REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 18 OF 2015

PAUL NGEI MUIYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 31 of 2015

in the Senior Resident (sic)Magistrate's Court at Taveta delivered

by Hon R. K. Ondieki (PM) on 23rd April 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Paul Ngei Muiya, wasjointly charged with Kyengo Kioko (hereinafter referred to as "the Appellant's Co-Accused") on three (3) Counts. Count I was in respect of entering a National Park contrary to Sections 102(1)(a)of the Wildlife Conservation and Management Act 2013 (Laws of Kenya) (hereinafter referred to as "the Act"). Count II was in respect of being in possession of meat of wildlife species contrary to Section 98 as read with Section 92 of the Act. Count III related to the offence of conveying hunting apparatus into a national park contrary to Section 102(1)(f) of the Act.

2. It was evident from the proceedings that on 19th January 2015, the Appellant herein pleaded guilty to Count II. The following day, 20th January 2015, Hon R.K. Ondieki(Principal Magistrate) who was the Trial Magistrate fined the Appellant Kshs 20,000,000/= or in default to serve life imprisonment.

3. In his Judgment that was delivered on 23rd April 2015, the Learned Trial Magistrate found that the Prosecution failed to prove its case against the Appellant and his Co-Accused beyond reasonable doubt. He therefore acquitted the Appellant and his Co-Accused on all three (3) Counts under the provisions of Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).

4. The particulars of the Counts were as follows :-

COUNT I

"On the 18th day of January 2015 at about 1048 hrs at Njoro Area in Tsavo East National Park within Taita Taveta County, with others not before the court entered the said national

park without authorization."

COUNT II

"On the 18th day of January 2015 at about 1048 hrs at Njoro Area in Tsavo East National Park within Taita Taveta County, with others not before the court were found in possession of 3 dik diks, one oryx, one red buck, one quill and one love bird carcasses without certificate of ownership(sic)**."**

COUNT III

"On the 18th day of January 2015 at about 1048 hrs at Njoro Area in Tsavo East National Park within Taita Taveta County, with others not before the court were found in possession of hunting gear to wit six pangas, one knife and three torches where two were fitted with horns in contravention of the said act."

5. Being dissatisfied with the said judgment, on 13th February 2015, the Appellant filed a Notice of Motion application seeking leaving 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 he entered a plea of guilty in the first appearance in court because he never understood the elements of crime before him. When he appeared before the judge to enter his plea of guilty, the judge didn't tell all or some of the important rights that he was "waiving" or giving up with his plea, such as rights to confront the witnesses against him and to have every element of the crime proven beyond a reasonable doubt** (sic)**.**

2. THAT the judge who had (sic) **his case imposed the highest sentence available for the conviction and never gave any reason for choosing that particular sentence**(sic)**.**

3. **THAT in view of his old age (52 years) and the circumstances of this case, the sentence of life imprisonment or a fine of Kshs 20 million was harsh, severe and manifest excessive punishment** (sic)**.**

6. On 6th September 2016, the Appellant filed the following Amended Grounds of Appeal:-

1. **THAT the trial magistrate erred and misdirected himself in entering his conviction and sentence without proper considering that there was a mis-step of taking a plea in breach of Section 198(1) of the CPC.**

2. **THAT the Trial Magistrate erred and seriously misdirected himself in failing to see that the charge sheet upon which they based their findings were fatal and un-curably defective for it went contrary to Section 134 and 210 of the C.P.C.**

3. **THAT the trial magistrate erred and seriously misdirected himself by failing to see that the evidence of the prosecution witnesses were so conflicting thus contravening the provision of Section 163(1) (c) of the evidence** (sic) **Act.**

4. **THAT the trial Magistrate erred and seriously misdirected himself in convicting him without proper entering the municipal prescription of the plea taking contrary to legal requirements of law by adding some issues which were not in trial.**

5. **THAT the trail magistrate erred and seriously misdirected himself in convicting and sentencing him without noticing that there were** (sic) **no proof tendered as provided by Section 109 of the evidence** (sic) **Act.**

7. On 17th November 2016, this court directed him to file his Written Submissions. Instead of doing so, on 20thDecember 2016, he filed the said Written Submissions together with new Amended Grounds of Appeal. The new Amended Grounds of Appeal were as follows:-

> 1. **THAT the learned trial magistrate erred both in law and facts by not considering that there was mis-steps in plea taking exercise as he was not provided with the interpreter to interpret the "word" English language used before the court contrary to Section 198 (1) of the C.P.C.**
>
> 2. **THAT the learned trial magistrate erred both in law and facts by not considering that he was not accorded an advocate as it was a fundamental rights** (sic)**given in Section 50(2)(g) of the Constitution of Kenya, 2010** (sic)**.**
>
> 3. **THAT the learned trial magistrate erred both in law and facts by not considering that in the circumstances of this case he was not accorded an opportunity to mitigate as a fundamental rights** (sic) **prescribed by law.**
>
> 4. **THAT the learned trial magistrate erred both in law and facts by failing to consider the sentence against the Appellant was manifestly excessive in the circumstances of the case before the court.**

8. The State's Written Submissions were dated and filed on 20th December 2016 while the Appellant's Response to the said Written Submissions was filed on 15thFebruary 2016. He relied on the following fresh Grounds of Appeal, which were incorporated in his Amended Grounds of Appeal that had been filed on 20th December 2016:-

> 1. **THAT the learned Trial Magistrate erred in law and fact by convicting him to serve life imprisonment by not properly considering that there were mis-steps in plea taking exercise. Thus there was no evidence to suggest as to whether the word " English/Kiswahili" was interpreted by interpreter contrary to Section 198(1) of the C.P.C.**
>
> 2. **THAT the learned Trial Magistrate erred in law and fact by convicting and sentencing him by not seeing that he was not accorded an opportunity to be represented by advocate thus contravening Section 50 of the new Constitution of Kenya** (sic)**.**
>
> 3. **THAT the learned Trial Magistrate erred in law and fact in finding his sentence by not considering that he was not accorded an opportunity to mitigate. This not accorded a fair trial** (sic)**.**

9. When the matter came up on 15th February 2017, both the Appellant and counsel for the State asked this court to rely on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

10. Notably, once an accused person pleads guilty to the offence, the jurisdiction of the appellate court is limited to looking at the extent and legality of the sentence that he was given only. This is provided in Section 348 of the Criminal Procedure Code Cap 75 (Laws of Kenya) where it is stated that:-

> **"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."**

11. It therefore follows that as the Appellant had pleaded guilty to Count II, this court could only look at the extent and legality of the sentence that was meted upon him by the Learned Trial Magistrate. As can

be seen hereinabove, the Appellant filed three (3) sets of Grounds of Appeal making it difficult for this court to identify which set it was he wanted determined by this court.

12. Be that as it may, having looked at the Written Submissions by the Appellant and the State, it did appear to this court that the issues that had been placed before it for determination were:-

a. **Whether or not the plea taking accorded with the law;**

b. **Whether or not the Appellant's right of fair trial was infringed for:-**

i. **for not having been accorded legal representations; and**

ii. **for not having been accorded an opportunity to mitigate before the sentence was meted upon him.**

c. **Whether or not the sentence was manifestly harsh in the circumstances of the case herein.**

13. To consider all the Grounds of Appeal were filed on 13th February 2015, 20th December 2016 and 15th February 2017, this court dealt with the issues under the following heads. It did not analyse the Amended Grounds of Appeal filed on 6th September 2016 as they did not appear to have relevant in the circumstances of this case as no evidence was adduced by prosecution witnesses, the Appellant having pleaded guilty to Count II and acquitted on Counts I and III.

I. **PLEA TAKING**

14. Ground and Amended Ground of Appeal No (1) filed on 13th February 2015, 20th December 2016 and 15th February 2017 respectively were dealt with under this head as they all related to the question of plea taking.

15. As can be seen from the Appellant's Grounds of Appeal, the Appellant was challenging the entire process of how his plea was taken. His contention was that his conviction and sentence that was meted upon him by the Learned Trial Magistrate after he pleaded guilty to Count II ought to be reconsidered as he was a layman and was ignorant of the consequences of pleading guilty to a charge.

16. He also contended that the use of the word "English/ Kiswahili" was not in line with the requirement of Section 19(1) of the Criminal Procedure Code Cap 75 (Laws of Kenya) to the effect that whenever evidence is given in a particular language and is not understood by the accused person, it shall be interpreted in a language that the accused person understands and also indicate the name of the interpreter.

17. He placed reliance on the case of **Anthony Njeru Kathiari & Another vs Republic [2007] eKLR** in which the Court of Appeal held as follows:-

> **"The failure by the trial magistrate to keen** (sic) **of at least the name of an interpreter and the nature of interpretation was a serious defect in the trial and must render the conviction of the Appellant unsafe and unsustainable."**

18. He further referred this court to the case of **Cr Appeal No 372 of 2012 Mohamed Badada vs Republic**(unreported)in which he stated that the court therein held that a mis-step in the plea taking was fatal and incurably defective and sentence, could not be based on an irregular procedure of plea taking.

19. It was his averment that the question of whether or not he understood the requirements at the time of plea taking was relevant considering he had been in custody and was confused mentally and physically.

20. The State submitted that the proceedings showed that the Appellant understood the language that was

being used in court and that is why he specifically pleaded guilty to Count II and not to Counts I and III. It pointed out that the facts were deferred to the following day and when the same were read to him, he confirmed that the facts to have been true.

21. It added that the Charge Sheet had clearly given the date of the offence, the location, the fact that he was found in possession of the wildlife species under the Sixth Schedule of the Act and that in fact, photographs had actually been tendered in evidence as exhibits. It was its submission that his right to cross-examine witnesses was extinguished once he pleaded guilty to the charge.

22. It place reliance on the cases of **Cr Case No 302 of 2007George Mbugua vs Republic** and **Cr Case No 78 of 2011 Bernard Ochieng vs Republic**, where in the latter case, the Court of Appeal rendered itself as follows:-

> **"…With respect to Grounds 1, 2, 3, 4, 6, 7 and 8 it is important to emphasize that, the Appellant having been convicted on his own plea of guilty, no evidence was adduced. As such, the trial court did not have the opportunity of evaluating any evidence that otherwise would have been tendered by the prosecution and the defence. For this reason, any ground of appeal raised to the effect that the trial court did not consider the evidence on record was misplaced."**

23. This court carefully perused the proceedings and noted that on 19th January 2015, charges were read to the Appellant and he pleaded guilty to Count II only. The language of interpretation was shown to have been "English/Kiswahili". Notably, when the facts were read to him the following day on 20th January 2015, the language of interpretation was not shown as was rightly pointed out by the Appellant herein.

24. It is important to note that failure to show the language of interpretation is a serious flaw that could cause an appellate court to nullify the entire proceedings of a trial. However, nullifying of proceedings on a trial court is not a blanket relief from the appellate court. Indeed, an appellate court will order that a matter be referred for re-trial where it is shown that an accused person's right to fair trial has been violated due to failure to understand the language in which evidence is given. Each case must therefore to be looked at on its own merits and depend on the circumstances of a case.

25. In this particular case, the language of interpretation used on 20th January 2015 was not shown. This was a serious irregularity or flaw that could have led this court to nullifying the entire proceedings in the Trial Court. However, this court noted that when facts were read to the Appellant, he admitted that the facts relating to Count II, which he had pleaded guilty to, were correct.

26. This court therefore agreed with the State's submissions that the fact that the Appellant specifically pleaded guilty to Count II and not to Counts I and III was a clear indication that he understood what transpired in court on 20th January 2015. His argument that the word "English/Kiswahili" was not interpreted to him by an interpreter was misplaced and irrelevant in the circumstances of the case herein.

27. It is important to point out that proceedings are not automatically rendered irregular merely because the language used in court is not shown. The objective of Section 198(1) of the Criminal Procedure Code is not to make it mandatory that the language used in court must be recorded but rather, it makes it mandatory for any evidence adduced in a language other than that of the accused person be translated to a language that such accused person understands. The purpose of indicating the language used is therefore to demonstrate to al and sundry that indeed an accused person understood all that has transpired in court.

28. In that respect, Ground and Amended Ground of Appeal No (1) filed on 13th February 2015, 20th December 2016 and 15th February 2017 respectively were not merited and the same are hereby dismissed.

II. **FAIR TRIAL**

A. **LEGAL REPRESENTATION**

29. The two (2) Amended Ground of Appeal No (2) filed on 20th December 2016 and 15th February 2017 were dealt with under this head.

30. The Appellant argued that he ought to have benefitted from Article 50(2)(g) of the Constitution of Kenya, 2010 as he was put in the same position as a person who had been charged with murder. The said Article provides that:-

> **"(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;**

31. It appeared to this court that the Appellant intended to rely on the provisions of Article 50 (2) (h) of the Constitution of Kenya which he set out in his Written Submissions. The said Article stipulates as follows:-

> **"(2)Every accused person has the right to a fair trial, which includes the right—**
>
> **(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;"**

32. It is clear from the said Article that assignment of legal representation is not limited to persons who have been charged with capital offences only. Legal representation is to be provided to an accused person who is likely to suffer substantial injustice if an advocate is not assigned to him by the State irrespective of the offence he is charged with.

33. The threshold of what would amount to substantial injustice has not been defined in the Constitution of Kenya. Appreciably, no accused person who has been convicted of a capital offence has been sentenced to death in recent years.

34. Unless the situation changes in Kenya, one can safely assume that for now, such a person who has been sentenced to death is likely to be in prison for the rest of his life without suffering death. In any event, most of the convicted persons who were and have been sentenced to death have benefitted from the commutation of their death sentences to life imprisonment.

35. It was the considered opinion of this court that a person who faces a life sentence finds himself in the same position as a person who is facing a capital offence. He is likely to suffer great injustice if he is not assigned legal representation by the State. In this particular case, the Appellant suffered great injustice because he was not informed of his right to legal representation, even if he was to organise for it privately as envisaged in Article 50(2)(g) of the Constitution of Kenya.

36. There was a high likelihood that the Appellant may not have pleaded guilty to the charge in view of the punitive sentence prescribed under the Act but may have opted to through the rigours of trial. His lack of knowledge of legal technicalities and financial incapacity to hire legal representation put him in a situation where he suffered substantial injustice.

37. Having said so, the limitation of the right to be assigned legal representation by the State was addressed by the Court of Appeal in the case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR** when it stated as follows:-

> **"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include *all situations where an accused person is charged with an***

offence whose penalty is death. **This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.**

Again, this Court differently constituted in the case of Moses Gitonga Kimani v Republic, Meru Criminal Appeal No. 69 of 2013, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows:

"It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation."

Article 261 of the Constitution provides *inter alia*:-

(i) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.

(ii) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year

It is therefore apparent that the provisions of Article 261 and the Fifth Schedule to the Constitution, that would give effect to the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. We must however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the Constitution to provide guidelines on legal representation at State's expense. We believe time is now ripe and nigh for the enactment of such legislation. That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under Article 25 of the Constitution."

38. Whilst this court agreed with the Appellant that there was discrimination relating to the provision of legal representation, it wastook cognisance of the aforesaid decision by the Court of Appeal and only hoped that the right to assign legal representation to **all**(emphasis court) accused persons will be realised progressively but sooner than later.

39. Having said so, the Learned Trial Magistrate did not inform the Appellant promptly of his right to be represented by an advocate as enshrined in Article 50(2)(g) of the Constitution of Kenya. This was a violation of the Appellant's rights which did not need to be realised progressively. Indeed failure to adhere to the provisions of Article 50(2)(g) caused the Appellant to suffer substantial injustice due to fact that he was not a person schooled in legal matters.

40. In that respect, this court found that the Appellant's Amended Ground of Appeal No (2) filed on 20th December 2016 and 15th February 2017 had merit and the same is hereby upheld.

