REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL APPEAL NO. 160 OF 2017

N M.....ACCUSED

-VERSUS-

REPUBLIC.....PROSECUTOR

JUDGEMENT

1. The Appellant was charged with offence of:- **INCEST WITH A CHILD CONTRARY TO SECTION 20(1) OF THE SEXUAL OFFENCES ACT NO 3 OF 2006**

2. On the 21st day of October 2015, at **[particulars withheld] in Mbooni West District** within Makueni County being a male person **N M** intentionally caused his penis to penetrate the vagina of **M M** a child aged **four and a half years** with his penis who was to his knowledge his granddaughter.

3. Alternative charge was:- **COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION II(I) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**.

4. On the **21st day of October year 2015**, at [particulars withheld] in Mbooni West District within Makueni County intentionally touched the vagina of M M a child aged four and half years with his penis who was to his knowledge his granddaughter.

5. He pleaded not guilty and matter was heard fully. The accused was found guilty, convicted and sentenced to serve 20 years imprisonment.

6. Being aggrieved by the aforesaid decision, the Appellant lodged an appeal and set out the following grounds namely:-

> *1) **That,** the trial magistrate erred in law and facts by convicting him despite inconsistencies, insufficient as well as contradictory evidence.*
>
> *2) **That,** the credibility of PW1's evidence [the mother of the complainant] was questionable and doubtful.*
>
> *3) **That,** the medical evidence adduced by the medical officer, which the trial magistrate acknowledged was obscure, indeterminate and professionally dysfunctional.*
>
> *4) **That,** the prosecution's failure to parade vital and independent witnesses such as the father of the child [complainant] amounted to obstruction of justice as enshrined in the constitution, while vitiating the allegations purported.*

*5) **That,** due to his advanced age, that is at 96 years, he was not accorded a fair trial, since he has a problem with impaired hearing and loss of memory hence he had difficulties in cross examinations and the whole trial process.*

*6) **That,** the sentence of 20 years imprisonment issued by the trial magistrate was harsh and excessive considering my age as the Appellant.*

*7) **That,** the trial magistrate erred in law and fact by not considering that the mother of the complainant had a grudge with him (the Appellant) concerning land issues, and that she had earlier on issued threats that she would do him some harm.*

*8) **That,** the trial magistrate erred in law and fact by not putting into consideration my defense and mitigation which was consistent.*

*9) **That**, he wish to be furnished with trial proceedings record for more grounds before the hearing of the appeal.*

7. The Appellant submitted that:-**The victim allegedly aged four and a half (4 ½) years was never called as a witness! The alleged victim did not testify before the lower court!** This was so despite the fact that the alleged victim's mother PW1 H K N claimed it was the alleged minor victim who told her that "babu slept on her in babu house".

8. "Babu" being Swahili for grandfather. This part of her testimony, in our humble submission, was and still is hearsay hence inadmissible. In this case, only PW1 the mother of the alleged victim, **PW2 Francis Muange Muoki** an assistant chief, PW3 police officer **Collins Aoko** and PW4 administration police officer testified. Even a crucial witness a boy aged 6 years who was apparently in the company of PW1 as per her testimony when she was interrogating the alleged victim was also not called as a witness!

9. The prosecution's failure to parade vital and independent witnesses amounted to obstruction of justice and the lower court did not even invoke its powers conferred under Section 150 of the Criminal Procedure Code to call the alleged victim and the 6 year old boy.

10. The above position was similar in the decided case of **JOHN KINYUA NATHAN –VS- REPUBLIC NYERI COURT OF APPEAL CRIMINAL APPEAL NO. 52 OF 2015, WAKI, NAMBUYE AND KIAGE, JJ.A, 25/01/2017,** where it was stated inter alia that:-

11. "As we see it, there is only one main issue of law relating to fair trial which the Appellant raised in ground 1 as follows:-

"The learned judge erred in law when she upheld (sic) the Appellant's conviction without considering that the case was not proved beyond any reasonable doubts as stipulated under Section 150 of C.P.C that no eye witnesses were (sic) involved in this case and the victim did not testify before the court".

