REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 36 OF 2019

S. K.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. L. N. Mesa Principal Magistrate in Kehancha Magistrate's Court Criminal Case No. 30 of 2018 delivered on 2/05/2019)

JUDGMENT

1. On 15/10/2018 the Appellant herein, **S. K.,** was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** No. 3 of 2006 and with an alternative offence of **committing an indecent act with a child**. The Appellant denied both counts.

2. The particulars of the offence of defilement were that '*on 11th day of October 2018 at [particulars withheld], intentionally caused his penis to penetrate the vagina of SGM a girl aged 15 years*'.

3. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.

4. Five witnesses testified in support of the prosecution's case. **PW1** was the victim one SGM. **PW2** was the victim's younger brother, SM. The victim's mother testified as **PW3**. **PW4** was a Clinical Officer attached to Kisinya Health Centre. The investigating officer one **No. xxxx PC Lydia Nyaboke** attached to Ntimaru Police Station testified as **PW5**. The Appellant appeared in person during the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court except for the victim (PW1) whom I will refer to as '**the complainant'**.

5. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave an unsworn defence without calling any witness. Thereafter the court rendered its judgment on 02/05/2019 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to 20 years' imprisonment.

6. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal. He then filed a Petition of Appeal on 30/05/2019 where the Appellant challenged the judgment and sentence on three grounds that he pleaded not guilty to the charges, that the offence was not proved and that the court failed to find that he was framed.

7. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant duly complied. He contended that his rights under **Articles 50(2)(g)** and **(h)** of the **Constitution** were flouted. He further contended that despite his visual disability he was given written statements and compelled to proceed with the hearing without the requisite assistance. He also contended that the trial court failed to conduct a *voir dire* examination. Finally, he argued that the offence was not proved and that his defence was not considered. The Appellant prayed that the appeal be allowed, conviction quashed and sentence set-aside.

8. **Mr. Kimanthi** Learned Senior Principal Prosecution Counsel vehemently opposed the appeal and submitted that the offence was proved beyond any peradventure. He also submitted that the sentence was appropriate. Counsel prayed that the appeal be dismissed.

9. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions.

11. I will first deal with the constitutional issues raised by the Appellant. On **Article 50(2)(g)** of the **Constitution** I recall to have previously rendered myself. I am still of that position. This is what I stated in **Migori High Court Criminal Appeal No. 44 of 2019 N.M.T. *alias* Aunty vs. R** (unreported): -