B. **MITIGATION**

41. Amended Ground of Appeal No (3) filed on 20th December 2016 and 15th February 2017 was dealt

with under this head.

42. Section 92 of the Wildlife Conservation and Management Act No 47 of 2013 provides as follows:-

> **"Any person who commits an offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species shall be liable upon conviction to a fine of not less than twenty million shillings or imprisonment for life or to both such fine and imprisonment."**

43. As can be seen hereinabove, the Learned Trial Magistrate's hands relating to the extent of the fine he could impose on the Appellant were tied. The minimum fine he could impose on the Appellant was a fine of **not less than Kenya Shillings twenty million (Kshs 20,000,000/=) and a sentence of life imprisonment** (emphasis court). He could also exercise his discretion to fine the Appellant and also sentence him as aforesaid.

44. Bearing in mind the discretion the Learned Trial Magistrate could have exercised in the penalty he would have meted on the Appellant, he was required to have given the Appellant an opportunity to mitigate. Indeed, irrespective of the charge they have been convicted with, all convicted persons must be accorded a chance to mitigate before the sentence is meted out upon them.

45. A perusal of the proceedings in the Trial Court showed that the Learned Trial Magistrate did not accord the Appellant an opportunity to mitigate. The proceedings were as follows:-

> **"THE ACCUSED- The facts are correct.**
>
> **COURT- Convicted on own plea of guilty.**
>
> **PROSECUTOR- The accused may be treated as a first offender.**
>
> **COURT- The accused is sentenced to a fine of twenty million (Ksh. 20 million) in default to serve life imprisonment. Right of Appeal 14 days."**

46. This court came to the firm conclusion that despite the Appellant having pleaded guilty to Count II and the Learned Trial Magistrate having handed him the least penalty, his failure to accord the Appellant an opportunity to mitigate was clearly a violation of his right to fair trial.

47. A re-trial would definitely have been fair in the circumstances of the case herein to cure the obvious irregularity and illegality in the proceedings by the Learned Trial Magistrate.

48. In this regard, this court found merit in Amended Ground of Appeal No (3)filed on 20th December 2016 and 15th February 2017 had merit and the same is hereby upheld.

III. **SENTECING**

49. Amended Ground of Appeal No (4) of the Amended Grounds of Appeal that were filed on 20thDecember 2016was dealt with under the separate heads shown hereinbelow.

A. **NATURE OF THE CHARGE**

50. Having found that the Learned Trial Magistrate's failure to give the Appellant an opportunity to mitigate madethis case a good one for a re-trial, this court was not persuaded that that was the best way to go. It noted that the Appellant's pleading guilty to Count II was irregular for the reason that he was charged under Section 98 as read with Section 92 and of the Act. Section 98 of the Act stipulates as follows:-

"A person who engages in hunting for bush-meat trade, or is in possession of or is dealing in any meat of any wildlife species, commits an offence and shall be liable on conviction to a fine of not less than two hundred thousand shillings or to imprisonment for a term not less than one year or to both such fine and imprisonment."

51. Clearly, the sentence the Learned Trial Magistrate could have been imposed on the Appellant under Section 98 of the Act was **"a fine of not less than two hundred thousand shillings or to imprisonment for a term not less than one year or to both such fine and imprisonment**(emphasis court)**."** By pleading to Count II completely in the way it had been drafted prejudiced him as it was not clear to which offence he was pleading guilty to.

52. As sheen hereinabove, the Appellant was a layman and would not have known that a combination of offences under Section 92 and Section 98 of the Act was not legally feasible. A section can only be read with another if one section prescribes the offence and the other section prescribes a penalty. It can never be that two (2) sections of the law prescribing different offences attracting different penalties could be read under a single Count.

53. Appreciably, it was also not clear to this court why the Learned Trial Magistrate opted to convict the Appellant under the provisions of Section 92 and not Section 98 of the Act which had a lower sentence.The Prosecution's reliance on two (2) distinct sections with different penalties as safety valve was obviously prejudicial and burdensome to the Appellant.

