REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 11 OF 2016

KAINGO LESAKEI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being an appeal arising from the judgement in the lower court in Criminal Case No. 8 of 2014 presided over by Hon. M. O. Okuche (SRM delivered on 2/6/2016)

JUDGEMENT

In this appeal the appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the alleged offence were that on the 7/12/2014 at [particulars withheld] village in Kajiado Central Sub-County the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ (vagina) of K.S. aged 7 years.

The trial court magistrate upon hearing the case for the prosecution and the appellant defence in his judgement found him guilty, convicted, and sentenced him to life imprisonment. There was no finding made on the alternative charge of indecent act with a child contrary to section 11 as read with section 11(1) of the Sexual Offences Act (Supra).

The appellant being dissatisfied and aggrieved by the judgement on conviction and sentence has appealed to this court on six grounds:

(1) That the learned trial magistrate erred in matters of law and fact by convicting on a charge that was bad in law for replication of facts between the main count and the alternative charge of facts.

(2) That the learned trial magistrate erred in matters of law and fact by holding that the case was proved beyond reasonable doubt whereas he was not properly identified as the perpetrator of the crime charged.

(3) That the learned trial magistrate erred in matters of law and fact by not finding that no DNA was conducted to link him with the crime charged.

(4) That the learned trial magistrate erred in matters of law and fact by not finding that essential witnesses, necessary to prove basic facts were not produced.

(5) That the learned trial magistrate erred in matters of law and fact by not finding that essential exhibits, necessary to prove basic facts were not produced.

(6) That the learned trial magistrate erred in matters of law and fact by conducting the trial in a manner that violated his constitutional rights to a fair hearing under Article 50 (2) (c) (j) of the Constitution of Kenya 2010 for none provision of witness statements.

The appellant prayed that the appeal be allowed conviction quashed and sentence set aside.

The appellant besides oral arguments on appeal he did file written submissions relying on various case law principles. It is contended by the appellant that the prosecution failed to prove the elements of defilement conclusively and beyond reasonable doubt. In this proposition the appellant relied on the authorities of ***Pappyton Mutuku Ngui c Republic Cr. Appeal No. 296 of 2010, DPP v Woolmington AS [1935].*** He therefore sought that the judgement be set aside.

The appellant further submitted that the charge is bad for duplicity. The basis of his arguments anchored on the provisions of section 134 of the Criminal Procedure Code Cap 75 of the Laws of Kenya. The major complaint on this ground was the manner the main charge of defilement and that of indecent act was drafted to contain similar particulars of the offence.

Thirdly the appellant submitted and took issue with the evidence on identification. The appellant contention was that the features given by the victim PW1 were not sufficient to positively place him at the scene. In his highlight the appellant flagged a statement in PW1 testimony that she did not know the person who defiled her on the material day. The following authorities were cited and relied upon by the appellant; ***Mary Wanjiku Gichira v Republic Cr. Appeal No. 17 of 1998, Maitanyi v Republic [1986] KLR 198, Miller v Minister of Pensions [1947] 2ALL ER 372, J. OO v Republic [2015] eKLR, Republic v Turnbull & Others [1973] 3 ALL ER 549.***

The appellant further brought to the attention of the court that the prosecution case failed to conduct a DNA to ascertain the source and the presence of spermatozoa in the genitalia of the victim (PW1). According to the appellant absence of DNA and non-production of essential witnesses occasioned gaps and inconsistencies in the prosecution case. He relied on the cited authorities ***of J. OO v Republic (Supra), Juma Ngodia v Republic [1982-88] KAR 454, Paul Kanja Gitari v Republic [2016] eKLR, Bukenya & Others v Uganda [1972] EA 549.***

The appellant further submitted that he was not accorded fair trial under Article 50 (2) (c) (j) of the Constitution in witness statements. On this proposition he cited and relied on the following authorities; ***Republic v Amos Karuga Karatu [2008] eKLR, Simon Ndichu Kahoro v Republic [2016] eKLR, Simon Githaka Malombe v Republic [2015] eKLR, Republic v Daniel Chege Magotho [2014] eKLR and Cholmondeley v Republic.*** The appellant therefore in a nutshell asked this court to consider the entire record and order for his release by allowing his appeal.