> ***11. I will start with a consideration as to whether Article 50(2)(g) of the Constitution was infringed during the trial. The said provision states 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.*
>
> ***12. In light of the foregone provision a consideration of the record is necessary. The Appellant was arraigned before the trial Court at Rongo on 04/04/2019 where she was accordingly charged. The charges were presented to the Appellant in Kiswahili language where she denied them and appropriate orders were made. The prosecution informed the plea court that it had supplied the Appellant with copies of the witness statements and a copy of the charge sheet. The court further fixed the matter for hearing on 12/04/2019. Come the hearing date the matter proceeded on where the complainant, PW1, PW2 and PW4 testified. PW5 testified later.***
>
> ***13. When the Appellant was placed on her defence, the court duly complied with Section 211(1) of the Criminal Procedure Code. The court also explained to the Appellant that she had the right to be represented by Counsel, to proceed alone, to give sworn evidence or unsworn evidence and to call witnesses. The court also informed the Appellant of the right to remain silent. The Appellant elected to give sworn defence without calling any witnesses.***
>
> ***14. That being the record the question which now begs an answer is what entails the right as provided in Article 50(2)(g) of the Constitution. The reading of the said provision avails that an accused person must be promptly informed of the right to choose to be represented by an Advocate. Since the Constitution does not define the word 'choose' I will make reference to the Tenth Edition of the Black's Law Dictionary on how the said word is defined. The said Dictionary does not expressly define the word 'choose or choice' but refers one to 'Freedom of Choice' (See page 294 thereof). At page 779 the Dictionary defines 'freedom' as follows: -***
>
> > *i. The quality, state or condition of being free or liberated esp. the right to do what one wants without being controlled or restricted by anyone.*
>
> ***15. The Dictionary further defines 'Freedom of Choice' as 'the liberty embodied in the exercise of one's right'. The Second Edition of the Law Dictionary has the following to say about the 'Freedom of Choice': -***
>
> > *Unfettered right to do what one wants when one wants as one wants, except where it infringes or prevents another from doing what that one wants, and do so on. Also excluded is doing something that would harm one's self or another.*
>
> ***16. To choose hence connotes options and discretion. When one is called upon to make a choice it must mean that the person has been availed with options upon which he/she may exercise his/her discretion. The right to choose an Advocate of one's choice as embodied in Article 50(2)(g) of the Constitution therefore means that for an accused person to exercise that right he/she must be certainly told of the right to legal representation by an Advocate of one's choice and any other attendant information be availed accordingly to be able to make a choice on whether he/she requires any legal representation.***
>
> ***17. The right under Article 50(2)(g) of the Constitution must be distinguished from the right under Article 50(2)(h) of the Constitution given that in many instances the rights under Article 50(2)(g) and (h) of the Constitution are dealt with contemporaneously. The right under Article 50(2)(h) of the Constitution on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of the Constitution on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one's choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under Article 50(2)(h) of the Constitution deals with instances where the State must assign an Advocate to an accused person. Suffice to say that the right to a fair trial under Article 50 of the Constitution is among those rights that cannot be limited in any way whatsoever courtesy of Article 25 of the Constitution.***
>
> ***18. Courts have dealt with the need to avail such information to an accused person to enable him/her make a choice on legal representation. In Pett vs. Greyhound Racing Association (1968) 2 All ER 545 Lord Denning presented himself thus: -***
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> > *It is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task.*
>
> ***19. In South Africa in Fraser vs. ABSA Bank Limited (66/05) (2006) ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC)***

the Constitutional Court had the following to say: -

> *Without the recognition of the right to legal representation in section 26(6), the scheme of restraint embodied in POCA might well have been unconstitutional. However, the right embodied in section 35(3)(f) of the Constitution does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation….*

20. In Kenya, the Supreme Court in <u>Petition No. 5 of 2015 Republic -vs- Karisa Chengo & 2 Others [2017] eKLR</u> while dealing with various aspects of the right to a fair hearing under Article 50 of the Constitution stated as follows: -

> *the right to legal representation…...under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more.*

21. Apart from the Constitution and the foregone judicial decisions there is The International Convention on Civil and Political Rights (ICCPR) which Kenya is a party after adopting it on 16th December 1966. Article 14(3)(d) thereof entitles an accused person of the following rights: -

> *To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*

22. Having settled the need to inform an accused person of the right to legal representation under Article 50(2)(g) of the Constitution, the next limb of consideration must be <u>who is under such a duty to inform the accused person</u> <u>of the right</u>. The answer seems to be in one of our legislations. The Legal Aid Act No. 6 of 2016 (hereinafter referred to as '<u>the Act</u>') is an Act of Parliament to give effect to Articles 19(2), 48, 50(2)(g) and (h) of the Constitution. Section 43(1)(a) of the Act which provides one of the duties of the court as follows: -

> *43.(1) A court before which an unrepresented accused person is presented shall-*
>
> *(a) promptly inform the accused of his or her right to legal representation;*

23. Still on the said subject, a South African Court in <u>S -vs- Daniels & Another 1983(3) 275(A) at 299 G-H</u>, while emphasizing that the duty to inform the accused person squarely lies on the court stated that: -

> ***….** the accused's rights were explained to him, must appear from the record, in such a manner as, and with sufficient particularity, to enable a judgment to be made as to the adequacy of the explanation*

24. Further, another South African Court in <u>Mphukwa v S (CA&R 360/2004) [2012] ZAECGHC 6 (16 February 2012)</u>, made reference to the comments of Goldstone J. in <u>S v Radebe; S v Mbonani 1988(1) SA 191 (TPD)</u>, a decision which was quoted with approval by the Supreme Court of Appeal of South Africa in <u>Ramaite –vs- The State (958/13) [2014]</u> (26 September 2014). My Lordship Goldstone, J. stated as follows: -

