



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 91 OF 2013

STEPHEN MURIUKI MURARA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (M. Onkoba (Ag. S.R.M.) at Gichugu, Criminal Case No. 1 of 2013 delivered on 22nd April, 2013)

JUDGMENT

1. The appellant **Stephen Muriuki Murara** was charged with defilement contrary to **Section 8 (1) (4) of the Sexual Offences Act** in that on the night of 25th – 26th December, 2012 at Kutus in Kirinyaga East District within Kirinyaga County, intentionally caused his penis to penetrate the vagina of M.W.W. a child aged 16 years and four months. In the alternative the appellant was charged with committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act**. The particulars are that the appellant on the night of 25th and 26th December, 2012 at Kutus in Kirinyaga East District Kirinyaga County unlawfully rubbed the vagina of M.W.W. a child aged 16 years four months with his penis.
2. The Appellant is charged with a second count of Grievous Harm contrary to **Section 234 of the Penal Code**. It was alleged that on the night of 25th – 26th December, 2012 at Kutus in Kirinyaga District Kirinyaga County unlawfully did grievous harm to M.W.W.
3. The appellant was charged at Gichugu Principal Magistrate's Court and pleaded not guilty in court file No. 1 of 2013. After a full trial, he was found guilty and convicted on the offences of defilement and grievous harm. On the offence of defilement he was sentenced to serve 20 years imprisonment and two years imprisonment for the offence of grievous harm. The sentence was to run concurrently.
4. The appellant being aggrieved with the conviction and sentence filed this appeal raising the following grounds:
 - (i) *That, the trial magistrate erred in both law and facts while convicting me on reliance to P.W. 1 and P.W.2 evidence which was flawed with a lot of doubts and inconsistencies.*
 - (ii) *That the trial magistrate erred in both law and facts while being impressed with my mode of arrest in light of no touchable supportive evidence to suit on P.W.3 and P.W.4 allegations in my respect.*
 - (iii) *That, the trial magistrate erred in both law and facts while convicting me on charges that weren't proved to me at the needs of justice.*

(iv) That the trial magistrate erred in both law and facts while rejecting my defence by shifting burden of prove on my shoulder which was against the requirement of law.

5. The appellant prays that the conviction be quashed and the sentence be set aside.

6. From the record, the appellant had filed seven grounds. When he was given time to file submissions, he filed “the memorandum grounds of appeal (sic) on 6th December, 2016” and begged leave to substitute interalia filed grounds. The appellant did not seek leave to file the grounds. The respondent has urged the court to expurge the ground for want of leave. He however, left the matter to the discretion of the court and went ahead to respond to the new grounds. **Section 350 (2) (i) of the Criminal Procedure Code** provides that the appellant shall not be permitted at the hearing of appeal to rely on ground of appeal other than those set out in the petition of appeal. **Section 350 (2) (iv)** provides a petition of appeal can only be amended with leave of the court.

7. I am of the view that though rules of procedure are not made in vain and ought to be complied with, they should not bar a litigant from getting justice where no prejudice is likely to be occasioned to the other party. The State filed a reply to the amended grounds and is not likely to suffer any prejudice. The requirement for leave to amend is a procedural technicality. **Article 159 (2) (d) of the Constitution** provides that:

“In exercising judicial authority the courts and tribunals shall be guided by the following principles –

Justice shall be administered without undue regard to procedural technicalities.”

The Court will consider the amended grounds despite the fact that the court did not grant leave to the appellant.

8. This being a first appeal, this Court has a duty to consider the evidence and come up with its own independent finding but bearing in mind that it did not have the opportunity to see the witnesses when they testified and leave room for that. This was so held in the case of **Okeno –V- Republic (1972) E.A.** where it was held:

“a 1st appellate court must consider the evidence presented before the trial court and come up with its own findings and draw its own conclusions and only then can it decide whether the magistrate’s finding should be supported and in so doing it should make allowance for the fact that trial court has had advantage of hearing and seeing the witness.”

9. The Summary of the Evidence

The complainant M.W.W. (P.W.I) a girl aged 16 years and 4 months and is a form four student at [particulars withheld] Secondary School testified that on the night of 25th December, 2012 and 26th December, 2012 she had gone to Kutus town to celebrate Christmas. She received a call from her cousin J N at around 6.30 p.m. and he asked her to go and pick him at the entrance of riverside Park. When she reached there she took out her phone to call him. It is then the appellant emerged from a nearby path and pulled her to the rear of the fence. The appellant dragged her across river Thiba and crossed the main road to Kerugoya. He pulled her to a maize field, took her money Ksh.300/- and her phone. He twisted her right hand and started removing her clothes. He then removed his penis and penetrated her. They then went to the coffee field of K.T.I. where he defiled her again twice. They went to his mother’s home to get his house keys but met with a lady and a young man who came to her rescue and the appellant ran away. She contacted her cousin Denis and they went to Kutus Police Patrol base. The next day she went to Kerugoya District Hospital where her right hand was plastered after she was X-rayed. The complainant was examined, treated and a P3 form, **exhibit 3** was filled. The complainant identified the clothes which she was wearing on the material day namely, a black jeans trouser MF1-5A, blouse MF1-5b and a pant MF1-6 which were soiled and the pant was blood stained.

10. The testimony of the complainant shows that she met the appellant at 6.30 p.m. when it was not dark. She could not have failed to identify the appellant. Thereafter she was with the appellant for about seven hours. The appellant was a total stranger to her. The complainant did not know the appellant before as he was a total stranger when he accosted her. The complainant could identify the appellant since at 6.30 p.m. there was sufficient day light to enable her see the appellant very well before darkness set in. The complainant had no reason to frame the appellant as he was a total stranger to her.

11. Evidence was also adduced by **Nicholas Mwai Muthike** (P.W.2) FROM Giashai village and is a shop attendant in Embu. He testified that on 25th December, 2012 he arrived home at about midnight and heard screams in a neighbour's place. He went and met the complainant who was bleeding from the nose and was injured on the hand. It was alleged the lady was taken there by Kariuki. He also met the parents of the Appellant. When the appellant saw the P.W.2 he ran away. The complainant narrated to him what had happened and requested him to take her to Kutus Police Patrol base.

In cross-examination, P.W. 2 denied that he had a grudge with the appellant or that they had boundary disputes. The evidence of P.W.2 corroborates the testimony of the complainant that she was at the home of the appellant on that material night and the appellant disappeared when help from P.W. 2 came. The allegations against the P.W.2 which were made by the appellant cannot possibly be true because as testified by P.W.2 he had not complained of any threats to the authorities. In any case it is the complainant who implicated him not P.W. 2.

12. P.W. 3 **Obed Mwaniki Difathas** who hails from Karia village on his part testified that on 31st December, 2012 while working at Kirinyaga University where he works as a security guard, he received a call that there was a suspect of defilement who had gone into hiding and was being pursued by Police. The suspect was hiding in the institution's farm. P.W. 3 mobilised villagers and zeroed in on the suspect who was employed as a casual worker on that day. He arrested the appellant and took him to Kutus Police Patrol Base. The complainant went and identified him as the culprit.

13. P.W.4 Police Constable Derrick Wafula attached to Kutus Police Patrol Base is the investigating officer. He testified that on 26th December, 2012 at 2.50 a.m. the complainant reported that she was defiled. She was referred to hospital and her hand was plastered. She handed over the clothes she was wearing during the ordeal. P.W. 4 retraced the path that the complainant had been taken and defiled. He then went to the home of appellant but he was not there. On 31st December, 2012 the appellant was arrested and charged with these offences.

