Nyariaro v Republic (Criminal Appeal E019 of 2023)
[2024] KEHC 2790 (KLR) (7 March 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E019 OF 2023

WA OKWANY, J

MARCH 7, 2024

BETWEEN

ONYANCHA MOMANYI NYARIARO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment and Conviction in Nyamira SO No. E030 of 2022 at Nyamira Chief Magistrate's Court delivered by Hon. W. C. Waswa, Senior Resident Magistrate on 27th September 2022)

JUDGMENT

1. The Appellant herein, Onyancha Momanyi Nyariaro, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on 25th day of May 2022, at Nyamira South Sub-County within Nyamira County, intentionally and unlawfully caused his genital organ, penis to penetrate the genital organ, vagina of N.O. (particulars withheld), a child aged 14 years.

2. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the charge were that on 25th day of May 2022, at Nyamira South Sub-County within Nyamira County, intentionally and unlawfully touched the genital organ, vagina of N.O. (particulars withheld), a child aged 14 years with his genital organ penis.

3. The Appellant denied both the main charge and the alternative charge. The matter then proceeded to a full trial in which the Prosecution called a total of 4 witnesses as follows: -

4. PW1 E.N. (particulars withheld), the complainant's mother, testified that the victim was 14 years old. She produced the minor's birth certificate (P. Exh1) indicating that she was born on 29th May 2007.

PW1 testified that she knew the Appellant as he resided in Egesieri where she also stayed. She testified that she had attended a night vigil at a funeral near her home 24th May 2022 and returned home the following day when she found that the complainant had been defiled.

5. PW1 reported the matter to the chief and later to the police. The victim was examined at the hospital where it was confirmed that she had been defiled.

6. PW2 N.O. (particulars withheld), testified that she was 14 years old and that she knew the Appellant as he lived next to their home. She explained that she was on the night of 25th April 2022 asleep at home when she was suddenly awakened by the Appellant who was beside her and in the process of removing her clothes.

7. PW2 testified that she was able to see the Appellant using her torch light. She screamed as the Appellant inserted his penis into her vagina and her brother heard her scream and came into her bedroom before the Appellant ran away.

8. PW2 further testified that a neighbour, that she did not name, also came and chased away the Appellant who was thereafter arrested the following day. She was escorted to the Chief's office where she confirmed that it was the Appellant who had defiled her. She was taken to Nyamira Police Station and Nyamira County Hospital.

9. PW3, Rodgers Onganga, a Clinical Officer at Nyamira County Hospital examined the victim (PW2) on 26th May 2022 and found that her hymen was broken and that she had bruises on the labia minora and foul-smelling vaginal discharge. He concluded that there was penetrative injury as the victim had been defiled.

10. PW4, No. 95892, Cpl. Vanince Michira, a police officer then attached at Nyamira Police Station, Gender desk investigated the case and issued the complainant with a P3 Form. She also recovered the complainant's clothes and visited the crime scene where he saw the hole used to access the house. PW4 produced a maroon trouser (P. Exh4), an orange skirt (P. Exh5), a panty (P. Exh6) and a black vest (P. Exh7).

11. At the close of the Prosecution's case, the trial court found that the Appellant had a case to answer under Section 211 of the Criminal Procedure Code and placed him on his defence. He elected to give sworn evidence and did not call any witnesses.

The Appellant's (Defence) Case

12. DW1, the Appellant testified that he was aware of the case against him but only knew the complainant when he was arrested. He stated that he did not commit the offence and that the case had been fabricated.

13. At the end of the trial, the trial court rendered a judgment in which it found the Appellant guilty on the main count of defilement. The Appellant was convicted and sentenced him to serve 20 years' imprisonment.

14. Dissatisfied with the trial court's decision, the Appellant filed the present appeal vide Petition of Appeal filed on 19th June 2023 wherein he listed the following grounds of appeal: -

    1. That the learned trial magistrate erred in law and fact by not finding that the Prosecution had not proved their case beyond reasonable doubt.

2. That the learned trial magistrate erred in law and fact in convicting the Appellant of the offence of defilement notwithstanding that the evidence before the trial court, when properly analysed and evaluated, did not support a conviction.

3. That the learned trial magistrate erred in law and fact by failing to afford the Appellant a fair trial.

4. That the learned trial magistrate erred in law and fact in convicting and sentencing the Appellant on insufficient evidence.