> ***…**a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place.*
>
> *If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice ...*

25. In Kenya, Nyakundi, J. in <u>Joseph Kiema Philip vs. Republic (2019) eKLR</u> added his voice on the subject in the following manner: -

> ***……**it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that the he cannot afford an advocate, one may be appointed at the expense of the state. It [the court record] must show that the court did take the profile of the accused person before the trial commenced.…..…*

26. From the foregone I believe I have said enough regarding the duty of a court to inform an accused person of the right under Article 50(2)(g) of the Constitution.

27. That now leads to the other question as to <u>what point in time should the right be explained to the accused person</u>.

28. Article 50(2)(g) of the Constitution dictates that the accused person must be informed of the right to legal representation promptly. In rightly answering the question Nyakundi, J. in Joseph Kiema Philip (supra) stated as follows: -

> *…. The earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearings… (emphasis added).*

29. I must emphasize that the accused person must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether the plea would be taken at that point in time or later. Of importance is the emphasis that since the court speaks through the record then the record must be as clear as possible and ought to capture the entire conversation between the court and an accused person. A court should therefore not be in a hurry to take the plea before ascertaining that it has fully complied with Article 50(2)(g) of the Constitution among others as required. Circumstances calling, a court should boldly postpone the plea-taking until satisfied that the court has fully complied with the law.

30. In this case the trial court explained the right to representation to the Appellant at defence stage. That was too far late in the day.

31. Having dealt with the various limbs of the right under Article 50(2)(g) of the Constitution and in view of the status of the record as espoused hereinabove I must return the verdict that the trial court failed to comply with the dictates of Article 50(2)(g) of the Constitution. The Appellant was hence not accorded a fair trial in line with Article 50(2)(g) of the Constitution.

32. ……

33. ……..

34. Having said so, the inevitable question that now follows is: What is the effect of the derogation of the right under Article 50(2)(g) of the Constitution in the circumstances of this case?

35. There are two schools of thought on the issue. The first school fronts the position that once the derogation of the right is confirmed then the entire proceedings, judgment and sentence before the trial court are vitiated and stand null and void ab initio. The other school fronts the position that failure to inform an accused person of his/her right to legal representation does not necessarily have the effect of vitiating the proceedings in a criminal trial unless it is proved that substantial prejudice to the accused person or a miscarriage of justice was occasioned.

36. In answering the question, I will consider the wording of the Article 50(2)(g) and (h) of the Constitution. From the wording of Article 50(2)(h) the right therein is not absolute as the court must first satisfy itself that substantial injustice may result before it enforces the right. However, that is not the position under Article 50(2)(g) where the right is not qualified. Since that is what the People of Kenya wanted and so settled it in the Constitution then it remains the unwavering duty of this Court to enforce the provisions of the Constitution.

37. I therefore fully associate myself with the school which fronts the position that upon proof of derogation of the right under Article 50(2)(g) of the Constitution then the trial is rendered a nullity. Qualifying the provisions of Article 50(2)(g) of the Constitution will be tantamount to amending the Constitution through a back door, an act which this Court must frown at. It may appear like the position is harsh and is likely to fan multiple applications and appeals, but I must say that unless Courts, as custodians of justice and the Rule of Law, are prepared to enforce the Constitution as it is the intentions of the People of Kenya as expressed in the Constitution will never be realized. I therefore find and hold that the entire proceedings, judgment and sentence before the trial court are a nullity and cannot stand in law.

38. The above finding now leads me to a consideration of whether the Appellant be released or be retried. My attention is drawn to several decisions of the Court of Appeal including Samuel Wahini Ngugi v. R (2012) eKLR where the Court stated as follows:

The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered……In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person

That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004 (unreported)when this Court stated as follows:

…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.

39. The error on the record was occasioned by the trial court. I have carefully considered and reviewed the evidence on record and without going into the merits thereof, a conviction is likely if the case is properly prosecuted. The offences allegedly

committed are not only very serious but also beastly and the innocent, helpless and vulnerable victim will no doubt be affected for the rest of his life.