The respondent's counsel Mr. Akula submitted and made reference to the prosecution case and urged this court to find the prosecution proved the case beyond reasonable doubt. The learned counsel further argued that the appeal by the appellant lacks merit on the grounds relied upon and the written submissions.

In this appeal as a first appellate court I am duly bound to the parties to evaluate the evidence of trial court on questions of fact and law and issue a decision of the appeal. That therefore requires the task of weighing conflicting evidence on record from the prosecution, the defence and draw its own inferences and conclusions, only bearing in mind that it has neither seen nor heard the witnesses and due allowance should be made. In this respect (see ***Pandya v Republic [1957] EA 336 and Ruwalla v Republic [1957] EA 570).***

In this regard I will review the testimony of the witnesses and the medical evidence on record that the trial court considered to establish the guilt of the appellant. During the trial PW1 K.S, the complainant alleged to have been assigned duties of looking after their goats within their farm. According to PW1 it happened that the appellant was also in the adjacent field grazing their cattle. In the course of executing the assignment appellant approached PW1 and asked her to go and pick a goat's kid which was within the

grazing fields. That is when the appellant followed, pushing her to the ground, undressed the pants and penetrated her private parts. In a little while PW1 told the trial court that her mother PW2 came and incident was reported to her where she took action.

PW2 the complainant's mother stated that on the 7/12/14 in the morning hours PW1 and the appellant had left for the fields to go and graze their respective livestock. In the course of the day PW2 testified that one of her children came to the house and reported that PW1 and another man had gone after a goat's kid. The absence of PW1 made PW2 to travel to the grazing area where she found PW1 under a tree groaning in pain. It was further her testimony that she noticed blood stains on the ground where she was lying complaining of injury to the back and hip. It was at the moment PW1 pointed a finger at the appellant as the one who lured her to go and pick a goat's kid only to follow immediately to defile her. The injuries sustained by PW1 were treated at Kajiado District Hospital where she was admitted for three months. The discharge summary admitted in evidence to demonstrate the examination and mode of treatment.

PW3 APC James Sigero testified that on 9/12/2014 in company of the father to the complainant PW6 they pursued the appellant and effected arrest. According to the testimony of PW6, PW1 was defiled while in the field looking after their goats. He only received a report later when PW2 had gone to trace PW1 only to find her to have been defiled. When PW6 came in contact with PW1 he observed that she was bleeding from her private parts and in pain.

PW5 the police detective who investigated the incident told the trial court on role of recording statements, issuance of the P3 and also applying for age assessment report. According to PW5 the complainant minor PW1 was assessed to age between 6/7 years old.

PW4 DR. FRIDAH GOREDI who saw PW1 at Kajiado District Hospital examined her and filled the P3 form. On examination from her evidence she found that PW1 was in pain, bleeding from the private parts, she also suffered rectal vaginal tests and presence of spermatozoa presence in the pus cells. The P3 duly filled and the discharge summary was admitted in evidence as exhibit 2 and 1.

The appellant at the close of the prosecution case placed on his defence. In his sworn statement he denied the charge of defilement as alleged by the prosecution witnesses. The appellant alluded to the evidence of PW1 as having exonerated him as the perpetrator of the defilement.

From the assessment of the trial court record the memorandum of appeal and the submissions by both the appellant and the respondent counsel, I will determine this appeal in the manner hereinunder:-

In my considered view ground 1, 2, 3, 4 and 5 of the amended memorandum of appeal can be reformulated to one key issue:

> (1) Whether the prosecution proved the case beyond reasonable doubt to warrant this court to affirm the judgement of the lower court on conviction and sentence?
>
> (2) The second issue is whether the trial magistrate erred in law and fact by conducting the trial in a manner that violated the appellant's constitutional rights to a fair hearing under Article 50 (2) (c) (j) of the Constitution 2010 for non-provision of witness statements?

