Kaiyuhu v Republic (Criminal Appeal E023 of 2024)
[2025] KEHC 7951 (KLR) (26 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7951 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E023 OF 2024

DKN MAGARE, J

MAY 26, 2025

BETWEEN

ONESMUS WAHOME KAIYUHU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from the sentence of Hon. Lubia Merceline (PM) in Nyeri CMSO Case No. E037 of 2020. The Appellant was convicted on 08.06.2023. The appellant was sentenced to 15 years imprisonment hence this appeal. The Appellant was convicted with the offence of defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act*.

2. The particulars were that on diverse dates of February 2020 at Kihiko Village in Tetu Sub-county, within Nyeri County intentionally caused his genital organ, namely a penis to penetrate the vagina of LMN, a child aged 15 years. The appellant was arrested on 08.07.2020.

3. There was an alternative count irrelevant to this appeal. The appellant was found guilty and sentenced to 15 years imprisonment. He raised the following grounds of appeal:

    1. The learned trial magistrate erred in law and in fact in failing to find that the evidence presented by the Prosecution did not meet the required threshold to warrant the conviction of the Appellant.

    2. The learned trial magistrate erred in law and in fact in that despite claims that defilement the subject of this appeal resulted in the minor getting pregnant the prosecution failed to bring forth evidence by way of DNA that the pregnancy was as a result of the defilement.

3. The learned trial magistrate erred in law and in fact in that despite observing that the alleged issue born of the defilement was presented in court failed to exercise her discretion under Section 36 of the Sexual Offence Act.

4. The learned trial magistrate erred in law and in fact in failing to find that the failure of the prosecution to bring forth evidence of DNA which was all though at their disposal created doubt as to the culpability of the Appellant.

5. The learned trial magistrate erred in law and in fact in failing to find that a key element of the offence of defilement i.e. penetration was not proved to the required standard.

6. The learned trial magistrate erred in law and in fact despite discrediting the evidence of the investigating officer, and finding that the investigating officer did a lot of disservice in this matter and failed to find that issue ought to have been resolved to the benefit of the Appellant.

7. The learned trial magistrate erred in law and in fact while sentencing the Accused by referring to the impact of the complainant's life with regard to the resultant pregnancy out of defilement which pregnancy had not been ascertained at the trial.

8. The learned trial magistrate erred in law and in fact in sentencing the Appellant to 15 years imprisonment.

Evidence

4. PW1 was Nancy Muthoni Wambugu who testified that she asked for the complainant's mother to allow her to stay with the witness. The mother called the witness to go to Gichira. On Monday she enquired from the complainant whether she knew that she, the complainant was pregnant. One Nyambura asked for the complainant to go to a checkup. When the same was done, they found the complainant was pregnant. The complainant stated that the pregnancy was for baba Wanjugu. She was examined at Nyeri Provincial General Hospital. Later she gave birth to a baby. She relied on a post rape care form which she stated that an elderly man whom they met in a shamba forcefully held her. The child stated that the child was born on 15.12.2020.

5. The complainant testified as PW2. She stated that it was during midterm which was in mid-January in a year she cannot recall. She was stood down. The matter was adjourned to March 2021. She stated that in February 2020, she had gone to harvest food for rabbits on a parcel of land leased to them. She saw Wahome who came to where she was and did bad manners to her. She left the shrubs and left. Mama Doreen called and asked to go to their home. She was taken to hospital at Gichea. She never slept with someone else before the incident. She identified the appellant who is her uncle. She stated that she begat a baby. On cross examination, she stated that the appellant did bad manners to her but in October, which she was sure of. She stated that the place where the incident took place had no bushed but there are houses there. She stated that the appellant subdued her. She stated the appellant was a neighbour but he did not know him. This was surprising when she had started with the names at some stage. She also referred to the appellant as 'huyu'. She stated that she threw away panties, which were bloody. She stated that she self-recorded her statement but didn't mention a slasher. She also did not record that she threw away her clothes. She stated that she neither told the older sister or her father. She stated that she wanted the appellant to be put to jail so that she can go to school. She stated that she went to the police station on a Monday.

6. She remembered the incident took place in October. She stated that she did not frame the appellant and was not protecting someone else. She stated that she did not tell anyone since she feared they will

say it is a lie. She then changed her mind that it was in February 2020. She now remembered the name of the Appellant as wahome.

7. Dr. William Muriuki testified as PW3. He started working at PGH in 2017. He produced Rape Care form filled by Ms. Sarah Gichuki. The patient represented a sexual assault on two occasions. The assailant penetrated her in two occasions. The incident is said to have taken place on 14.2.2020. He produced the form and P3 form. On cross examination he stated that the history given was that the minor was penetrated twice.

8. PW4 PC Kennedy Maasai testified as the arresting officer, having arrested the Appellant on 7.07.2022. Cpl. Haron Kaboko testified stating that he was the investigating officer in this matter. On 7.05.2020 the case was minuted for him.