40. The Appellant was charged in April 2019. Judgment was rendered on 17/06/2019. The Appellant has by now been incarcerated for less than a year from taking plea. That period is not inordinately long. The witnesses in the case are within the complainant's family and neighborhood and as such it will not be difficult to trace them including the Clinical Officer and the Police.

41. This Court is therefore of the considered view that the ends of justice will be served by an order of retrial instead of discharging the Appellant. In view of the above unfolding events, dealing with the other grounds of appeal will not add any value. I therefore choose to end this discussion here.

42. Consequently, the appeal is allowed and the conviction quashed. The sentence is hereby set-aside and the Appellant will be released into police custody and be produced before any court competent to try him except Honourable R.K. Langat, SRM. This should be in the next 7 days of this judgment.

12. There is also the contention that the Appellant is blind and was given witness statements, but without the necessary assistance. He further contended he was hence not accorded an appropriate opportunity to prepare his defence.

13. The Appellant raised the issue of his inability to see on the first day he appeared before court. That was on 15/10/2018. The court recorded as such. The court however did not take any proceedings or make any orders on the Appellant's disability.

14. The Appellant raised the issue again on 13/12/2018. The court made an order that the Appellant be escorted to an Ophthalmologist for a report on his eye sight. No report was availed in court and the matter was not revisited. Instead the hearing proceeded on 27/12/2018 and 28/12/2018 where the complainant, PW2 and PW3 testified. The rest of the witnesses testified later. The Appellant also successfully applied for the recall of PW2.

15. The trial court placed the Appellant on his defence at the close of the prosecution's case. He gave an unsworn statement and called no witness. Before he rendered his defence, the Appellant again raised the issue of his disability. The court made an order that the Appellant be escorted to Migori Level IV Hospital for treatment. That was on 04/03/2019. Again there is no mention of whether the Appellant was taken for treatment as ordered. The Appellant testified on 08/04/2019. He informed the court that he had written submissions which he requested for someone to read on his behalf. The record is silent on whether the submissions were read out as prayed or were adopted as part of the record. The matter was fixed for judgment on 23/04/2019.

16. **Article 54** of the **Constitution** provides for persons with disabilities. **Sub-Article 1** provides as follows: -

A person with any disability is entitled

(a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;

(b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;

(c) to reasonable access to all places, public transport and information;

(d) to use Sign language, Braille or other appropriate means of communication; and

(e) to access materials and devices to overcome constraints arising from the person's disability.

17. **Article 260** of the **Constitution** defines **disability** to *'includes any physical, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long term effect on an individual's ability to carry out ordinary day to day activities.'* **The Persons with Disabilities Act, No. 14 of 2003** (hereinafter referred to as **'the Act'**) also defines '**disability**' as *' physical sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.'* **The Act** further defines '**usual day-to-day activities'** to mean *'the activities of daily living which an ordinary person would reasonably be expected to carry out'.*

18. The trial court was therefore under an obligation to ascertain whether the Appellant fell within the category of persons with disabilities. Once that was proved in the affirmative then the court was to ensure that the Appellant was availed with the necessary assistance including '**assistive devices and services'** as defined under **the Act**. The court would have also been called upon to ascertain whether the Regulations contemplated under **Section 38** of **the Act** were in place and if so to ensure compliance. The court would also have ensured that if the disabled was held in custody then such facility must have complied with modifications as directed by the Minister under **Section 38(3)** of **the Act**.

19. The trial court variously initiated the process towards ascertaining whether the Appellant was blind as he alleged. However, the process was not carried to completion. The court did not ensure that the orders it made were complied with and a report filed in court. Had that been done the trial court would have been in a position to ascertain the Appellant's position.

20. When the Appellant filed his appeal he forwarded the Petition of Appeal together with two other documents. They were a Medical Report by an Ophthalmologist from Jaramogi Oginga Odinga Teaching and Referral Hospital in Kisumu dated 17/07/2019. He also filed a

letter addressed to the Deputy Registrar of this Court by the Officer-in-Charge of Kibos Maximum Security Prison in Kisumu. It is dated 22/07/2019.