14. P.W. 5 Hezron Macharia Maina a clinical officer based at Kerugoya District Hospital testified that the complainant who was M.W.W. a young patient went to the hospital early in the morning to seek medical attention. She alleged that she was sexually assaulted by a person physically known to her on the night of 25th December, 2012. On examination, the inner wear was dirty and blood stained. She appeared agitated, was in pain and walked in difficulties on a broad based gait. On the genitalia she had fresh bruises on the labia majora and labia minora. The hymen looked freshly broken. There was foul smelling discharge from the genitalia. There were indications of a struggle. The neck and hand revealed generalized swelling. She had abrasion on lower part of the abdomen, shoulder and upper arm and right elbow. The right wrist joint was clearly dislocated after X-ray was done. High vaginal swab revealed numerous pus cells. No spermatozoa cells were seen. A plaster was applied on the dislocated wrist. She was treated. The clinical results were assessed as maim in addition to defilement. There was penetration. The complainant was 16 years and four months old. He filled a P.3 form exhibit P3 and also produced the P.3 form and treatment card exhibit 4 and laboratory test form exhibit 7 and X-ray exhibit 2. This evidence corroborates the testimony of the complainant that she was defiled and maimed.

15. DEFENCE

After the prosecution closed its case, the court ruled that the appellant had a case to answer. The provisions of **Section 211 of the Criminal Procedure Code** were explained to him and he chose to give a statutory statement in his defence. He stated that he is an employee of [particulars withheld] College.

On 23rd December, 2012 he got one week off to attend to his aunt's wedding at Nyeri and reported back on 31st December, 2012. Four people went to the college and arrested him. He saw P.W. 2 who he had a grudge with and other unknown people. He had nothing to do with the charges.

16. Issues for Determination

It is from these facts and the defence which appellant raised the four grounds.

The first ground is on identification. In his submission, the appellant argues that the evidence by P.W. 1 and P.W. 2 was riddled with lots of doubts and inconsistencies as per the record. He cited the case of **Charles Maitanyi -V- Republic (1986) 2 KAV** (sic) among others to submit that the testimony of a single witness on identification will have no place in our jurisprudence. That the court has to test with care such evidence to exclude the possibility of mistaken identity before such evidence is accepted and acted upon to find conviction like the instant case. That the facts raise reasonable doubts. He further submits that there was need for an identification parade as the applicant had not given any description of the assailant.

17. On the part of the respondent, it is submitted that the evidence was overwhelming. The incident took about seven hours and hence the complainant had ample time to enable her positively identify the assailant. The respondent further contends that P.W. 2 who went to the home of the appellant was able to indicate that it was the appellant who had committed this offence. Further that the complainant stated that she was able to see the appellant at 6.30 p.m. when he held her as it was not dark.

18. The respondent submits that the contention by the appellant that the court relied on a single identifying witness, the court to consider that defilement cases are different as the standard of proof as there was no other eye witness apart from the complainant. That the authorities cited are not relevant.

19. The trial magistrate addressed the issue of identification and found that it was incumbent upon the court to carefully interrogate and evaluate the evidence on the circumstances prevailing at the time in order to make a determination on whether or not there was proper identification. She found that the evidence of the complainant was that the ordeal started at 6.30 p.m. when it was not dark and she was able to identify the assailant. The trial magistrate also considered evidence by P.W.2 who testified that at 1.00 a.m. there was sufficient light cast from the moon. P.W. 2 knew the assailant before and saw his visual image as well as by his voice. P.W. 2 testified that he knew the appellant well. The P.W. 2 was at the home of the appellant and could not have failed to recognize him. The complainant was with the assailant for over six hours. The complainant had sufficient time to identify the person she was with.

20. I am of the view that the trial magistrate was right to find that the appellant was properly identified. The record shows that the complainant testified that she met the appellant at 6.30 p.m. for the first time when it was not dark. She did struggle with him where upon he hit her twice on the nose causing her nose bleeding. A victim of such heinous crime will never forget his assailant and particularly if the victim saw him in broad day light. As submitted by the state in defilement cases where the victim is the only witness the Court can rely on the testimony provided that the trial magistrate records the reason for believing the victim. It is provided under **Section 124 of the Evidence Act Cap. 80 Laws of Kenya** as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

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.”

21. I am of the view that the appellant was properly identified at the scene where he held the complainant for the first time at 6.30 p.m. which was in broad day light and her evidence was well corroborated by the testimony of P.W. 2 who knew the appellant before and was able to recognize him. In the case of **Peter Musau Mwanzia -V- Republic (2008) eKLR** the Court of Appeal dealt the issue of recognition and stated:

“In the well known case of R -V- Turnbull (1976) 3 ALL E.R. 5459 at page 552 it was stated:

“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.” We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger.....

Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.”

P.W. 2 who knew the appellant before recognized him at his home where he had taken the complainant. Though the appellant alleged that he had a grudge with P.W. 2, it remained an allegation which I find is not true. The appellant had not reported the threats he alleged and P.W.2 denied the allegation of grudge. I find that the testimony of P.W.2 is credible. I am satisfied that the appellant was identified by the complainant and though no identification parade was conducted, the trial court was right in relying on the testimony of P.W.1 as it was corroborated by the testimony of P.W. 2 who was a neighbor of appellant and was able to recognize him. The appellant was properly identified as the assailant. The appellant’s submission on the issue lacks merits.

22. The appellant raised the ground that the trial magistrate erred in both law and facts while being impressed by his mode of arrest in light of no touchable (sic) supportive evidence to suit on P.W.3 and P.W. 4 allegations in his respect. He submits that the manner in which he came to be arrested remained to be totally doubtful to have been relied on.

23. The State submits that the manner in which the appellant was arrested was proper based on the report of defilement. The evidence by P.W. 4 Derrick Wafula who is the investigating officer is that he investigated and found that the appellant had pounced on the complainant and defiled her. P.W. 4 testified that the appellant had gone into hiding. On 31st December, 2012 P.W. 4 received a tip off that the appellant was seen at Kirinyaga University. He liaised with the security officer at the farm who arrested him and brought him to the patrol base. The complainant duly confirmed that the accused was her assailant. P.W. 4 knew the identity of the appellant when he informed the security officer to arrest him. P.W. 3 testified that the farm manager informed him of the suspect and he arrested him and took him to the Kutus Police Patrol Base. There are no inconsistencies in the manner in which he was arrested. A report of defilement had been made to the Police. The appellant was arrested on the strength of the report. As submitted by the respondent the manner in which the appellant was arrested was proper in the circumstances based on the report of defilement which had been made earlier. P.W. 4 testified that appellant was the culprit. There was no doubt on his identity.

24. The appellant raised the ground that the trial magistrate erred in both law and facts while convicting him on charges that were not proved. He submits that no proper investigations were done by P.W. 4 to link him to the charges. The respondent submits that the evidence was overwhelming. That the case was proved against the appellant in its entirety for penetration was proved by way of medical evidence.

25. The evidence adduced was overwhelming. There is no doubt that the complainant was defiled and also maimed. The evidence of P.W. 1 was corroborated by P.W. 2. The medical evidence adduced by P.W. 5 corroborated the evidence of the complainant. He complainant had injuries on the external genitalia and internally her hymen was broken. The medical evidence further corroborated the evidence

of the complainant that there was use of violence and force as the complainant had tenderness on the neck, abrasion on the left lower part of the abdomen (left iliac fossa area), abrasion on the left of the shoulder (aspect) right upper arm, side of left elbow (lateral), right wrist, joint dislocation confirmed by X-ray done. There were fresh bruises on the labia majora and minora, hymen freshly broken. These details are in the P. 3 form which was produced as exhibit 3, treatment notes from Kerugoya District Hospital exhibit 4, lab tests results and X-ray exhibit 5. The complainant identified the clothes which she was wearing and were visibly soiled and the pant was bloodstained. The age of the complainant was proved to be 16 years and four months at the time of the incident with the production of the birth certificate exhibit P.1 which shows that she was born on 4th August, 1996. The medical evidence adduced by P.W. 5 proves beyond any reasonable doubts that the complainant was defiled. The evidence also proves that the complainant was maimed and the dislocated joint was plastered. The complainant was also treated. The medical evidence adduced by P.W. 5 corroborated the testimony of P.W. 1 that there was penetration and injuries which were maim.

26. The trial magistrate found that the prosecution had proved the case to the required degree of beyond any reasonable doubts. I find that based on the evidence on record the trial magistrate was right to find that the charges were proved beyond any reasonable doubts.

27. The trial magistrate properly analysed the evidence on record and gave reasons for arriving at her decision. The conviction was in view of the evidence on record not in any way erroneous. In the case of **Benjamin Mbugua Gitau -V- R (2011) eKLR** the Court of appeal in dismissing the appeal stated;

“The learned Judge also dismissed the appellant’s contention that there was no corroboration of the complainant’s evidence stating that corroboration was not a requirement of the law as it was removed by the proviso to section 124 of the Evidence Act, and even if there was such requirement, it was declared unconstitutional in the case of Mukungu v R Cr. App. No. 277/02, as it would be discriminatory of women and girls.....”

28. Failure to have the blood stains on the clothes examined in the government chemist was not fatal. In a case of defilement, there are three key ingredients, that is, the victim and age of the victim, the perpetrator and penetration. The perpetrator was identified. The trial magistrate in her judgment found that it is not the complainant alone who linked the appellant to the actual commission of the offences charged. She cited **Section 124 of the Evidence Act** to hold that she can receive the evidence and convict if she is satisfied that the alleged victim is telling the truth. She believed the complainant and found corroboration to her testimony by the medical evidence and evidence of P.W. 2. The ingredients were proved. It is therefore not fatal that the blood was not analysed. The complainant had injuries on her genitalia and other parts of the body. It is therefore not far fetched for her to say her pant was bloodstained with her blood. The submission by the appellant is of no use.

29. The appellant raised the ground that the trial magistrate erred in both law and facts while rejecting his defence by shifting burden of proof on his shoulder which was against the requirement of the law. The trial magistrate gave reasons for rejecting the defence of the appellant. This is at page 35 and 36 of the judgment. The trial magistrate found as follows:

“When and how an alibi defence should be raised is a matter that was exhaustively dealt with by the Court of Appeal, in the case of Karanja Vs Republic [1983] KLR page 501. The court among many other holdings, stated that an accused person who intends to raise an alibi for his/her defence, should be minded to do so at the earliest possible opportunity in the proceedings. The purpose of doing that, is to give to the authorities charged with the responsibility of conducting investigations, a chance to conduct investigations with a view to determining the authenticity of the same.

I have carefully considered the record and it is clear that the accused herein, had raised his alibi, for the first time during the hearing of the defence case. That was long after the prosecution had folded up its case. The police who are in charge of conducting investigations, cannot be said to have been accorded a chance to investigate and determine the authenticity of the

accused's alibi. It is important to note that it is the duty of the prosecution to prove the authenticity or falsity of an accused's alibi, but the accused has an obligation to raise it early enough, in the proceedings as contemplated in the Karanja case (ibid)

In so far as the accused had raised his alibi for the first time during the defence hearing, I have no doubt that he put it forth as an afterthought. Besides, a careful scrutiny of the evidence on record, clearly shows, that a part from the complainant who stated that she had seen the accused, P.W.2, who is a neighbour to the accused had stated in his testimony, that he had seen the accused at his home way past midnight on Christmas day (of the year 2012). That line of evidence in my view dislodges the accused's alibi. I therefore do not find his alibi to be authentic, which settles effectively the first point for my determination."

In view of this analysis of the defence, I am of the view that the trial magistrate properly rejected the defence of the appellant.

30. In any case, from the evidence the appellant was placed at the scene of crime by the complainant whose testimony as pointed out was corroborated. The appellant did not state where he was on the material night. His defence is that he is from Giachai village. According to him he went to Nyeri on 29th December, 2012 and returned on 30th December, 2012 when he was arrested. From the defence the appellant was given off from 23rd December, 2012. It is safe to state that on the material night he was at Giachai village where his neighbour P.W. 2 saw him. Though the appellant had no burden to prove his alibi, I am satisfied that the defence was disapproved by the testimony of P.W. 1 the complainant and P.W.2. the trial magistrate did not shift the burden. The defence of the appellant does not state where he was on the material night. The defence of alibi was intended to show that he could not have been at the scene as he was somewhere else. It is a fact clearly on the face of the record that he did not state where he was. No burden was shifted. I find that the trial magistrate properly rejected the defence of the appellant.

31. The appellant raised the ground that crucial witnesses were not called. He claims that one D W who is cousin of P.W.1 was not called to give evidence. D did not witness when the appellant grabbed the complainant nor did he witness the defilement. The evidence on record shows that the said D W met the complainant and P.W.2 AT Kutus Police Patrol. The appellant further submits that his mother who was said to have been present when P.W.2 rescued the complainant was not called as a witness. As submitted by the State, failure to call the parent of the appellant was not fatal. The Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – See **Section 143 of the Evidence Act**. In the case of **Erick Onyango Ondeng -V- Republic (2014) eKLR** the Court of Appeal held;

"In BUKENYA & OTHERS VS UGANDA (supra), the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case;....."

While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso to section 124 of the Evidence Act and the medical evidence must be borne in mind as well Section 143 of the Evidence Act (Cap 80) which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In this appeal, it is not clear to us what value the evidence of violet would have added to the evidence of P.W.2, which the court found trustworthy, as well as the medical evidence. In our opinion, violet would have been a peripheral witness as she was said to merely have happened by when he appellant was with P.W.2 on a different occasion.

The proviso to Section 124 of the Evidence Act therefore allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on a fact.

Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available”.

In this case, though D W and the appellant’s mother were not called, the evidence of P.W.1 was consistent that it was the appellant who had defiled her. Her medical evidence also proved that she had been defiled.”

32. The charge sheet shows that the appellant was charged with defilement contrary to **Section 8 (1) (4)** of the **Sexual Offences Act** which provides:

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

The age of the complainant at the time of defilement was 16 years and four months. The appellant submission in response to the respondent’s submission is misplaced as the charge sheet did not cite **Section 8 (1) (3)**. The sentence which was meted out was appropriate and in accordance with what is provided in the Sexual Offences Act. The charge has no error and no miscarriage of justice was occasioned.

33. From the evidence of the complainant she was robbed Kshs.300/- and a mobile phone by the assailant who was also armed with a knife which he used to injure her on the shoulders. The appellant was not charged with this offence. Physical violence and sexual violence was used by the appellant. There are all ingredients of the offence of robbery with violence, a capital offence which was disclosed and should have been preferred. The investigating officer ignored this charge. As pointed out by the trial magistrate, she could not do anything to nub the appellant with this capital offence. It is indeed unfortunate that the investigating officer did not see it fit to charge the appellant with robbery with violence. It is a high time that the police should consider sexual violence as “any other personal violence,” envisaged under **Section 296 (2) of the Penal Code**. Failure to charge the appellant with the robbery of Kshs.300/- and a mobile phone while armed with a knife and used violence made the appellant walk away with a capital offence.

34. All in all I am of the considered view that this appeal lacks merits. The prosecution adduced overwhelming evidence to prove the charges against the appellant beyond any reasonable doubts. In the case of **Stephene Nguli Mulili -V- Republic (2014) eKLR** it was stated by the Court of Appeal:

“On issue of whether the prosecution discharged its burden of proof, it is not in doubt that the burden of proof lies with the prosecution. The ‘locus classicus’ on this is the case of DPP –V- Woolmington (1935) UKHL 1 where the court eloquently stated that the “golden thread”, in the “web of English common law is that it is the duty of the prosecution to prove it case”. In reference to this Lord Denning in Miller -V- Ministry of Pensions, 1947 2 ALL E.R. 372 stated:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

35. Considering all the evidence in its entirety, I find that the prosecution discharged its burden to prove the case beyond any reasonable doubts. The trial magistrate properly convicted the appellant based on the overwhelming evidence presented before her. The sentence meted out was appropriate safe that the trial

magistrate was very lenient on the charge of grievous harm where the sentence imposed was two years and the sentence provided is life imprisonment. The sentence imposed is not commensurate with the gravity of the offence despite the fact that it was committed in the same transaction. I will however, not interfere with the sentence. The appeal lacks merits. I dismiss it.

Dated and delivered at Kerugoya this 23rd day of June, 2017.

L. W. GITARI

JUDGE

Judgment read out in open Court, Mr. Omayo prosecutor for the State, Appellant present, court assistant Naomi Murage this 23rd day of June, 2017.

L. W. GITARI

JUDGE

23.06.2017