54. The Prosecution ought to have separated the offences and brought the same as either as separate Counts or as alternative Counts to each other depending on how it had prepared its case. Sentencing the Appellant in the manner that the Learned Trial Magistrate did occasioned the Appellant gross miscarriage of justice.

B. **FACTS OF THE CASE**

55. Going further, the plea of guilty could also not be sustained because the facts did not demonstrate any of the ingredients of offences either under Section 92 and Section 98 of the Act. The facts were as follows:-

"On 18-1-2015, at about 10.45 am. wildlife officers, Bernard and another were on patrol at Tsavo West when they met the accused and another and arrested them. Some fled. Six pangas, one knife, three torches and three did diks, one (sic) that of oryx ,one red pucks, one quaff and one lope. They were arrested and brought to court. The meat was rotting and so we photographed the carcass and I produce the photograph exh. 1 six pangas as exh.2, torches, exh.3, one torch without horn- exh 4 and one knife as exh 5."

56. The facts the Prosecution placed before the Trial Court did not in any way demonstrate that the Appellant had committed an offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species or that he had engaged in hunting for bush-meat trade, or was in possession of or was dealing in any meat of any wildlife speciesas envisaged under Sections 92 and 98 respectively of the Act.

57. No evidence was placed before the Trial Court that showed that the carcasses belonged to endangered or threatened species as set out in theSixth Schedule of the Act. The Learned Trial Magistrate ought to have been satisfied himself that the carcasses were of endangered and threatened species and not merely sentenced the Appellant.

58. The fact that an accused person pleads guilty does not mean that the trial court should convict. Rather, a trial court should be satisfied that an offence that an accused person pleads guilty to exists or has indeed been committed.

59. This court thus came to the conclusion that the pleading guilty by the Appellant herein was a complete

sham and consequently, the sentence that was meted upon the Appellant was manifestly excessive, harsh and severe as it was not clear which offence he pleaded guilty.

60. In the premises foregoing, Amended Ground of Appeal No (4) of the Amended Grounds of Appeal was also merited and the same is hereby upheld.

CONCLUSION

61. In this case, the serious flaws and irregularities herein could have been cured by ordering a Re-trial of this case. However, the Learned Trial Magistrate acquitted both the Appellant and his Co-Accused of all Counts after hearing them as well as the Prosecution witnesses.In his Judgment, he rendered himself as follows:-

> **"In sum I make a finding that the prosecution has failed to prove its case beyond reasonable doubt and I acquit the accused persons in** (sic)**all counts under section 215 of the CPC and set them free unless otherwise lawfully held back…"**

62. The taking the Appellant through the rigours of trial in respect of Count II may have been due to the fact that he was jointly charged with his Co-Accused who had pleaded not guilty to all Counts. As the Appellant was erroneously taken through the trial and the Learned Trial Magistrate found that the prosecution had not proven its case in respect of Count II, this court was not persuaded that the Appellant ought to be taken through a fresh trial.

63. This court had at the back of its mind that save where a case has been found suitable for a re-trial, a person who has been acquitted or convicted ought not to be taken through a fresh trial. This is to ensure that such a person does not suffer double jeopardy.

64. Notably, Article 50 (2)(o) of the Constitution of Kenya provides as follows:-

> **"(2)Every accused person has the right to a fair trial, which includes the right—**
>
> **(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted**(emphasis court)**or convicted."**

65. Accordingly, having considered the Appellant's Petition of Appeal, his Written Submissions and those of the State, this court found and held that the facts as read out to the Appellant fell short of the threshold of what would constitute an offence that would be punishable under any law and the plea of guilty by the Appellant could not be sustained as it was clearly illegal and a complete sham.

DISPOSITION

66. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 13th February 2015 was successful and the same is hereby allowed.

67. This court hereby quashes the conviction and sets aside the sentence that was meted upon him by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless he be held or detained for any other lawful reason.

68. It is so ordered.

DATED and **DELIVERED** at **VOI** this **28th** day of **March** 2017

J. KAMAU

JUDGE

In the presence of:-

Paul Ngei Muiya…..……. Appellant

Miss Anyumba……..for State

Josephat Mavu– Court Clerk