9. They arrested the suspect at 11 pm. The complainant was said to be 13 years at the time. It was stated that the incident took place in the appellant's land. The minor reported that she was herding livestock when the incident took place. According to him an aunt discovered the pregnancy. According to the witnesses the minor was defiled several times. The witness mentioned 8.7.2020.

10. The incident allegedly took place in January but no date was given. He did not know the exact date of birth of the minor's baby. The complainant's father had the baby's birth certificate but was not an exhibit. He stated that according to his investigations, the incident took place in several days in February 2020. In cross examination he confirmed that the incident was reported in May 2020. He stated that the place where the incident took place was fenced and no one can see through. There were said to be pedestrians on the road. The place is also 20 metres from the neighbors. The witness stated that the appellant lives in the land where the incident took place.

11. The Appellant was placed on his defence. The matter then proceeded after section 200 of the *Criminal Procedure Code* was complied with. The appellant opted to remain silent and did not call witnesses.

The Impugned Judgment

12. The court below in a terse judgment found the accused guilty. The court found that the investigating officer did a lot of disservice on the matter. The court lamented that the officer did not carry out DNA, even where the child had already given birth. It stated that the investigating officer did not do service as he did not do a better job in unearthing the case. That he was speculating and could have done a better job. The court found critical elements of the case were proved, that is penetration, age and identification. The court stated that the witness referred the appellant severally as Wahome meaning she is well known to him. She stated that the minor described the incident. The court found that the minor contradicted herself on the date of the incident. She stated that she insisted that the baby belonged to the appellant and the court after reading the notes believes her. She found the appellant guilty.

Submissions

13. The Appellant filed submissions on 13.11.2024. He lamented that the court failed to rely on section 36(1) of the *Sexual Offences Act*. He stated that the issue of pregnancy was not followed up. The minor gave birth on 15.12.2020. The appellant invited the court to rely on the case of Stephano Ngigi Maigwa v Republic [2022] eKLR where Mwongo J, stated as follows:

> 23. In Kassim Ali, however, the trial court found that the medical examination was conducted immediately after the offence was committed but the report filled in two months later. Here the evidence is that the report to police and the medical examination were made when the complainant was pregnant; when it was useless for purposes of determining whether the offender was the one who penetrated the complainant, and making the causal connection.

14. They posited that the crucial witnesses, such as mama Doreen or Rosemary Nyambura were kept away since they knew the real culprit. The appellant continued as follows:

> "24. In addition, the state argued on the strength of the case of the Court of Appeal decision in Benjamin Gitau v Republic [2011] eKLR that there was no necessity of a DNA test as penetration which is the main element of the offence was proved through direct evidence. In Gitau's case the report of the defilement occurred immediately after the incident due to distress calls from the victim(s), there was no issue of pregnancy, and the accused were arrested following the distress calls. The evidence of penetration was shown by tears and bleeding in the vaginal opening and the inflamed labia. Here, there was nothing to connect the penetration by whoever was the perpetrator with the offence.
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> 25. In her judgment, the trial magistrate noted that section 124 of the *evidence Act* "was amended to allow conviction on the uncorroborated evidence of a complainant with merited reasons"

15. They argued that at the age of 15, the complainant can know whether there was penetration. They state that bad manners were not explained.

16. The state filed submissions on 06.05.2025, long after the time limit for filing. Unfortunately, they were in a format that is not readable.

Analysis

17. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

18. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya v Republic [1957] EA 336 as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

19. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw

its own conclusions. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated as follows on the duty of the court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post, [1958] E. A. 424."

20. Section 8 of the *Sexual Offences Act* provides as follows:

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

(2) ....

(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 of not less than twenty years.

(4) ...

(5) ...

21. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington v DPP [1935] A.C 462 pp 481 comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

22. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the

party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

23. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 [1970], at pages 361-64 stated that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

24. The court found and actually had doubt on the offence. The first doubt is the question whether the appellant herein penetrated the minor herein. Section 60 of the *evidence act* provides as follows:

60(1) The courts shall take judicial notice of the following facts—

(m) the ordinary course of nature;

25. The child was born on 15.12.2020. The child could have been earliest conceived in March 2020. There is no possibility, at least in nature that the child was in fitro for over 11 months. Secondly, the doctor was given an exact date, 14.2.2020. This could only have resulted in a birth in November. The human gestation period is 40 weeks from the last menstrual period (LMP). It can be expected to go even to 42 weeks. However, there is doubt that a birth in December can relate to conception in February 2020. Doubts could have been eliminated had DNA testing been carried out. Section 36(1) provides as follows:

Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

26. The second and most disturbing part was that the complainant was prevaricating between dates and incidents. She is said or is it her, that the incident took place on 14.02.2020. However, the investigating officer was told of several incidents. This resulted in the charge being referred to as 'on diverse dates'. The doctor was told of two incidents. The minor spoke of one incident in a neighbour's plot near the Appellant's home. However, the investigating officer was told that this was on the appellant's land. The minor told the investigating officer that she was herding livestock. This was on a Friday when she was supposed to be in school, if 14.2.2020 is to be believed. At some stage, the minor did not know the name of the assailant and at another stage, it was Wahome. Her story, however traumatic it was, was not cogent.

27. The court stated that she believed the complainant. However, there was no scintilla of evidence. The court rightly condemned the investigating officer for shoddy investigation. The evidence was shaky. The court did not have a reason to believe the witness. She neither saw nor heard her. While addressing a scenario where the court below did not have advantage, Kiage JA stated as follows in the case of

Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR:

> " I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge. I think that this further widens our latitude for departure where necessary."
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> In this matter the court below did not have any advantage of hearing witnesses. The court herein thus has more latitude.

28. It must be clear that it is not enough for evidence of a single witness to be tendered. The evidence must be believable and corroborated. Section 124 of the *Evidence Act* provides as follows:

Where the evidence of the alleged victim is 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.

29. Every reasonable doubt must be given to accused, not the state. It is irrelevant what the gut feelings are or how the court wishes the investigations should be done. The sentence meted out was a minimum sentence. In the case of R v Lifchus [1997]3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

30. The failure to conduct DNA when the case was, borderlines, must be construed against the state. It must be presumed that had that evidence been called, it would have been against the state. In Republic v Sagirai (Criminal Case E049 of 2022) [2023] KEHC 938 (KLR) (26 January 2023) (Judgment), Wendoh J, posited as follows:

Section 143 of the *Evidence Act* provides that a fact can be proved by the evidence of a single witness unless a statute requires otherwise. As held in Bukenya & others v Uganda [1972] EA 549 that where important witnesses are not called by the prosecution; to testify, the court may draw on inference that the evidence of that important witness may have been adverse to the prosecution case. In Donald Majiwa Achilwa & 2 others v Reublic [2009] eKLR, the court said:

The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case."

31. The net effect is that the prosecution evidence was too weak, too poorly investigated. A simple DNA test will have sufficed or at the very least, tied up the loose ends in terms of dates. The Appellant opted to remain silent. His right against self-incrimination is sacrosanct. This was addressed in the case of Mini Cabs & Tours Company Limited v Attorney General & 2 others (Petition 450 of 2019) [2022] KEHC 11207 (KLR) (Constitutional and Human Rights) (16 June 2022) (Judgment), HI Ong'udi, J posited as follows:

Speaking on the right against adducing self-incriminating evidence the court in the case of Republic v John Kithyululu [2016] eKLR opined as follows:"7. The question of self-incrimination has been dealt with in several cases. In the case of Richard Dickson Ogendo & 2 others v Attorney General & 5 others [2014] eKLR, Majanja J stated as follows:-"To my mind the, the privilege of an accused person not to incriminate himself, protects against compulsory oral examination for the purposes of extorting unwilling confessions or declarations implicating the accused in the commission of the crime. The purpose of protection against self-incrimination was summed up by the US Supreme Court in Miranda v Arizona 384 US 436 [1996]"...8. In the case of Pennsylvania v Muniz 496 US 582, the United States Supreme Court further held as follows:-"The privilege against self-incrimination protects an "accused from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature," Schmerber v California, 384 US 757, 384 US 761, but not from being compelled by the State to produce "real or physical evidence," id at 384 US 764."

51. Equally the court in the case *Republic v Mark Lloyd Steveson Criminal Revision 1 of 2016*; [2016] KEHC 4022 (KLR), expounded on the right as follows:

> " The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigations. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society's acceptance of the inviolability of human personality. . . . .30. I believe that this statement captures the position under the Kenyan Constitution: The right against self-incrimination covers both testimonial as well as documentary evidence. As long as the evidence sought to be adduced is or was compelled either in court

or outside court by an Investigating Officer or some other person in authority, such evidence is given due to testimonial obligation and will be excluded from the criminal trial of the accused person who is so compelled.31. It follows that any questioning of or eliciting of any documents or things from an accused person without the proper administration of caution or under circumstances in which the rules on confessions would apply is covered by the right against self-incrimination."

52. The consensus of the existing jurisprudence as seen in the cited authorities is that an accused person's right against self-incrimination constitutes giving oral or documentary evidence that will be used against that person.

32. The court cannot, ipso facto hold the exercise of this right against the accused. The right to prove the case is on the state. The burden of proof is on the state. In case there is doubt, such doubt is to be resolved in favour of an accused person. The principle is that the prosecution must prove the guilt of an accused. Viscount Sankey L.C in the case of H.L. (E) woolmington v Dpp [1935] a.c 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters, that:

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

33. The appeal on conviction is therefore allowed. The conviction is set aside. It is not necessary to go into the question of sentence. In any case, the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment), stated as follows:

> " Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.
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> 66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law.

> A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed."

34. The sentence could have been proper had the offence been proved.

Determination

35. The consequence of the foregoing is that the court makes the following orders:

    a. The appeal on conviction is allowed. The conviction and sentence are set aside. The Appellant is set free unless otherwise lawfully held.

    b. The file is closed.

DATED, SIGNED AND DELIVERED AT NYERI ON THIS 26TH DAY OF MAY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Kimani for the State

Mr. Muhoho for the Appellant

Court Assistant – Michael

M. D. KIZITO, J.