In defilement offences the prosecution has to prove the following elements against the appellant:

> (1) The act of penetration.
>
> (2) The age of the victim minor alleged to have been defiled.
>
> (3) The identification of the appellant as the perpetrator of the offence.

From the foregoing it becomes immediately apparent that this court has to sift through the entire record to confirm whether any misdirection on matters of fact or law occurred at the trial.

(1) The act of penetration:

Section 2 of the Sexual Offences Act defines penetration as follows:

> **"Penetration means the partial or complete insertion of the genital organs of a person into a genital organ of another person."**

The appellant submitted that the prosecution did not order for a DNA test to connect him with the offence of defilement. In my judgement the true position is as stated in the case of ***AML v Republic [2012] eKLR*** where the court held that:

> **"The fact of rape or defilement is not proved by way of DNA test but by way of evidence."**

In considering similar provisions under section 36 of the Sexual Offences Act on DNA test the Court of Appeal in the case of ***Kassim Ali v Republic Cr. Appeal No. 84 of 2005*** the court stated thus:

> **"The absence of medical evidence to support the fact of rape is not decisive as to the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."**

A reading of the evidence by PW1 she recounts on how they were grazing adjacent to each other with the appellant on the material day. That is the time appellant sent her to go and pick a kid of a goat which had strayed from the rest of the herd. The complainant in obedience went for the goat kid but incidentally that was the time appellant way laid her and had sexual intercourse. The report reached the mother PW2 who moved to the scene and found PW1 bleeding from the genitalia and there was evidence of blood stains on the ground. PW2 took PW1 to Kajiado District Hospital where she was examined and admitted for three months for treatment. The injuries were confirmed by the doctor PW4 who examined PW1 few hours after the incident of defilement. According to the doctor PW4 the victim PW1 suffered grievious harm injury to perineal body and rectal mucosa vaginal stool discharge from the rectum because of what she referred as rectal vaginal visto. There was also presence of sperms in the pus cells. Dr. Fridah PW4 told the trial court that the probable type of weapon could have inflicted the sexual assault was the penis.

This is in line with the provisions of section 5 of the Sexual Offences Act which reads as follows:

> **"5(1) Any person who unlawfully**
>
> **(i) Penetrates the genital organs of another person with**
>
> > **(i) Any part of the body of another or that person; or**
> >
> > **(ii) An object manipulated by another or that person except where such penetration is carried out for proper and professional hygiene or medical purposes.**
>
> **(b) Manipulates any part of his or her body or the body of another person's body is guilty of an offence termed as sexual assault."**

In the instant case the proviso, section 124 of the Evidence Act Cap 80 provides for admission of evidence in sexual offences without corroboration. However from the record its apparent that there was corroboration from PW2 the mother of PW1 who was the first person to arrive at the scene. PW2 found PW1 in a distressed condition bleeding from her private parts and in pain. The victim reported to PW2 on how she was attacked by the appellant. Corroboration to me is also found in the doctor's evidence. PW4 who in her findings confirmed the serious injuries suffered to the genitalia and presence of spermatozoa. According to PW4 she opined that the victim suffered sexual assault of defilement.

I am therefore satisfied that the prosecution proved the ingredient at the trial court beyond reasonable doubt.

(2) The second ingredient is that of the age of the victim:

The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. It is a critical element within our jurisdiction for the very reason that while legislating the Act parliament categorized cluster of punishment depending on the age of the victim. Section 8 of the Act reads as follows:

> **"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement.**
>
> **(2) A person who commits an offence of defilement with a child between the age of eleven years or less shall upon conviction be sentenced to imprisonment for life.**
>
> **(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term not less than 20 years.**
>
> **(4) A person who commits and offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction for a term of not less than 15 years."**

The principles to be applied in cases of this nature have found their way in various citations and decisions. I make reference to just a few. In the case of ***Kazungu Elias Kasomo v Republic Cr. Appeal No. 504 of 2010*** the court observed as follows:

> **"The age of the minor is an element of a charge of defilement which ought to be proved by medical evidence documents such as baptism cards, school leaving certificates.**
>
> **In my view would also be useful in this regard. Since the passage of the Sexual Offences Act, the practice has been that age assessment of defiled victim is carried out by dentists. The said assessment while useful and in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial court heard the minor's evidence and saw her. The court was convinced that she spoke the truth."**

(See also ***Gilbert M. Kanampiu v Republic [2013] eKLR, Pappyton Mutuku Ngui v Republic Cr. Appeal No. 295 of 2010 at Machakos).***

Going by the evidence on this aspect the prosecution case depended on the testimony of PW2 the mother to the victim. According to PW2 she told the trial court that the victim as at the time was aged 7 years old. In furtherance to prove this ingredient the prosecution caused a medical assessment admitted as exhibit 3 placing the age of PW1 as at between 6-7 years old. This fact as to the age of the complainant was not disputed by the appellant during the trial.

The prosecution therefore is deemed to have proved this ingredient beyond reasonable doubt.

(3) The third element involves identification of the appellant:

As regards participation in committing the offence, the appellant submitted that PW1 never gave any descriptions as to the assailant. The appellant pointed out that the entire evidence on identification was based on mere suspicion which was not probative as to him being at the scene. It was appellant's contention that PW2 alleged that he had gone to her house to fetch drinking water and hence was not at the scene of the defilement. The appellant invited the court to evaluate the testimony of PW1 who denied any knowledge that she knew the person who defiled her on the material day.

The cited authorities by the appellant have been noted elsewhere when capturing his submissions at the hearing of the appeal. The question which begs for an answer is whether the evidence of PW1 positively recognized the appellant as the one who defiled her on 7/12/2014. The classic cases of ***Abdullahi bin***

Wendo [1953] 20 EACA 166 and Roma v Republic [1967] EA 585 provide the testing criteria the evidence of a single identifying witness, the circumstances as interalia whether the witness had a chance to explain what was seen before and or in the first report to the police, what was the physical features and identifying marks if any of the assailant, whether they could identify the assailant's on identification parade of other people. Were there any identifying marks, clothing, strange features or the like. Had they known the assailant before the alleged date of the offence.

What were the prevailing circumstances as to light was it dim or bright, was the attack sudden for identification to be accurate? How long did the assailant spend with the victim/complainant. At the time of the attack was the assailant talking to the victim so that issue of voice identification could be captured. The trial court relied on the evidence of PW1 to identify the appellant. It was far that the prevailing circumstances were favourable to a positive identification.

On this evidence of PW1 I find that the appellant was a neighbour and on the material day they were together at the grazing field. The victim PW1 categorically stated that she was sent to move from where she was grazing goats to another point by the appellant. The victim PW1 did not manage to execute the assignment before the assailant appeared and pushed her to the ground and committing acts of sexual penetration. The appellant only disappeared from the scene according to PW1. The sexual assailant occurred on or about midday where the prevailing lighting conditions are extremely favourable. I take therefore that there was no impediment on the part of PW1 to mistake the appellant with someone else.

It is for these reasons I uphold the learned trial magistrate judgement on the evidence on identification. Consequently the appeal on this ground fails.

The other ground of appeal put forward by the appellant was on duplicity of the charge. The bone of contention by the appellant was that the particulars of Count 1 on defilement and Count 2 on indecent act are related for making reference to penile penetration, complaint's genitalia. According to the appellant this caused him confusion and prejudice in conducting his defence.

The elements of what constitutes duplicity or a charge being duplex were clearly stated by the Court of Appeal in the case of ***Joseph Njuguna Mwaura v Republic [2013] eKLR*** as follows:

> **"We are minded that the rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge. In a charge sheet such charge is sometimes said to be duplex or duplicitous. The rule stems from two important principles:**
>
> **Firstly as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so that they can either prepare and present the appropriate defence."**

If one considers the charge and particulars in Count 1 and viz viz the alternative charge. The alleged duplicity does not arise. The main count particularizes intention and unlawful penetration into the genitalia of the victim. Whilst the particulars under the alternative charge specifically on replies on the language on Count 1.