21. This Court is alive to the fact that the two documents may not be regularly on record having not been produced in line with the law on additional evidence on appeal. I will however use them just to demonstrate what the trial court would have found had it insisted on the production of the medical report. The Appellant was certified blind on both eyes when he was examined on 17/07/2019. The report stated that the Appellant lost his eyesight 2 years prior to the examination. It therefore means that when the trial was conducted in 2018 and 2019 the Appellant was already blind. However, the Appellant stated in his defence that at the time the offence was allegedly committed he was able to partially see.

22. With such a medical finding, the Appellant ought to have been treated in a different manner so as to accommodate the challenges he faced during the trial. One hence wonders if the written statements given to him added any value since there is no indication that the Appellant was duly accorded the necessary assistance.

23. A wholesome review of the circumstances under which the Appellant participated in the trial does not sum up to having been accorded a reasonable opportunity and facilities to prepare his defence and to counter the prosecution evidence. Although the Appellant was a person with disability he was not treated as such during the trial. The trial infringed **Article 50(2)(j)** of the **Constitution.** It also fell below the statutory calling.

24. The Appellant also raised the contention that the trial court failed to conduct a *voir dire* examination on the minor witnesses. The complainant was aged 15 years old. The trial court correctly applied the law on *voir dire* examinations as laid by the Court of Appeal. In view of the age of the complainant there was no need for such an examination.

25. According to PW3, the complainant and PW2 were her children. PW2 was a boy and gave sworn testimony. He stated that he was in Standard 2 and not in Standard 4. He also denied that he was 12 years old. PW2 however did not state his age.

26. PW5 stated that the boy who was with the complainant during the ordeal (preferably PW2) was aged 2 years old. The question which lingers is if PW2 was truly 2 years old. If so, was he able to testify with such clarity? Was it therefore necessary for the court to conduct a *voir dire* examination prior to receiving PW2's testimony?

27. Going by the correct analysis by the court on the *voir dire* examinations it was only fair that the court conducted such an examination prior to making a finding that PW2, who was aged 2 years old, was fit to tender sworn testimony. That did not happen.

28. I believe I have by now demonstrated enough that the conviction cannot stand. I opt not to deal with the rest of the grounds of appeal as they are unlikely to add any value to the appeal. I hence find and hold that the trial was variously vitiated and cannot be a legal basis of a conviction. The conviction is hereby quashed. That being so, the sentence is equally set-aside since the sentence cannot be sustained in the absence of a conviction.

29. Having so found, I must now address the plight of the Appellant. I have already dealt with the law on retrial. I have carefully considered the evidence on record and find that there is a possibility of sustaining a conviction on a retrial. However, I am aware that the Appellant was partially blind when offence was allegedly committed and now that he is totally blind. That is medically certified. The challenges he has so far faced in prison have been partially highlighted by the Officer-in-Charge of Kibos Maximum Security Prison in Kisumu in his letter dated 22/07/2019 to this Court.

30. I also carefully observed the Appellant whenever he appeared before me. The Appellant truly faces enormous challenges in prison. Given that the Appellant totally lost his eyesight during or shortly after the trial and he has all along been in custody, the chances that he can use the braille language are very minimal if at all any. In a bid to accord the Appellant a fair trial he may have to learn the braille language. That is likely to take time and will also depend on the Appellant's capability and willingness.

31. In consideration of the foregone I find that ordering a retrial may not meet the ends of justice. There is uncertainty on how and the pace in which the retrial will be carried out. I find that the best order in the circumstances of this order is to release the Appellant.

32. It must however raise a caution in this matter. This Court is not making a general finding on suspects who are blind. The decision to release the Appellant instead of ordering a retrial has been reached upon consideration of the peculiar circumstances of this case. I must say that blind people are also able to commit offences and the law squarely provides for how they be tried and punished if found culpable. It is my hope that the Appellant will abide by the law henceforth.

33. Finally, I hereby order that the Appellant will not be retried but instead he will be set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 23rd day of December 2019.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Samwel Kiboga the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant