



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CRIMINAL APPEAL NO 23 OF 2016**

**FERDINAND MUNYERE.....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 103 of 2015 in the Senior Resident Principal Magistrate’s Court at Wundanyi delivered by Hon G.M. Gitonga (RM) on 8<sup>th</sup> April 2016)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, Ferdinand Munyere, was charged jointly with Patrick Mwandoe Mwanyalo (hereinafter referred to as the “Appellant’s Co-Accused”) with two (2) Counts. Count I was in respect of the offence of rape contrary to Section 10 of the Sexual Offences Act No 3 of 2006 with the alternative charge being that of committing an indecent act with an adult contrary to Section 11(A) of the same Act. Count II related to a charge of malicious damage to property contrary to Section 339 (1) of the Penal Code Cap 63 (Laws of Kenya). During trial, the Appellant herein was the 2<sup>nd</sup> Accused person while his Co-Accused was the 1<sup>st</sup> Accused person therein.

2. Having convicted the Appellant and his Co-Accused on Count I and sentenced them to life imprisonment, the Learned Trial Magistrate, Hon G.M. Gitonga (RM). made no finding in respect of the alternative charge. Notably, he convicted them on Count II but he did not specify the penalty he meted on them.

**COUNT I**

**“On the 20<sup>th</sup> day of March 2015 at about 12.15am at [particulars withheld] within Taita Taveta County in association intentionally and unlawfully caused your penis to penetrate the vagina of L M M.”**

**ALTERNATIVE CHARGE**

**“On the 20<sup>th</sup> day of March 2015 at [particulars withheld] within Taita Taveta County in association intentionally touched the vagina of L M M.”**

**COUNT II**

**“On the 20<sup>th</sup> day of March 2015 at [particulars withheld] within Taita Taveta County acting jointly (sic) willfully and unlawfully destroyed the dwelling house of L M M by breaking part of the wall using a wooden stick.”**

3. Being dissatisfied with the Judgment of the Trial Court, on 1<sup>st</sup> July 2016, the Appellant filed a Notice of Motion application seeking leave to file an appeal out of time. The said application was allowed and the Petition of Appeal was deemed to have been duly filed and served. The Grounds of Appeal were as follows:-

**1. THAT the honourable resident magistrate erred in law and fact by finding that the prosecution had established the appellant guilty beyond reasonable doubt to warrant his conviction.**

**2. THAT the honourable resident magistrate erred in law and fact by believing the alleged medical evidence relating to a(sic)discharge and hence penetration.**

**3. THAT the honourable magistrate erred in law and fact by failing to appreciate whether the appellant had been medically examined by the doctor (sic).**

**4. THAT the honourable magistrate erred in law and fact by failing to appreciate the appellant’s personal and social circumstances in his sentencing (sic).**

4. He filed Written Submissions and Amended Grounds of Appeal on 5<sup>th</sup> October 2016. On 22<sup>nd</sup> November 2016, he filed Further Written Submissions in response to the State’s Written Submissions that were dated and filed on 8<sup>th</sup> November 2016.

5. The Amended Grounds of Appeal were as follows:-

**1. THAT the learned trial magistrate erred in law and fact by not considering the importance of a thorough and cohesive investigation in his sentencing (sic).**

**2. THAT the Honourable Magistrate erred in law and fact by failing to appreciate the appellant’s personal and social circumstances as per the evidence (sic).**

**3. THAT the sentence was manifestly excessive in the circumstances.**

**4. THAT the Honourable trial magistrate erred in law and fact by finding that PW 3’s evidence was truthfully (sic) enough without seeing that her evidence was unbelievable and exaggerated.**

**5. THAT the learned trial magistrate erred in law and fact by not considering his defence submission as the truth of this case (sic).**

6. When the matter came up on 20<sup>th</sup> December 2016, both the Appellant and counsel for the State indicated that they would rely on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

## **LEGAL ANALYSIS**

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

**“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it**

**must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.**

8. The issues this court identified for its determination were:-

**a. Whether or not the Prosecution had proved its case against the Appellant herein beyond reasonable doubt;**

**b. Whether or not the sentence that was meted upon the Appellant herein was excessive in the circumstances of the case.**

9. The said issues were dealt with under the heads shown hereinbelow.

### **I. PROOF OF THE PROSECUTION CASE**

10. Amended Grounds of Appeal Nos (1), (2), (4) and (5) were dealt with together as they were related.

11. The Appellant submitted that no proper investigations were conducted in this matter. He contended that he was an innocent person who had been misled by his Co-Accused and he was now carrying a cross he had no idea about. He said that he had conducted his own investigations while in prison and established that his Co-Accused was a jail bird, that the Co-Accused's wife and the Complainant herein, L M M (hereinafter referred to as "PW 3") were cousin sisters and that the Co-Accused had a love relation with her. He therefore urged this court to order fresh investigations be carried out and that PW 3 be arrested and compelled to tell the truth of what happened on that material date.

12. He averred that on that material night of 20<sup>th</sup> March 2015, he met his Co-Accused at the local brew and because it was late and there were elephants in that area, his Co-Accused told him that they could go and sleep at PW 3's house for safety reasons. He said that PW 3 and his Co-Accused were talking about their love on that material night.

13. In his unsworn evidence which he reiterated in his Written Submissions, he said that on the material date, he was drinking at [particulars withheld] and as he was going home, he met his Co-Accused. He contended that as they were walking home, they met with elephants and ran to a house which happened to be PW 3's house. He said that his Co-Accused informed him that it was his brother's house.

14. It was his evidence that they knocked on PW 3's door and her children responded and that his Co-Accused asked PW 3 for a torch but she said that she did not have one. He said that she asked him where he had come from and he explained. She then invited him into her house and went outside with his Co-Accused. He said he did not know where they went to. It was his submission that together with his Co-Accused, she left him and the children in the house so that they could "relax."

15. He was categorical that PW 3 opened the door when they knocked on her door because she recognised his Co-Accused's voice. He explained that they had knocked on PW 3's door loudly because they were scared of the elephants. He pointed out that he undressed and slept but was surprised when he was woken up by villagers who locked him in the house on allegations that he had raped PW 3. He contended that since he was so drunk, a fact he said that was corroborated by M M M (hereinafter referred to as "PW 1"), it was therefore not possible for him to have had sex with PW 3.

16. It was his averment that PW 3 had fabricated the charges against him as she had thought she would never see him again and that she may have wanted to implicate his Co-Accused because she went outside the house and waited for his Co-Accused to wear the condom but failed to explain how his Co-Accused left her house.

17. He submitted that the sentence that was meted upon him was excessive in the circumstances but nonetheless urged this court to allow his Appeal as the Prosecution had not proved its case beyond reasonable doubt.

18. On its part, the State submitted that although PW 2 could not confirm that the Appellant herein had sexual intercourse with PW 3, he saw him remove the Appellant trouser and lie on PW 3, which could be assumed that he was undressing in preparation to sexually assault PW 3. It pointed out that the Appellant touched PW 3's breasts and other body parts but did not penetrate her as she persuaded him to go to the bedroom. However, it was its contention that his Co-Accused raped her in the sitting room.

19. It submitted that in a case of gang rape, all persons need not rape a victim because one could assist the other by pinning down the said victim. It referred this court to the definition of "gang" in the Black Law Dictionary which is **"a group of person or persons who go about together on an act in concert especially for antisocial criminal activities."**

20. It averred that it was evident from PW 3's testimony that the Appellant and his Co-Accused pushed the door and demolished part of her house with a view to gaining entry therein. They eventually managed to enter her house where the Appellant's Co-Accused held a knife to her threatening her with death and in fact raped her in the presence of the Appellant who was holding a torch at the material time which action, made him equally guilty of the offence of gang rape.

21. It submitted that Section 3 of the Sexual Offences Act established the following ingredients:-

**a. The accused intentionally and unlawfully commits an act which causes penetration into the victim's genital organs;**

**b. The other person does not consent to the penetration; and**

**c. The consent is obtained by force or by means of threat or intimidation of any kind.**

22. It was emphatic that PW 3 did not consent to having sex with the Appellant and his Co-Accused because the same was done through fear, intimidation and threats. It placed reliance on Section 42 of the Sexual Offences Act that provides that:-

**"for the purposes of this act a person consents if he or she agrees by choice and has the freedom and capacity to make that decision."**

23. It was its argument that PW 3's identification of the Appellant herein was free from any errors as she positively identified the Appellant and his Co-Accused as they were in her house for almost an hour and she saw the Appellant holding a torch that provided adequate light. It added that the incident took place for about forty (40) minutes and there was sufficient light from the torch he was holding to have enabled her recognise her perpetrators.

24. It added that PW 2 also positively identified the Appellant and his Co-Accused as he took PW 3's phone which had a torch and that further M W M (hereinafter referred to as "PW 1") and J L M (hereinafter referred to as "PW 4") went to PW 3's house and found the Appellant locked in PW 3's house while he was still drunk and was undressed lying in PW 3's bed. It also stated that the sexual act was corroborated by No 70931 Corporal Onyiego (hereinafter referred to as "PW 6") but who it referred as PW 8 as he recovered a used condom from PW 3's house.

25. It was its contention that the Appellant was previously unknown to PW 3 and there was no reason for him to have been in her house in the middle of the night and as the Appellant was not related to PW 3, there was no reason for her to have implicated him as the offender.

26. It also pointed out that the medical examination that was conducted on PW 3 by R M (hereinafter referred to as "PW 7") showed that PW 3 had a vaginal tear noted at 6.00 o'clock, bloody discharge and traces of spermatozoa in her vagina. She also noted that PW 3's under pant was torn.

27. It was therefore its argument that PW 3's evidence was credible in line with the Proviso of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) that provides as follows:-

**“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”**

28. It also submitted that although PW 2 adduced unsworn evidence, he was a credible witness and his evidence had no defects for the reason that the Learned Trial Magistrate conducted a proper *voire dire* enquiry as provided in Section 19 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya).

29. It pointed out although Section 42 of the Sexual Offences Act empowered the Learned Trial Magistrate to sentence the Appellant to life imprisonment, it was conceding to the said sentence being reduced.

30. The said Section stipulates as follows:-

**“Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to life imprisonment.”**

31. In respect of Count II, it stated that the same was proven by PW 3’s evidence that the Appellant and his Co-Accused demolished part of the wall of her house, evidence it said was corroborated by PW 2, No 9093081 PC Shem Asher (hereinafter referred to as “PW 8”) who tendered in evidence photographs of the said house showing a hole in the back wall, PW 6 who visited the house and confirmed that a wall of PW 3’s house had been demolished.

32. It contended that although the Learned Trial Magistrate convicted the Appellant and his Co-Accused of Count II and erred in not elaborating the sentence they were to serve in respect of that Count, the Appellant was nonetheless guilty on both Counts.

33. It therefore urged this court to dismiss the Appellant’s Appeal as it had no merit having proven its case beyond reasonable doubt.

34. Whilst this court noted the State’s submissions regarding the Appellant’s identification, it opted not to spend too much time on the same as perusal of the proceedings in the Trial Court showed that the Appellant did not deny having been in PW 3’s house on the material date.

35. The gist of his appeal, however, was that PW 3 had fabricated the charges against him and that his Co-Accused put him in trouble when he took him to her house. He did not address his mind to Count II perhaps because he was contending that PW 3 voluntarily allowed him into her house.

36. According to PW 3, the Appellant and his Co-Accused forced themselves in her house after demolishing part of the wall and pushing the door open. She stated that the Appellant held the torch as his Co-Accused raped her. It was her testimony that the Appellant’s Co-Accused raped her and left her to the Appellant herein to continue.

37. During her Cross-examination by the Appellant herein, she stated that she talked him into entering his bed as she was looking for a way to escape when she realised that he wanted to rape her. When Cross-examined by the Trial Court, she said that the Appellant was found asleep in her house at about 3.30 am and that his Co-Accused left at about 1.30 am, the whole ordeal having started at about 12.15 am. In her Re-examination, she stated that she never left her house.

38. Notably, PW 2’s evidence regarding the role the Appellant and his Co-Accused played during the alleged incident contradicted that of PW 3. PW 2 said that the Appellant removed his trouser, held and lay on PW 3 but that she locked him in their house. He did not mention anything about the Appellant

threatening PW 3 with a knife. His evidence was that the Appellant's Co-Accused herein came from behind their house and started pulling PW 3 from her house but he never entered their house.

39. On her part, PW 3 stated that the Appellant did not rape her but he touched her breasts and body and that it was the Appellant's Co-Accused who had removed his trousers until his knees and had sex with her. She was clear that it was the Appellant who was left outside the house. She never mentioned anything about the Appellant having laid on her.

40. M W M (hereinafter referred to as "PW 1") corroborated PW 3's evidence that she was raped by the Appellant's, who she knew well as he came from [particulars withheld] that PW 3 had locked the Appellant in her house.

41. This court was left confused as to where the Appellant collected the condom from, which No 70931 Corporal Fredrick Onyiego (hereinafter referred to as "PW 6") said he collected from PW 3's house. Her evidence was that the Appellant dropped the Trust Condom he had used when he had sex. There was no evidence that was adduced to show that there was sufficient lighting for the him to have known where his Co-Accused dropped the condom and picked the same.

42. In view of the inconsistencies in the evidence by PW 2, PW 3 and the Appellant herein, this court was completely unable to decipher exactly what transpired on that material night. This court therefore analysed PW 7's evidence with a view to making sense of the alleged incident.

43. According to PW 7, when she examined PW 3, she noted that her pant had blood stains, her hymen was torn with a tear on the vaginal wall on the mid lower part, there was a bloody discharge from her vagina, she had injuries to her hand and there was evidence of spermatozoa after a high vaginal swab was done. It was reasonable to expect that PW 3's hymen was broken because she already had two (2) children, a fact that PW 7 alluded to.

44. This court noted PW 7's assertions that it was not easy to distinguish between spotting that was ordinary and that which had been caused by an injury making it difficult to conclude authoritatively that the bloody discharge was a result of the alleged rape.

45. While this court noted that there was a tear at 6.00 o'clock, the Prosecution did not lead evidence to advance a logical scientific explanation to demonstrate how spermatozoa were found in PW 3's vagina after a condom had allegedly been used. If as PW 3 stated the Appellant's Co-Accused raped her while wearing a condom and the Appellant did not rape her, this court was baffled as to where the spermatozoa in her vagina came from.

46. Notably, neither she nor PW 6 nor PW 7 mentioned the said condom to have had any tears that would have allowed spermatozoa to flow high into her vagina. Even so, this court was at a loss why DNA testing on the spermatozoa was not done as the Appellant's Co-Accused, who PW 3 said had raped her, was known to her and was in fact arrested the following day. This could either have linked his Co-Accused to the sexual act with PW 3 or exonerated him.

47. Going further, this court was unsure of what to make of PW 3's evidence that after she locked the Appellant in her house, she went and reported the matter to the Village Elder who alerted other neighbours. In her Re-examination, she said that she never left her house. She had stated as follows:-

**"...2<sup>nd</sup> accused was arrested by members of the public and taken to Mwakitau Police Post. He was arrested in my house, I had not left my house."**

48. There was further contradiction in PW 3's and PW 1's evidence. PW 1 said that PW 3 went to her house with her two (2) children at about 2.30 am and told her that the Appellant's Co-Accused had raped her and that she had locked a suspect in her house. However, neither PW 2 nor PW 3 said anything about them going to PW 1's house at 2.30 am. In fact, PW 2 stated that after the Appellant's Co-Accused left, PW 3 locked the Appellant in their house and they went to report the matter to his grandmother.

49. If they had indeed gone to PW 1's house as PW 1 had contended, nothing would have been easier than for PW 2 to have told the Trial Court as much as that was not a piece of evidence he could have forgotten. If he could remember going to his grandmother's place, then he could also have recalled to PW 1's house as it was in the dead of the night.

50. PW 3's evidence that the Appellant herein was arrested at 3.30am also concerned this court. This is because she said that her ordeal started at 12.15 am and ended at 1.30 am when the Appellant's Co-Accused left. If as PW 3 stated the Appellant was outside the house, why did she not run away as it was the Appellant's Co-Accused who she had said had a knife and she had the opportunity of running away?

51. The other question was, why did she entice the Appellant to come into the house when he was part of a gang that had just raped her? Why did she allow the Appellant to sleep in her house for about two (2) hours? Why did help take so long to come? Since the house was mud walled, why did the Appellant not continue demolishing the wall so as to escape as he had been locked in the house?

52. All these were pertinent issues that could have explained if really the Appellant entered and slept in PW 3's house as she had alleged. In the absence of credible answers to the said questions, serious doubts were raised in the mind of this court.

53. Although PW 2 was a child who adduced unsworn evidence and broke down while testifying, this court was not persuaded to overlook the evidence of who raped PW 3. His testimony that it was the Appellant herein who had laid on PW 3 and he was able to set him apart from his Co-Accused when he testified dissuaded this court from ignoring the contradictions in his evidence.

54. Appreciably, PW 3's explanation that she was trying to sweet talk the Appellant so that he could not rape her did not sound plausible to this court. Indeed, though possible but not probable, it was difficult for this court to comprehend how PW 3 could negotiate with a person who was part of a gang that had just raped her.

55. The Appellant would by all standards have been a dangerous person. A prudent or reasonable person would not have been expected to invite such a dangerous person in the precincts of her home or to put herself in such a precarious situation.

56. Appreciably, whereas the State rightly pointed out that a trial court can convict a person based on a victim's uncorroborated evidence as outlined in the Proviso of Section 124 of the Evidence Act, the inconsistencies and gaps in and PW 2's and PW 3's evidence led this court to conclude that there was more than met the eye in this case.

57. It is not in doubt that witness accounts differ. However, the variation of their testimony ought not to be so wide or divergent so as to lead a court to question whether an alleged incident occurred in the manner it has been described. Although the Appellant's evidence was unsworn and had very little probative value, the legal burden lay on the Prosecution to have present a cogent and believable case. It was not for the Appellant to fill gaps in its case.

58. In the case of **Erick Onyango Ondeng' v Republic [2014] eKLR**, the Court of Appeal addressed its mind to the resultant effect of inconsistencies in the evidence that is adduced by the prosecution and stated as follows:-

***“...As noted by the Uganda Court of Appeal in TWEHANGANE ALFRED VS UGANDA, Crim. App. No 139 of 2001, [2003] UGCA, 6 it is not very contradiction that warrants rejection of evidence. As the court put it:***

***“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do***

***not affect the main substance of the prosecution's case.””***

59. In this case, having analysed the evidence that was adduced in the Trial Court, the Written Submissions by the respective parties and the case law that was relied upon, this court came to the conclusion that the contradictions, inconsistencies and gaps in PW 1's, PW 2's, PW 3 and PW 7's evidence were so irreconcilable to have been sufficient to lead it to conclude that the Prosecution did not furnish sufficient evidence to the required standard, that of, proof beyond reasonable doubt, to prove the charge of gang rape against the Appellant herein.

60. Indeed, this is a court of evidence and one that does not and must not determine a matter on presumptions or mere suspicions or innuendos.

61. As regards Count II, this court noted that PW 2's account was different from that of PW 3. In his evidence, he stated that the Appellant's Co-Accused went behind the house and started demolishing the house. On her part, PW 3 stated that the Appellant and her Co-Accused demolished the wall to her house before they pushed their way through the door.

62. From her evidence, she identified the Appellant's Co-Accused as the person who started knocking and pushing the door. Her contentions that "they" then went to the back of the house, started demolishing the house and then came to the door and pushed it again failed to demonstrate how she knew it was both the Appellant and his Co-Accused who were demolishing the wall. It was a dark night with no proper lighting at the material time.

63. Notably, as this was a case for malicious damage against two (2) persons, the Prosecution was expected to adduce evidence that would have supported its case to demonstrate that indeed PW 3 saw both the Appellant and his Co-Accused demolishing her house and that it was not only one of them who did it. It would be a travesty of justice to punish two (2) persons for the offence when the same had been committed by one person more so as the Prosecution had not demonstrated that there was common intention by both the Appellant and his Co-Accused to demolish PW 3's house at the material time.