12. The learned judges went further to state:-

"Only the mother of the child who is alleged to have had a grudge with the Appellant, two clinical officers and the arresting officer were called to testify. The issue then arises as to whether the Appellant was deprived of an opportunity to interrogate the evidence of his accusers and whether in the absence of the complainant the charge was provable. In his written submissions, the Appellant observed that the child was able to give information to her mother that she had been defiled and that it was the Appellant who did it using his penis. He wondered why the child could not have given the same story to the court and face cross examination. He also observed that, on the recorded evidence, there appears to have been another unnamed child who gave a similar story to their mother but was not called to testify. To make matters worse, he contended, a neighbor named Lydia who was supposed to corroborate the mother's story was not

called to the stand. In his view, therefore, all those omissions rendered the charge unproved as there was no eye witness account to prove that he was involved"

13. It is clear that the above scenario is strikingly similar to this case. The court of appeal went on further to explain that the court ought to have conducted a voire dire and make its findings as to whether the alleged victim could testify. Moreover, the learned appellate judges went on to analyze situations when an intermediary would be needed, appointed by the court and subscribe to an appropriate oath, in which case the role of the intermediary would be to assist a complainant or an accused person to communicate with the court. It is to be noted that the evidence presented by the intermediary to the court ought to be that of the witness and not the intermediary's.

14. In the upshot, the Court of Appeal stated:-

"In the case before us, the child was a necessary witness both in determining the third element of the offence as to whether the Appellant was responsible, and also in determining whether she was a vulnerable witness and therefore needed an intermediary to speak on her behalf. No reason was given for the failure to call the complainant in this case and the trial court made no finding on that crucial aspect of the case. The High Court on its part, as already stated, misdirected itself. If PW2 was to be believed, the child was able to inform her about her injury and the person responsible and so, as argued by the Appellant, she was capable of stating so to the court directly or through an intermediary.

In the circumstances, the evidence of PW2 was at best hearsay as she was not the appointed intermediary."

15. Therefore from the foregoing and in our humble submission PW1's testimony cannot be taken as that of an intermediary and is hearsay hence inadmissible. The evidence adduced in the lower court is speculative, indirect, uncorroborated and purely circumstantial trying to link the Appellant herein with the offences charged out of **MERE SUSPICION** as no prosecution witness witnessed any such acts occur.

16. **On analysis 0f the lower court proceedings,** it is submitted that PW3 police officer Collins Aoko was an incompetent witness to adduce crucial medical evidence, that is, **exhibit 1** – Age assessment report, **exhibit 2** – treatment card for the alleged victim, **exhibit 3 – P3** form for the alleged victim and the accused and **exhibit 4-** accused's treatment card. (Kindly refer to pages 6, 8 and 9 of the lower court proceedings).

17. Firstly, no basis whatsoever was laid before the lower court either under **Section 33 or 77(1) and 77(2)** of the Evidence Act relied on by the prosecutor to warrant such production by a lay person in the field of medicine and not the makers thereof. Secondly, no difficulty to secure the attendance of the doctors or medical practitioners was pleaded and the said police officer was clearly neither familiar with the handwriting of the makers thereof nor the medical terms contained therein.

18. This caused a miscarriage of justice and denied the Appellant a fair hearing as will be substantively argued in the second limb hereunder. The police officer ought not to have purported to interpret the medical terms and could not even be cross examined on the same.

19. Thirdly, although the said police officer claimed the age assessment was done by one doctor Walumba, there is clearly no indication of the doctor's name on the document. From the stamp thereon, the document was allegedly prepared on 03/11/2015. It is to be noted that the Appellant had already been arraigned in court on 23/10/2015 when he pleaded to the charges hence the same is highly suspect as it may have been merely orchestrated to suit the charges.

20. Lastly, the police officer also claimed that the Appellant's treatment card, exhibit 4, was signed by one doctor Mutinda yet there is no such indication on the card! Moreover, in our humble submission, production of **exhibit 4** amounts to an attempt to make the accused person to give alleged self-incrimination evidence contrary to the provisions of **Article 50(2) (1**) of the constitution. The appellant

submission is therefore that, the foregoing rendered the medical evidence adduced obscure, indeterminate and professionally dysfunctional.

21. **Due to the Appellant's advanced age, that is 96 years, he was not afforded a fair trial since he has a problem with impaired hearing as loss of memory and had difficulties in cross examinations and the whole trial process; and the sentence of 20 years imprisonment issued by the trial magistrate was harsh and excessive considering the Appellant's age. (GROOUNDS 5 AND 6 COMBINED)** It is submitted that the Appellant's Constitutional rights envisaged under Article 50 of the Constitution were violated.

22. To begin with, we humbly submit that the Appellant was not afforded adequate time and facilities to prepare a defence as envisaged under Article 50(2) (c) of the Constitution. The accused was ambushed when he was supplied with witness statements in court on 05/11/2015 which was the date appointed for hearing. (Kindly refer to page 3 lines 3, 4 and 5 of the lower court proceedings). The hearing proceeded without affording him the opportunity to go through the statements.

23. This is more so considering the statements are written in the English language which the Appellant cannot read, write or even understand! This was also therefore against the provisions of Article 50(3) of the constitution which requires information to be given in a language that the accused person understands.

24. It is clearly discernible from the proceedings at page 1 during plea taking that a Kikamba interpreter by the name Clara had to be called in to interpret the charges. In addition, pursuant to the provisions of Article 50(2) (j) of the constitution, the Appellant ought to have been informed in advance of the evidence the prosecution intended to rely on and to have reasonable access to that evidence. This was therefore a travesty of justice.

25. Secondly, we do humbly submit that the Appellant ought to have been promptly informed of this right to choose, and be represented by an advocate, as envisaged under Article 50(2)(g) of the Constitution. This was not done. This is particularly so considering the gravity of the charges he was facing. In fact, it is our humble submission that an advocate ought to have been assigned to the accused person by the state and at state expense since a substantial injustice would otherwise result considering the Appellants age as the sentence involved is a sure death sentence in jail considering the Appellant's advanced age.

26. Moreover, the Appellant also ought to have been promptly informed of this right by the court. This again was not done. Thirdly, Your Lordship, it was apparent to the lower court that the Appellant is over 80 years of age through the proceedings. (Kindly refer to page 3 line 13 of the lower court proceedings). It also became apparent during the mentioning of this matter before the court for directions that the accused has impaired hearing hence could not even properly follow the court's direction! No wonder the Appellant could barely cross examine witnesses in the lower court.

27. This is clearly elucidated at:-***Page 5 line 5 of the lower court proceedings where the Appellant barely asked two (2) questions to PW1.Again at page 8 line 1 of the lower court proceedings, the Appellant does not manage to ask any questions to PW2.At page 9 line 17 of the lower court proceedings, the accused clearly indicated that he was confused and would not ask questions to PW3. The lower court simply ignored this crucial revelation by the Appellant; and at page 11 line 3 of the lower court proceedings, again the Appellant asked no single question to PW4.***

28. Moreover, it is to be noted from the court record that on 19/11/2015 there was no Kikamba interpreter in court. This means that the Appellant could not follow the proceedings on that day. Firstly, on that day, the family of the Applicant and the complainant wanted to withdraw the charges against the Appellant. Secondly, a crucial application was made by the prosecution to have the investigating officer produce medical documents as exhibits.

29. It is clear that the accused could not comprehend the cited sections of the Evidence act to make a rejoinder and neither was he supplied with the case cited by the prosecution nor the same explained to him to enable him to even attempt to respond. He clearly needed to be represented by an advocate.

30. Thirdly, PW2 and PW3 went on to testify on that day without an interpreter for the Appellant! No wonder he never asked a single question to the said witnesses in cross-examination and he even confessed that he was confused!

RESPONDENT SUBMISSIONS

31. The Respondent via Kihara state counsel submitted that the prosecution evidence was sufficient and corroborated to justify conviction.

32. The girl's mother PW7 revealed that the girl (victim) was walking with spread legs. The brother of the victim informed her (PW1) of what the accused did to the victim. The PW1 examined the victim and confirmed that she was defiled. The PW1 called the elder who confirmed the same injuries.

33. The assistant chief was also informed of the same incident and he involved the police and thus the investigation officer PW3 came and took the victim and the accused for medical examination which confirmed the involvement of the both sexual activity.

34. The medical officer examined the victim and confirmed the act of defilement had taken place in victim's genitalia.

35. The information aforesaid was contained in a P3 produced by the investigation officer PW3.

36. The Appellant did not rebut the aforesaid evidence, though he was 86 years old then illiterate and un-represented he understood the proceedings.

37. However, during the testimony of some witnesses there was no translation to Kikamba language which could had recorded as the language he understood.

38. This court duty is to analyse, re-evaluate and arrive at its own conclusion.

39. The facts of the case were as set out in prosecution witnesses and accused testimony which is as follows:-

PROSECUTION CASE

40. The prosecution availed a total of four (4) witness to prove its case against the accused. It is necessary to summarize the testimonies of each prosecution witness.

41. PW1, H K N is the mother to M.M, the victim of the alleged sexual offence. She informed the court that on 21/10/2015, at 2:00 p.m., two other children, one a boy aged 6 years old, and one a girl known as MM aged 4½ years old came at her working place and she saw the small girl walking with difficulties. She was spreading her legs while walking.

42. PW1 further informed the court that she asked the boy what happened and the boy answered that he was in the house and when he came out he saw the child M.M walking with difficulties and the girl said that it was babu (grandfather) who 'slept on her' in babu's house. (Babu means grandfather).

43. PW1 stated that earlier on the material day, she had woken up, prepared breakfast and left for work and left the children alone with the accused. PW4 stated that she examined the child and saw a wound, blood and white substance in the vagina. She called a village elder who in then called the sub-chief who came and examined the girl and who in turn called police officers who arrested the accused person.

44. PW2 Francis Muange Muoki is the assistant chief, Kavumbu sub-location. He informed the court that on 21/10/2015, he was in his house when he was called by one Malika Kasimu, a village elder who told him that one NM had defiled a minor. He went to the home of PW1 and interrogated her. Later AP officers arrived and arrested the accused.

45. PW3, PC Collins Aoko was the investigating officer in this case and based at the Mbooni police station. He was at the station on 21/10/2015 at 4.00 p.m. when the OCS instructed him to collect a suspect already arrested for the offence of incest. PW3 accompanied by PC Kambona and PC Kamau proceeded to Utangwa and escorted the accused to the station.

46. PW3 further informed the court that the child, MM was referred for medical examination and doctor Patrick Mutinda filled the P3 form. PW4 APC Abdi Ismael is based at the Utangwa A.P post. On 21/10/2015, he accompanied APC Nahashon Mbusu to the accused home where they arrested the accused in the presence of PW1 and PW2.

47. The accused is an octogenarian. When placed to his defence, he stated that he will make sworn statement. He did not call any witness. The accused in his defence denied committing the offence. He asserted that PW1, who is his daughter in law had told him that she will cause him problems until he dies.

ANALYSIS AND DETERMINATION

48. For an offence under **Section 20(1) of the Sexual Offences Act**, it is an ingredient of the offence to prove the relationship between the accused and the victim of the alleged sexual offence. PW1 testified that MM was the grand daughter to the accused. The accused did not deny the fact and testified that PW1 was her daughter in law and therefore MM was her granddaughter.

49. The said relationship is covered under **Section 20 of the Sexual Offences Act**. The prosecution also adduced as evidence, an age assessment report which provides proof that MM was a minor aged 4 years and 10 months.

50. The minor, MM was treated and examined at Mbooni District Hospital. Doctor Mutinda filled the P3 form on 22/10/2015. The genitalia examination revealed that the minor suffered lacerated, swollen, tender and bruised labia minora/majora. The hymen was perforated. There were also bruises/lacerations around the clitoris and the hymen easily bleeding on touch.

51. The doctor also conducted High Vaginal Swap. Blood cells and pus cells were visible as well as presence of spermatozoa. The doctor opined that there was positive evidence of penetration which was forced. The hymen was freshly broken. The doctor also found that both the victim and the accused have a genital infection which is sexually transmitted.

52. The medical evidence provides proof, beyond reasonable doubt, that the minor MM was defiled. The presence of red blood cells and spermatozoa is clear evidence of a forced penetration. The hymen was freshly broken and easily bled upon touch. This corroborates PW1 evidence that she examined MM and saw a wound in her vagina. The minor was taken to hospital on the same day before taking a bath.

53. In the history it was reported that she had difficulties while walking. The quick action ensured that no evidence was lost particularly the presence of spermatozoa which is itself is a strong evidence of penetration.

54. The trial court found pertinent issue for determination as whether it was the accused who defiled the minor. The trial court made findings as hereunder. PW1 testified that on the material day, she woke up, prepared breakfast and left for work leaving her two children, a boy aged 6 years and MM alone with their grandfather (the accused). Later the two children came to her work place and she witnessed MM walking with difficulties.

55. Upon inquiring, the young boy told her that the minor MM told him that ‘babu’ (grandfather) had ‘slept’ on her. The boy did not record a statement and was not availed as a witness. The minor MM was also not availed as a witness. The minor MM was also not availed as witness. It presumed, on account of the children’s tender ages, they were not required to record their statements.

56. It further posed a question that, **did the failure to avail the said children under PW1 testimony as**

hearsay and fatal to the prosecution case? The trial court answer was that; **after a careful consideration of the evidence is no**. Reason, PW1 was able to testify that she witnessed MM walking with difficulties. She examined her and noted a wound in her vagina. That was corroborated by the medical evidence. Further, and of more importance, PW1 testified that she left the children with accused in the morning.

57. The trial court also observed that, the accused denied the offence. He did not deny being left with the children on the morning of 21/10/2015. The prosecution evidence that on 21/10/2015, the accused was alone in the homestead alone with the children was not controverted. His house, in accordance with PW1 was a few meters from PW1 house.

58. The accused therefore had the opportunity to count the offence as the only adult male person who was left with the children. Even without relying on any hearsay evidence, the evidence that the accused was left with the children, points to the accused person as the person who committed the heinous sexual act.

59. However there were other elements of procedure, fair trial and factors which trial court ignored which go to the root of the instant matter raised by appellant and apparent on record.

60. The victim allegedly aged four and a half (4 ½) years was never called as a witness! The alleged victim did not testify before the lower court! This was so despite the fact that the alleged victim's mother PW1 H K N claimed it was the alleged minor victim who told her that "babu slept on her in babu house". "Babu" being Swahili for grandfather. This part of her testimony was y77+-and still is hearsay hence inadmissible.

61. In this case, only PW1 the mother of the alleged victim, PW2 Francis Muange Muoki an assistant chief, PW3 police officer Collins Aoko and PW4 administration police officer testified. Even a crucial witness a boy aged 6 years who was apparently in the company of PW1 as per her testimony when she was interrogating the alleged victim was also not called as a witness!

62. The prosecution's failure to call vital and independent witnesses amounted to obstruction of justice and the lower court did not even invoke its powers conferred under Section 150 of the Criminal Procedure Code to call the alleged victim and the 6 year old boy.

63. See **JOHN KINYUA NATHAN –VS- REPUBLIC NYERI COURT OF APPEAL CRIMINAL APPEAL NO. 52 OF 2015, WAKI, NAMBUYE AND KIAGE, JJ.A, 25/01/2017,** where it was stated inter alia that:-

> **"As we see it, there is only one main issue of law relating to fair trial which the Appellant raised in ground 1 as follows:-**
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> **"The learned judge erred in law when she upheld (sic) the Appellant's conviction without considering that the case was not proved beyond any reasonable doubts as stipulated under Section 150 of C.P.C that no eye witness was (sic) involved in this case and the victim did not testify before the court". The learned judges went further to state:-"Only the mother of the child who is alleged to have had a grudge with the Appellant, two clinical officers and the arresting officer were called to testify. The issue then arises as to whether the Appellant was deprived of an opportunity to interrogate the evidence of his accusers and whether in the absence of the complainant the charge was provable. In his written submissions, the Appellant observed that the child was able to give information to her mother that she had been defiled and that it was the Appellant who did it using his penis. He wondered why the child could not have given the same story to the court and face cross examination. He also observed that, on the recorded evidence, there appears to have been another unnamed child who gave a similar story to their mother but was not called to testify. To make matters worse, he contended, a neighbor named Lydia who was supposed to corroborate the mother's story was not called to the stand. In his view, therefore, all those omissions rendered the charge unproved as there was no eye witness account to prove that he was involved."**

64. It is clear that the above scenario is strikingly similar to this case. The court of appeal went on further to explain that the court ought to have conducted a voire dire and make its findings as to whether the alleged victim could testify.

65. Moreover, the learned appellate judges went on to analyze situations when an intermediary would be needed, appointed by the court and subscribe to an appropriate oath, in which case the role of the intermediary would be to assist a complainant or an accused person to communicate with the court.

66. It is to be noted that the evidence presented by the intermediary to the court ought to be that of the witness and not the intermediary's. In the upshot, the Court of Appeal stated:-

> **"In the case before us, the child was a necessary witness both in determining the third element of the offence as to whether the Appellant was responsible, and also in determining whether she was a vulnerable witness and therefore needed an intermediary to speak on her behalf.**
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> **No reason was given for the failure to call the complainant in this case and the trial court made no finding on that crucial aspect of the case. The High Court on its part, as already stated, misdirected itself. If PW2 was to be believed, the child was able to inform her about her injury and the person responsible and so, as argued by the Appellant, she was capable of stating so to the court directly or through an intermediary. In the circumstances, the evidence of PW2 was at best hearsay as she was not the appointed intermediary."**

67. Therefore from the foregoing PW1's testimony cannot be taken as that of an intermediary and is hearsay hence inadmissible. The evidence adduced in the lower court is speculative, indirect, uncorroborated and purely circumstantial trying to link the Appellant herein with the offences charged out of MERE SUSPICION as no prosecution witness witnessed any such acts occur.

68. On analysis of the lower court proceedings, the PW3 police officer Collins Aoko was an incompetent witness to adduce crucial medical evidence, that is, exhibit 1 – Age assessment report, exhibit 2 – treatment card for the alleged victim, exhibit 3 – P3 form for the alleged victim and the accused and exhibit 4- accused's treatment card.

69. Firstly, no basis whatsoever was laid before the lower court either under **Section 33 or 77(1) and 77(2) of the Evidence Act** relied on by the prosecutor to warrant such production by a lay person in the field of medicine and not the makers thereof.

70 Secondly, no difficulty to secure the attendance of the doctors or medical practitioners was pleaded and the said police officer was clearly neither familiar with the handwriting of the makers thereof nor the medical terms contained therein. This caused a miscarriage of justice and denied the Appellant a fair hearing.

71. The police officer ought not to have purported to interpret the medical terms and could not even be cross examined on the same.

72. Thirdly, although the said police officer claimed the age assessment was done by one doctor Walumba, there is clearly no indication of the doctor's name on the document. From the stamp thereon, the document was allegedly prepared on 03/11/2015. It is to be noted that the Appellant had already been arraigned in court on 23/10/2015 when he pleaded to the charges hence the same is highly suspect as it may have been merely orchestrated to suit the charges.

73. Due to the Appellant's advanced age, that is noted to be 96 years, he was not afforded a fair trial since he has a problem with impaired hearing as loss of memory and had difficulties in cross examinations and the whole trial process. There was complaint that the Appellant's Constitutional rights envisaged under Article 50 of the Constitution were violated.

74. The Appellant was not afforded adequate time and facilities to prepare a defence as envisaged under **Article 50(2) (c0 of the Constitution.** The accused was ambushed when he was supplied with witness statements in court on 05/11/2015 which was the date appointed for hearing. The hearing proceeded without affording him the opportunity to go through the statements.