My take to this issue is that the answer is found under section 135 of the Criminal Procedure Code which provides:

> **"(1) Any offences whether felonious or misdemeanors may be charged together in the same charge or information if the offences charged are founded on the same facts, or are part of a series of offences of the same or similar character.**
>
> **(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a court.**

(3) Where before trial or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence committed, so in the same charge or information, or that for any other reason it is desireable to direct that the person be tried separately for any one or more offences charged in a charge or information. The court may order a separate trial of any court or courts of that charge or information."

Having considered the arguments by the appellant and applying the above principles of law in Joseph Njuguna Mwaura Case (Supra) and section 135 of Criminal Procedure Code, I find no evidence of prejudice or miscarriage of justice on the part of the appellant. The appellants concerns were addressed by the trial court in making a finding on Count 1in respect of conviction and sentence.

I find no error of law or fact on the part of the learned trial magistrate on this ground. This ground as advanced by the appellant is also lost.

The appellant further complained of misdirection on the part of the learned trial magistrate of not finding that essential witnesses were not called to testify for the prosecution. The appellant contention was that the crucial witnesses like Wangoi and the neighbour where is alleged to have escaped were not summoned to attend the trial. On this he relied on the cases of ***Juma Ngodia v Republic (Supra), Bukenya v Uganda (Supra) and Paul Kanja v Republic (Supra).***

The burden of proving the case against the appellant is case upon the prosecution (see section 107 (1) of the Evidence Act Cap 80. In executing this mandate section 143 of the same Act stipulates that no particular number of witnesses shall in the absence of any provision of law to the contrary be required to proof any fact.

In ***Bukenya Case*** which the appellant referred to this court which presupposes that the failure to call one Wangoi and a neighbour entitled the trial court to make an adverse conclusion against the prosecution case. To me is not applicable to this appeal.

In regard to this case, the trial court was mandated to draw an inference from the totality of the evidence placed before it by the prosecution.

As I have reiterated elsewhere it is trite that the burden of proof beyond reasonable doubt is not proof beyond all iota of doubt. (See ***Miller v Minister of Pensions [1947] 3 ALL ER 373).*** In addition if indeed the appellant felt Wangoi and the neighbour were beneficial witnesses for just determination of the case, nothing barred him from summoning them to adduce evidence for the defence.

I therefore find the ground on non-recall of witnesses lacks merit.

Finally the appellant moved this court under Article 50 (2) (b) (c) and (J) of the Constitution asserting a violation of his constitutional rights to a fair hearing for non-provision of witness statements. The relevant provisions of Article 50 (2) (j) provides as follows:

"**Every accused person has a right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to the evidence."**

The right to a fair trial under our constitution is absolute and is enjoyed by an accused person who is presumed innocent until the contrary is proved. See Article 50 (2) (a).

The same constitution mandates the Director of Public Prosecutions to fully disclose to the accused the material on which the case against him or her is to be premised.

Since the decision in the ***Patrick Cholmondeley Case*** and later the promulgation of the Constitution 2010 the right of disclosure and supplying statements in advance has become part of our criminal justice system. The jurisprudence relevant to the right to witnesses statements and all relevant material pertaining

to the issue can be described as trite.

The missing link the way I see it is absence of a legislation and or policy guidelines embodied to reflect the law as stipulated in various case law. The need for such a legal instrument cannot be underscored given the multi-sectoral approach in our criminal justice system. The failure by the system to address the disclosure issue has seen applications under Article 50 (2) (2) (k) sebsequently demanding a declaration for the trial to be quashed. The issue has been raised by the superior courts as a way of sending a clear message to trial courts the right to a fair trial should be enforced at all levels of the hierarchy.

I have heard vehemently the contention and submissions by the appellant. It is clear from the record that before the commencement of the trial and during he sought religiously to be issued with witness statements to the case. The learned trial magistrate seemed to have been least perturbed as to the request by the appellant. There is no evidence and fact that he made attempts to assist the appellant acquire the information on his case in advance. I consider it necessary that prosecution witnesses statements in advance could have assisted the appellant be in a position to assess the weight of the prosecution case and the nature of the defence in answer to it.

The mandatory case on the trial court is conferred under Article 50 of the Constitution which has adequate safeguard to ensure conduct of a fair trial. However it is impossible to visualize in a situation where an accused person is not represented by counsel and the case against him proceeds without the available information/documentary evidence on the charge.

In the Indian Supreme Court with a English Common Law jurisdiction in the case of ***Siddharth Vashisat Manu Sharma v State NCTDELHI [2010] 6 SCC 1*** the court held as follows:

> **"That though the primary duty of a public prosecutor is to ensure that an accused is punished, his duties extend to ensure fairness in the proceedings and also to ensure that all relevant facts and circumstances are brought to the notice of the court for a just determination of the truth so that due justice prevails. The court further held that it is the responsibility of the investigating agency as well as that of the courts to ensure that every investigation is fair and does not erode the freedom of an individual except in accordance with the law. It was also held that one of the established facets of a just, fair and transparent investigations is the right of an accused to ask for all such documents that he may be entitled to under the scheme contemplated by the Criminal Procedure Code."**

In ***State v Langa [2010] 2 SACR KZP*** the South African Court held and recognized the principle that a fair trial demands that an accused has the requisite knowledge in sufficient time to make critical decisions which bear on the outcome of the case as a whole.

Closer home the superior courts have developed the jurisprudence in the following cases***; George Ngodhe Juma v A.G [2003] eKLR*** the court held:

> **"In general terms, it means that an accused person shall be free from difficulty or impediment and free more or less completely from obstruction or hindrance, in fighting a criminal charge made against him. He should not be denied something, the result of which denial will hamper, encumber, hinder, impede, inhibit block, obstruct, frustrate, shackle, clog, handicap, chain fetter, trammed, thwart or state, his case and defence, or lesser and bottle neck his fair attack on the prosecution case."**

The Court of Appeal faced with similar interpretation of Article 50 on disclosure and right to a fair trial in ***Cholomondeley v Republic***.

On citing the principles in ***Republic v Strichamatel [1992]*** by the Supreme Court of Canada – the court held:

> **"Our understanding of this Canadian decision to that there is a duty on the part of the**

prosecuting authorities to disclose to an accused person the evidence which the prosecution has in their possession but which they do not intend to use during the trial. Such evidence may, if adduced weaken the prosecution case and strengthen that of the defence. Whatever may be its nature the prosecution is still obliged to disclose it to the defence. That duty continues during the pre-trial period. The trial itself so that if any new information is obtained during the trial it must be disclosed."

Applying the above principles to the present case I find the lower court trial constituted of fundamental defects as to the application on issuance of witness statements. The scope of assistance was within the power of the court and the prosecution counsel to ascertain availability of witness statements to the appellant. The appellant though did participate in conducting his defence was deprived the benefit of the information put together against him on the charge of defilement.

This matter is quite clear and I need not say anything on it save to declare that a violation of a right to a fair trial vitiated the proceedings of the trial court.

The issue I ponder therefore is whether this court should allow a retrial. If I may, let me set out the applicable law relating to retrials. The Court of Appeal in the case of ***Makupe v Republic [1984] KLR 523*** held as follows:

"In general, a retrial will be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of the insufficiency of the evidence or for the purposes of enabling the prosecution to full gaps in the evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is to blame, it does not necessary follow that a retrial should be ordered, each case must depend on its particular facts and circumstances and an order for a retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause injustice to the appellant or the accused."

I have carefully considered this matter and the duty placed upon the prosecutor and the court to ensure the compliance with the rights to a fair trial in a criminal process.

Applying the principles in the case of ***Wilson Washington Otieno v Republic [1989] 2 KAR I*** hold that the original trial was defective in view that the appellant was denied a chance of being supplied with the evidence by the prosecution in advance despite several applications.

On my part I hereby set aside the conviction and order that a retrial be commenced expeditiously on daily basis until conclusion. The Chief Magistrate Kajiado is hereby directed to comply with the order.

Dated, delivered in open court at Kajiado on 19th day of April, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Akula for the Director of Public Prosecutions

Appellant present

Mr. Mateli Court Assistant