamental right of the accused. In the context of the right to a fair trial, the time the case has lasted, the period the appellant was in prison, the weight of the evidence and the possibility of a conviction needs to be considered.

63. The above position is reflected in the Kenya Constitution which guarantees a fair trial to an accused person as one of the fundamental rights in the bill of Rights. In ***Rattiram vs State of M.P*** a three-Judge Bench ruled thus:-

> ***"Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism."***

64. In this regard, I find it necessary to emphasize that fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. ***Fair trial entails the interests of the accused, the victim and of the society***, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized.

65. There has to be a fair trial and no miscarriage of justice should be permitted and under no circumstances should prejudice be caused to the accused. I am persuaded that a retrial can be conducted without causing injustice to the appellant in this case.

66. First, he was first arraigned in court in 2018, which is a recent past. He has just served slightly a year or so of his 20-year jail term awarded. He

Can still access facilities for restarting trial denovo as he will be entitled to be admitted to bail pending trial. There is no indication that the witnesses and exhibits will not be available. To avoid any possibility of bias or prejudice the trial will be undertaken in Garissa law courts in magistrate courts.

67. Thus the court makes the following orders;

i. The conviction is quashed; sentence is set aside.

ii. The matter shall be heard denovo before chief magistrates' courts at Garissa.

iii. The appellant shall be admitted to the bail/bond terms he enjoyed during the initial trial.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF NOVEMBER, 2019.

.....

C. KARIUKI

JUDGE