75. This is more so considering the statements are written in the English language which the Appellant could not read, write or even understand! This was also therefore against the provisions of **Article 50(3) of the constitution** which requires information to be given in a language that the accused person understands.

76. It is clearly discernible from the proceedings at page 1 during plea taking that a Kikamba interpreter by the name Clara had to be called in to interpret the charges. In addition, pursuant to the provisions of **Article 50(2) (j) of the constitution**, the Appellant ought to have been informed in advance of the evidence the prosecution intended to rely on and to have reasonable access to that evidence. This was therefore a travesty of justice.

77. Secondly, the Appellant ought to have been be represented by an advocate, as envisaged under **Article 50(2)(g) of the Constitution**, particularly so considering the gravity of the charges he was facing, age and hearing impairments see **CHENGO** case **SCOK** which was to the effect that; The Supreme court in **R –VS- KARISA CHENGO PET NO 5 OF 2015** In the above context, held that;

> **"It is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:**
>
> **-the seriousness of the offence;**
>
> **-the severity of the sentence;**
>
> **-the ability of the accused person to pay for his own legal representation;**
>
> **-whether the accused is a minor;**
>
> **-the literacy of the accused;**
>
> **-the complexity of the charge against the accused;**
>
> **In concluding on the above issue, it is our finding that in addition to the specific guarantee of legal representation afforded to an accused person by Article 50(2) (h) of the Constitution, there is now in operation an elaborate legal aid scheme that is in the process of implementation following the enactment of the Legal Aid Act no. 6 of 2016"**

78. An advocate ought to have been assigned to the accused person by the state and at state expense since a substantial injustice would otherwise result considering the Appellants age as the sentence involved is a sure death sentence in jail considering the Appellant's advanced age.

79. It was apparent to the lower court that the Appellant was over 80 years of age throughout the proceedings. (Kindly refer to page 3 line 13 of the lower court proceedings). It also became apparent during the mentioning of this matter before the court for directions that the accused has impaired hearing hence could not even properly follow the court's direction! No wonder the Appellant could not cross examine witnesses in the lower court.

80. This is apparent:-Page 5 line 5 of the lower court proceedings where the Appellant barely asked two (2) questions to PW1.Again at page 8 line 1 of the lower court proceedings, the Appellant did not manage to ask any questions to PW2.

81. At page 9 line 17 of the lower court proceedings, the accused clearly indicated that he was confused and would not ask questions to PW3. The lower court simply ignored this crucial revelation by the Appellant; and At page 11 line 3 of the lower court proceedings, again the Appellant asked no single question to PW4.

82. Moreover, it is to be noted from the court record that on 19/11/2015 there was no Kikamba interpreter in court. This means that the Appellant could not follow the proceedings on that day.

83. Firstly, on that day, the family of the Applicant and the complainant wanted to withdraw the charges against the Appellant. Secondly, a crucial application was made by the prosecution to have the investigating officer produce medical documents as exhibits.

84. It is clear that the accused could not comprehend the cited sections of the Evidence act to make a rejoinder and neither was he supplied with the case cited by the prosecution nor the same explained to him to enable him to even attempt to respond. He clearly needed to be represented by an advocate.

85. Thirdly, PW2 and PW3 went on to testify on that day without an interpreter for the Appellant! No wonder he never asked a single question to the said witnesses in cross-examination and he even confessed that he was confused!

86. The court finds that there was a mistrial and thus same renders the proceedings a nullity. The court agonized on whether to order a retrial, but after considering the galaxies of errors and blunders committed by the trial court, omissions by the prosecutor and the age of the appellant, I find that it is only fair to decline a retrial.

87. The court makes the following orders;

I. The conviction is quashed and sentence set aside.

II. The appellant is set at liberty unless otherwise legally held.

SIGNED, DATED AND DELIVERED THIS 29TH DAY OF NOVEMBER, 2017 IN OPEN COURT.

C. KARIUKI

JUDGE

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