5. That the conviction and sentence by the learned trial magistrate was unfair and unjust to the Appellant.

6. That the learned trial magistrate erred in law and fact by giving a sentence that was harsh, excessive and not founded in law given that he never committed the alleged offence given that the complainant was 17 years of age contrary to the *Sexual Offences Act*.

7. That the learned trial magistrate failed to appreciate that the Prosecution case was riddled with contradictions.

8. That the learned trial magistrate erred in law and fact by failing to evaluate, analyse and appreciate that the medical evidence was not enough to sustain a conviction.

15. The Appeal was admitted for hearing before this Court and parties directed to canvass it by way of written submissions.

The Appellant's Submissions

16. The Appellant observed that the Prosecution did not call the evidence of the complainant's brother and the neighbour who were crucial witnesses since the complainant alleged that they allegedly saw and chased him away when she screamed following the attack.

17. The Appellant argued that he was not informed of his right to legal representation which amounted to a violation of his right to fair trial under Article 50 (2) (g) of *the Constitution*. He maintained that he is a lay man yet the trial the record did not indicate if he understood the proceedings. For this argument, the Appellant cited the case of *Macharia vs R. HCCRA* No. 12 of 2012, *Dominic Kimaru Tanui v R*, (2014) eKLR and *W.M.M. v R.* (2014) eKLR.

18. The Appellant submitted that the medical evidence did not link him to the alleged crime because he was not subjected to medical examination to establish if he defiled the complainant. He added that the alleged hole on the mud-wall that was allegedly used to open the door to the house where the complainant was sleeping could have been created to implicate him in a case.

19. On sentence, the Appellant submitted that the mandatory sentence imposed on him not only fettered the Court's discretion but also violated his rights under Article 28 of *the Constitution* besides going against the *Judiciary Sentencing Policy Guidelines*. He referred to the cases of *S. vs Malgas* (2001) 2 (SCA) 1235 and *Fredrick Otieno Odero vs R*, (2021) eKLR where it was held that, courts must consider the circumstances of a case in sentencing and mete lenient sentences to first offenders.

20. Reference was also made to *Evans Wanyonyi Wanjala v. R* (2019) eKLR where it was held that minimum mandatory sentences deprived the court of their legitimate jurisdiction to exercise their discretion in sentencing. The Appellant urged the Court to comply with the provisions of Section 333

(2) of the Criminal Procedure Code in computing his sentence. He also urged the court to allow the appeal and quash/set aside the conviction and sentence.

The Respondent (Prosecution's) Submissions

21. The Respondent submitted that the prosecution proved its case to the required standards as all the ingredients of the offence of defilement were proved. It was submitted that the birth certificate (P. Exh1) confirmed that the complainant was 14 years old at the time of the offence and that the medical evidence proved that there was penetration as defined under Section 2 of the Act. Reference was made to the decision in *Mark Oiruri Mose v. R*, (2013) eKLR where it was held that penetration needed not be complete to prove the offence of defilement.

22. On identification, it was submitted that the complainant was able to see and identify the Appellant using her flash light and that she also positively identified him after his arrest. It was the Respondent's case that there was no possibility of mistaken identity since the Appellant was well known to the complainant as he was their neighbour.

23. On fair hearing, the Respondent submitted that the Appellant's right to legal representation under Article 50 (2) (g) was not violated because as he actively participated in the proceedings and cross-examined the witnesses which means that he understood the proceedings. The Respondent argued that no injustice was occasioned to the Appellant as he was furnished with all the relevant documents that the Prosecution intended to rely on.

24. It was submitted that there were no contradictions in the Prosecution's case and that the sentence meted on him was legal since the law provides for a mandatory minimum sentence. The Respondent urged this court to dismiss the Appeal.

Analysis and Determination

25. The duty of a first appellate court is to re-examine, re-analyse and re-evaluate the entire evidence tendered before the trial court with a view to arriving at its own independent findings and conclusions while bearing in mind the fact that it neither heard nor saw the witnesses testify first hand. [See *Peters vs Sunday Post* 1978) E.A. 424].

26. I have carefully considered the trial Record and examined the exhibits produced by the Prosecution witnesses. I have also considered the grounds of appeal and the rival submissions of the parties. I find that the main issues for my consideration are as follows: -

    i. Whether the Appellant's right to fair trial was violated.

    ii. Whether the Prosecution proved the offence of defilement against the Appellant to the required standard.

    iii. Whether the sentence was legal and appropriate.

i. The Right to Fair Trial

27. The right of an Accused person to fair trial are provided for under Article 50 of *the Constitution* of Kenya which stipulates as follows: -

    (2) an accused person has a right -

    (g) to choose, and be represented by an advocate and to be informed of this right promptly.

28. Article 50 of *the Constitution* imposes a fundamental duty on the court to promptly inform an accused person of his right to be represented by legal counsel. Indeed, it is only after being informed of the right to legal representation that an accused person can decide whether he will be represented by counsel or not.

29. The legal framework for implementing the requirements under Article 50 is contained in the *Legal Aid Act*, No. 6 of 2016 which, at Section 43 thereof, outlines the duty of the Court as follows: -

Duties of the Court

(1) A court before which an unrepresented accused person is presented shall—

a. promptly inform the accused of his or her right to legal representation;

b. if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and

c. inform the Service to provide legal aid to the accused person.

(1A) In determining whether substantial injustice referred to in paragraph (1) (b) likely to occur, the court shall take into consideration—

(a) the severity of the charge and sentence;

(b) the complexity of the case; and

(c) the capacity of the accused to defend themselves.

(2) The Service shall provide legal aid to the accused person in accordance with this Act.

(3) Where a child is brought before a court in proceedings under the *Children Act* (No. 8 of 2001) or any other written law, the court may where the child is unrepresented, order the Service to provide legal representation for the child.

(4) Where an accused person is brought before the court and is charged with an offence punishable by death, the court shall, where the accused is unrepresented, order the Service to provide legal representation for the accused.

(5) The provision of legal representation under sub-section (4) shall be subject to the criteria for eligibility for legal aid under this Act.

(6) Despite the provisions of this section, lack of legal representation shall not be a bar to the continuation of proceedings against a person.

30. The right to legal representation, as a prerequisite to fair trial, was aptly explained by the *African Commission in Avocats Sans Frontiers (on Behalf of Bwampanye) v. Burundi, African Commission on Human Rights*, Comm. No. 213/99 (2000) thus: -

> "...Legal assistance is a fundamental element of the right to fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case...the right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor

shall have equal opportunity to prepare and present their pleas and indictment during the trial. They must in other words, be able to argue their cases ...on an equal footing."

31. Courts have however held that the right to legal representation is not absolute and may be subjected to specific limitations. In *S v. Halgryn* 2002, (2) SACR 211 (SCA) para 11, Harms JA stated as follows: -

> "Although the right to choose a legal representative is a fundamental one and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations."

32. Similarly, in *Karisa Chengo & 2 Others v. R*, Cr Nos. 44, 45 & 76 of 2014, the Court of Appeal held thus: -

> "It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. *The Constitution* is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the *David Njoroge Macharia case* (2011) eKLR seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise." (emphasis added)

33. From the above decision, it is clear that the main consideration in according an accused person the right to legal representation is whether substantive injustice will occur. In determining whether substantial injustice may occur, the court must subject the circumstances of the case to a three-fold test, namely; it must consider the gravity of the offence which means that an accused person must be facing a serious charge whose punishment is death, the complexity of the case and whether such a person is capable of affording legal representation.

34. In the present case, the trial record does not indicate whether the Appellant was informed of his right to legal representation. I have however considered the circumstances of the case which are that the Appellant was charged with the offence of defilement and the alternative charge committing an indecent act with a child aged 14 years.

35. Both offences attract minimum mandatory sentences of 20 years and 10 years respectively. The sentences are however subject to consideration of the mitigating circumstances of the case upon conviction since courts may in certain instances depart from prescribed mandatory sentences. (*S vs. Malgas 2001* [2] SA 1222 SCA 1235 para 25).

36. I have also considered the conduct of the trial and I note that the Appellant was duly informed of the charges against him in a language that he understood and was also furnished with the all the documentary evidence that the prosecution intended to rely on. I therefore find that the Appellant was aware of the case against him as he correctly stated in his defence. I note that he also competently cross-examined all the prosecution witnesses which is an indication that he comprehended the proceedings before the trial court.

37. It is my further finding that the mere failure, by the trial court, to inform the Appellant of his right to legal representation was not fatal to the outcome of the case. This finding is fortified by the fact that the charge that the Appellant faced trial was not capital in nature so as necessitate the mandatory requirement that the Appellant be accorded legal representation. I therefore find that the test of substantial injustice fails and hold that the trial was conducted in a fair and just manner. I do not find any evidence of violation of the Appellant's right to legal counsel or fair trial.

ii. Proof of the offence of defilement.

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

> 8. Defilement
>
> (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.

39. The ingredients of the offence of defilement were stated in the case of *George Opondo Olunga vs. Republic* [2016] eKLR to be the age of the victim, proof of penetration and the identification of the perpetrator. (See also *Charles Wamukoya Karani vs. Republic*, Criminal Appeal No. 72 of 2013 [2015] eKLR)

40. The age of a victim in a sexual offence trial is paramount in proving the offence of defilement as it determines the subsequent punishment to be meted on the accused person. The importance of proving the age of the victim was stated in the case of *Hadson Ali Mwachongo v. Republic* [2016] eKLR where the Court of Appeal held thus: -

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim."

41. The age of a victim in sexual offence cases can be proved through several ways. The Ugandan Court of Appeal outlined the various ways in which the age of a minor can be established in defilement cases in *Francis Omuroni vs. Uganda*, Criminal Appeal No. 2 of 2000 as follows: -

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

42. In the instant case, the Prosecution presented the evidence of PW1, the minor's mother, who testified that her child was fourteen years old. She produced the victim's birth certificate (P. Exh1) which I have perused and I note that it shows that the minor was born on 29th May 2007. This means that she was still fourteen years old or a few days shy of 15 years at the time the offence was committed on 25th day of May 2022. I find that the evidence adduced in support of the minor's age was sufficient. I find that the first ingredient of the offence was proved to the required standard.

43. On the ingredient of penetration, Section 2 of the Act defines penetration thus: -

> The partial or complete insertion of the genital organ of a person into the genital organs of another person.

44. Penetration is proved through the testimony of the victim and corroborated by medical evidence. It may also be proved through the sole testimony of the victim in accordance with the provisions of Section 124 of the *Evidence Act*.

45. In this case, PW2 testified that the Appellant defiled her as she was sleeping in her mother's bedroom. She testified as follows: -

> "...I woke up at night and I saw the accused beside me removing my clothes. I had worn a skirt and trouser. He started removing my clothes. I had a torch and I used it to see him. The accused removed my trouser and skirt and under pant. We were in my bed. The accused lay on top of me as I screamed and he inserted his penis into my vagina. I don't know if he used protection...."

46. PW3, the Clinical Officer, found that the minor suffered penetrative injury from his findings. He also found that the minor had a broken hymen, bruises on her labia minora and foul-smelling discharge. He produced the P3 Form (P. Exh2a), the Outpatient Card (P. Exh2b) and Laboratory Results (P. Exh3) which show that the minor sustained the said injuries.

47. I am satisfied that the ingredient of penetration was also proved to the required standard.

Identification

48. Identification is the link that connects an accused person to a particular criminal act. In this case, the incident is reported to have taken place at night/early morning at 0300hrs. Courts have held that evidence of identification at night must be considered with close circumspection. In *Nzaro v Republic* (1991) KAR 212 and Kiarie v Republic (1984) KLR 739 the Court of Appeal held that identification at night must be watertight in order to justify a conviction.

49. PW2, the victim, stated that she was able to identify the Appellant because she used a torch to see his face. PW4, the Investigating Officer, testified that the minor positively identified the Appellant at the police station following his arrest. PW1 and PW2 stated that they knew Appellant as their neighbour. This means that the evidence presented by the Prosecution was not merely that of identification but recognition.

50. It is trite that the Court may also rely on the victim's sole evidence of identification to convict an accused person if such evidence is cogent enough to show that the accused committed the offence. In *Abdala Bin Wendo and Another vs. Republic* (1953) 20 EACA pg.166, the Court of Appeal of Eastern Africa held: -

> "Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respectively identification especially when it is known that the conditions for owing a correct identification were difficult. In such circumstances what is needed is other evidences, whether it be circumstantial or direct, pointing to the guilty, from which a judge or jury can reasonably conclude that the evidence

of identification although based on the testimony of a single witness, can safely be accepted as free from possibility of error."(Emphasis added)

51. The question that arises is whether the description of the ordeal by the victim, PW2, when considered alongside the lighting conditions at the time of the incident could have provided a conducive environment for the positive identification of the Appellant. In other words, can the identification be said to have been free from error?

52. In addressing the above issue, I find guidance in the principles set out in the English case of *R. vs Turnbull* (1971) QR 227 where it was held as follows: -

> "... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... 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." (Emphasis added)

53. I have considered the evidence of PW2 with the above principles in mind and I note that the complainant testified that she sleeping in her mother's bedroom only to be awakened by the Appellant who was in the process of removing her clothes – skirt, trouser and underpants. She testified that she used a flash light to see the Appellant's face. She stated that she screamed before her brother and a neighbour came into the bedroom and chased away the Appellant away.

54. My analysis of the circumstances under which the victim PW2 encountered her assailant were in the nature of an ambush in the dead of the night. The complainant's account of the sequence of events leading to her defilement creates the impression that the encounter was brief and quick because no sooner had the stranger laid on top of her than she screamed before her brother and a neighbour came to chase him away.

55. It is also instructive to note that the incident happened at night when it was dark with the torch as the main source of light. This court has to satisfy itself that the circumstances of the case were such that the complainant was able to positively identify her assailant. Considering the complainant's narration of the sequence of events leading to her assault, which I have already noted were in the nature of an ambush, I am not satisfied that the identification of the assailant was free from error. I say so because several questions and gaps arise from the facts surrounding the case. For example, at what point did the complainant get the torch? Was the torch presented in evidence? Was the complainant in a position to get and switch on the torch? At what point did the complainant's brother and neighbour come to the complainant's rescue? Did they see the assailant? Why were they not called as witnesses to corroborate the complainant's testimony?

56. The above questions were left lingering with no answers from the prosecution. I am therefore not convinced that the prosecution proved the identity of the perpetrator of the offence beyond reasonable doubt.

57. I find that, in the circumstances of this case, it was necessary for the Prosecution to call further evidence to corroborate the victim's evidence of identification. According to the victim's testimony, her brother and a neighbour chased her assailant away. As I have already stated in this judgment, there is the unanswered question of why the 2 crucial witnesses not called by the prosecution.

58. In the case of *Oloro and Daltanyi vs. Regina* [1956] 23 23 EACA 49 the court addressed the issue of material witnesses and held: -

> " Prosecution have a duty to call material witnesses. If they fail, the presumption is that if the evidence had been called that evidence would have been unfavourable to prosecution."

59. The case of *Bukenya & Others vs Uganda* [1972] E.A.549 is the locus classicus on the issue of failure to call crucial witnesses where the Court of Appeal for Eastern Africa held that:

> " The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."

60. In *Julius Kalewa Mutunga vs Republic* [2006] eKLR, the Court of Appeal held that:

> " ...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

61. In the case of *Bukenya & Others vs Uganda* (supra), the court was clear that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will therefore only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, adverse inference will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.

62. Under Section 143 of *Evidence Act* (Cap 80) Laws of Kenya, no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

63. In the case of *Keter vs Republic* [2007] 1 EA 135 the court held inter alia that:

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

64. I have perused the trial court record of proceedings and judgment and I having noted the gaps in the prosecution's case, I find that the failure to call the victim's brother and neighbour who allegedly chased away the Appellant on the night in question dealt a fatal blow to the Prosecution's case considering the fact that the incident took place at night and in the dark when positive identification by the complainant could have been compromised.

65. Even though this court does not doubt the claim that the victim was defiled on the night in question, I find that the identification of the assailant was problematic owing to the brief and quick encounter she had with the assailant and the fact that the point at which she was able to switch on the torch was not clear.

66. My take is that the failure, by the Prosecution, to call these two material witnesses to fortify the evidence of identification ought to be construed in favour of the Appellant. It is the finding of this Court that the evidence of identification was not watertight and I therefore find that all the ingredients of the offence were not proved to the required standard.

67. Having found that the third ingredient of the offence was not proved to the required standards, I find that the third issue for determination, which is the issue of the legality of the sentence meted on the Appellant, is now moot.

68. In the end, I find that this Appeal is merited and I therefore allow it. Consequently, I set aside the conviction and the sentence passed by the trial court. I direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

69. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 7TH DAY OF MARCH 2024.

W. A. OKWANY

JUDGE