64. It was therefore the view of this court that the Prosecution failed also to sufficiently demonstrate that the Appellant maliciously damaged PW 3's house.

65. In this respect, this court found merit in Amended Grounds of Appeal Nos (1), (2), (4) and (5) of the Appellant's Petition of Appeal and the same are hereby upheld.

## **II. SENTENCE**

66. Having found the aforesaid grounds in the Appellant's Amended Grounds of Appeal to have succeeded, there would have been no need to address Amended Ground of Appeal No 3 herein as the same was now spent. However, this court nonetheless thought it necessary to address itself on the sentencing of the Appellant herein.

67. This court found and held that the Learned Trial Magistrate erred by not pronouncing himself on the sentence the Appellant was to serve after he convicted him of the offence of malicious damage to property, a fact that was correctly pointed out by the State.

68. This court also noted that the sentence for the charge of gang rape was manifestly excessive. This is not to make light of the offence of rape. It is a serious offence. This is because it leaves a victim completely traumatised for life and completely violates and annihilates the victim as the sexual act is committed without such victim's consent. It is committed through intimidation, threats and instilling fear in the victim by force of any kind that places a victim in a helpless situation and thus submit to the act being committed without his or her consent.

69. The seriousness with which the offence is taken is well captured by the length of the sentence that has been prescribed under Section 42 of the Sexual Offences Act which is that, if a person is convicted, he or

she is liable to imprisonment for a term of not less than fifteen years and that the same may be enhanced to life imprisonment.

70. Appreciably, the prescribed penalty gives both a minimum and maximum sentence. The flexibility of the sentence that can be meted on a convicted person is intended to give a trial court the opportunity to consider any aggravating circumstances that may exist in a particular case and decide on the most appropriate sentence.

71. Aggravating circumstances could include the threat of use of force by a weapon, actual use of the weapon, the type of weapon, nature or type of injury caused, the resultant effect of the injury, whether the injury was physical or psychological amongst other factors. This increases the culpability of the severity of the offence that is committed.

72. It was therefore the view of this court that against the backdrop that aggravating factors can range from minor to severe, the Learned Trial Magistrate herein could have perhaps taken into account that although there was supposedly threat by knife, it was not actually used on PW 3. This court formed the opinion that the Learned Trial Magistrate appeared to have based his consideration of what constituted the aggravating circumstances herein on the effect the ordeal purportedly had on PW 3's children as opposed to the effect it had on PW 3. He rendered himself as follows:-

**“As if this was not enough, the accused raped the complainant in the full glare of the children. This was traumatizing and greatly affected the children. I remember when the complainant's child testified as PW 2, he broke down in tears. In my view all these are aggravating circumstances”**

73. Appreciably, as can be seen hereinabove, aggravating circumstances are personal to the victim and not to third parties who may have witnessed a crime, which in this case was the alleged devious act of rape. If this court would have found the Appellant herein to have been guilty of the offence of gang rape and bearing in mind the range of aggravating circumstances that are likely to exist during the commission of an offence, it would have acceded to the State's submission to reduce the sentence of life imprisonment that was meted upon him. Indeed, the sentence of life imprisonment appeared to have been manifestly excessive in the circumstances of the case sufficient to have warranted this court to interfere with the said Learned Trial Magistrate's finding.

74. However, as this court found the Appellant's Amended Grounds of Appeal to have succeeded as the Prosecution did not prove its case to the required standard, it did not find it necessary to delve into the details of the actual sentence it would have meted out to him as this would have amounted to a purely academic exercise.

## **DISPOSITION**

28. The upshot of this court's decision was that the Appellant's Appeal that was lodged on 1<sup>st</sup> July 2016 was merited and the same is hereby allowed.

29. The evidence that was presented in the Trial Court created doubt in the mind of this court leading it to quash the conviction and set aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. This court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

30. It is so ordered.

**DATED and DELIVERED at VOI this 28<sup>TH</sup> day of FEBRUARY 2017**

**J. KAMAU**

**JUDGE**

In the presence of:-

Ferdinand Munyere .....Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk