Mwanzia v DPP (Criminal Appeal E033 of 2021)
[2024] KEHC 5480 (KLR) (8 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5480 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E033 OF 2021

SM MOHOCHI, J

MAY 8, 2024

BETWEEN

JOSHUA MBUVA MWANZIA ..... APPELLANT

AND

DPP ..... RESPONDENT

(Being an Appeal from the judgement Conviction and Sentence of Hon Y.I Khatambi Principal Magistrate delivered on 25th October, 2021 in Nakuru Chief Magistrate's Court Sexual Offence Case No. E104 of 2020)

JUDGMENT

Introduction

1. The Appellant, Joshua Mbuva Mwanzia filed the instant Appeal on the 4th November 2021, and the Appeal was admitted on the 31st January 2024 and set down for hearing, subsequently without the leave of the Court filed an undated amended petition of Appeal together with his written submissions on the 23rd February 2024.

2. The Appellant was on the 30th of June 2020, charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offence Act No. 3 of 2006. The Particulars of the charge are that-

> On the 14thJune, 2020 at Nakuru East Subcounty within Nakuru County, intentionally and unlawfully caused his penis to penetrate the vagina of PW a girl aged 13 years old.

3. The Appellant also faced an alternative charge of committing Indecent Act with a child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006. The Particulars are that:

> On the 14th June, 2020 at Nakuru East Subcounty within Nakuru County, intentionally and unlawfully touched the vagina of PW a girl aged 13 years old.

4. The Appellant pleaded not guilty to the charge and was subjected to a full trial from the 30th September 2020 to the 25th October, 2021, with the Prosecution calling five (5) witnesses while the Appellant gave sworn evidence in defence was cross-examined and the case was closed where he was convicted on the main charge and sentenced to serve imprisonment of twenty (20) years.

Trial Court

Prosecution's case

5. PW1, the complainant testified that on 14th June, 2020, at around 8:00am she was at home conducting her chores, when the Appellant person called and requested her to go to his home. She complied. On arrival, the Appellant gave her Kshs 200 and requested her to look for change. She went to a nearby shop, the Appellant gave her Kshs 100.

6. He then informed her that he loved her, he began caressing her breasts and vagina. He then pulled the complainant to the bed, caused her to lie down, removed her trouser and proceeded to insert his penis in her vagina. She went back home and did not tell anyone about the incident.

7. The complainant's mother found a message in the complainant's phone. The complainant informed her that, the number belonged to the Appellant. A report was lodged with the police. The complainant was escorted to the hospital where she was examined and treated.

8. PW2, the complainant's mother testified that on 25th June, 2020 she was at home when she heard the complainant's phone ring. She answered the phone, the caller greeted her and hanged up. The phone rang 3 more times. At around 7:00pm she received another call from the said number. A while later a message was received asking the minor to go to the gate. She stated that she received several messages from the same number.

9. That PW2 confronted the complainant, who informed her that, the caller and sender of the message was the Appellant. On further interrogation the complainant informed her that, the Appellant gave her money and that she slept with him on 14th June. She lodged a report with the police. The Appellant was then arrested and charged.

10. PW3, the investigating officer, testified that she received a report to the effect that she suspected that he daughter spoke to men. She presented the phone and the messages. She read the messages and noted that the sender was requesting to meet PW1 and further inquire on her welfare.

11. PW3 interrogated the minor who informed her that the messages were being sent by a neighbor who had once bought potatoes from the mother. That on the material day, the Appellant sent the complainant for airtime and allowed her to keep Kshs 100. He then defiled her. She visited the scene in the presence of P.C Mungai where they arrested the Appellant.

12. PW4, a Doctor, attached to the Nairobi Women Hospital, testified that the subject had been examined and treated at the facility. External genitalia were normal. Her hymen was torn at 2, 6 and 9 O'clock position. A thick white discharge was noted. Based on the examination the finding was that the minor had been defiled.

13. PW5, a police officer, testified that on 26th June, 2020 at 7:30pm he was at the police station. He accompanied the investigating officer and P.C Koima to the accused person's house with the intention of arresting the accused.

14. The accused was identified by the complainant's mother, he was then arrested.

Defence case

15. The Appellant gave sworn evidence and denied committing the offence. He stated that the complainant and her mother were his neighbors. He stated that the complainant went to his house only once when she was sent by her mother.

16. He denied giving the complainant money and stated that, he never had sexual intercourse with the complainant. He stated that, PW2 was his friend and that he used to lend her money.

17. That, the situation took a turn for the worse when he denied to give PW2 money. The situation worsened when PW2's husband died. He went on to state that the PW2, insisted on taking the jembe to his house, instead she sent PW1. PW2, became arrogant two weeks prior to the arrest. That at the time of the arrest P.C. Mungai informed him that the complainant's mother was demanding Kshs 50,000. He declined to pay the said amount leading to the current charges.

18. The Court thereafter found the Appellant guilty as charged with the prosecution having proved their case beyond reasonable doubt.

19. The Appellant being dissatisfied with the entire Judgement filed this Appeal seeking that this Court allows his Appeal, quashes the lower Court's conviction, sentence be set-aside and the Appellant be set at liberty.

20. The Appeal was argued based on the following three (3) grounds in the Amended Grounds of Appeal filed on the 23rd February 2024 reproduced in verbatim: -

    i. THAT the learned trial magistrate erred in law and in fact, by relying on uncorroborated, incredible, contradictory and unreliable evidence to convict the appellant.

    ii. THAT the learned trial magistrate erred in law and in fact, by failing to appreciate that in totality the prosecution case was not proved beyond any reasonable doubt as prescribed by law.

    iii. THAT the learned trial magistrate erred in law and in fact, by imposing an excessive sentence that was not based on the circumstances of the Case.

Appellant's Case

21. The Appellant in his submissions dated 23rd February 2024 submitted on three (3) framed issues that;

    i. Contradictory and incredible evidence;

    ii. Want of proof of penetration.

iii. Imposition of excessive sentence imposed in mandatory terms.

22. With regards to ground one of the Appeal the Appellant sought reference to a reference case by the Court of Appeal of Nigeria in David Ojeabuo V Federal Republic of Nigeria which held that: -

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of

evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

23. Further reference was made to the case of Augustine Njoroge Vs Republic Criminal Appeal Number 185 of 1982 where the Court of appeal held that;

> " Contradicted evidence is unreliable" the above stated case shows clearly that is trite law that where the evidence is contradicted or inconsistent, the Court should not rely upon it".

24. That, various Courts have pronounced itself on the issue, with more consideration being as to when contradictions can be described as material. And that, all these decisions, it is agreeable that contradictions in the evidence adduced in Court not only assails the credibility of the evidence adduced but also mutilates the truthfulness and credibility of the witness.

25. The Appellant submits that, under the cancellation rule that when a witness makes contradictory statements on the same question of fact, the statements cancel each of her and, therefore, do not amount to evidence of fact.

26. That, it is trite law that, material contradiction refers to a contradiction between two or more pieces of evidence or testimony that is significant or relevant to the Case at hand. In every legal proceeding evidence crucial for establishing facts and determining the truth of a matter. When there are material contradictions in the evidence presented therefore, it can raise doubts about the credibility or reliability of the evidence or the witnesses providing it.

27. That the case before Court, was one that was marred with a lot of contractions that touched on the following areas:

    a) The nature of the alleged scene of crime.

    b) The date of arrest

    c) The medical evidence.

28. That, in order to understand the contradictions in these three areas and others, the Appellant invites the Court to analyze with the individual evidences produced by prosecution witnesses.

29. That, PWI testified in her evidence with the following material contradictions arose.

    a. In page 5 line 5 PWI stated;

    > " ..... he pulled me to his bed in the bedroom. He caused me to lie on the bed facing up ..... this was confirmed by PW3 in page 11 line 20 where she said that the complainant told her that the accused made her lie on the bed. However, on cross examination in page 6 line 24 she states that there was no bed".

    b. She stated in page 4 line 15 that;

    > " the incidence happened at around 0800hrs, on the other hand she reported at the hospital happened at 1000hrs as encapsulated in the evidence by adduced in Court by PW4 in page 14.

c). That, PW1 in page 6, line 18 states that;

> " it was her first time to go to the accused person house but at the same time in the same line states that her mother had sent her another time to send a jembe to Joshua at his house.

d). That, PW1 states that;

> " her mother had sent her to Joshua place to take a jembe whereas on the of her hand her mother PW2 in page 9 line 6 that she had never sent the complainant to the accused house that had three rooms, sitting room, kitchen and a bedroom. However, the investigating officer in11 states that the house had a bedroom and a sitting room,

e) That, in page 8 line 13, PW2 states;

> " my daughter told me that Joshua used to give her money and slept with her on 14.06. on the other hand, PWI told the Court in page 5 line 18 that she did not tell the mother that Joshua had slept with her.

f) That, PW2 States in page 8 lines 17 that;

> " she was issued with a P3 form on 26th June, 2020 however the P3 form was dated 29th June, 2020. On the same note she indicates that they were sent to hospital the following day meaning that the same could have been dated not later than 27th June, 2020.

g) That, PW2 states that, she got the first communication on 13th June, 2020 on cross-examination. However, in her evidence she clearly stated that she got the communication on 25th June 2020 which manifests an untruthful and unreliable witness.

h) PW 4, the doctor stated in her testimony on page 15 line 5 that;

"the patient is in good condition. Duration of injury was one week caused by blunt object." That this is in total contradiction with the evidence adduced in Court that the incidence took place on 14th June 2020 12 days after the incidence and not one week.

i) That, PW4 stated that she made a finding of penetration based on broken hymen whereas on the other hand admits that hymen can be broken by other means.

30. It is the Appellant's submission that, these and other contradictions are verily material, as they casted considerable doubts in the whole evidence adduced. The contradictions on how the alleged scene of crime lookedlike and whether there was a bed or not is very material, how could even the complainant who alleged to have been defiled contradict on this?

31. These inconsistencies within a single witness's testimony raise doubts about her credibility and her evidence is therefore unreliable, besides this, the contradiction as to when the P3 form was issued also raises considerable doubts and puts the case on the limelight of a frame-up case. The PW2 indicated according to her testimony that they were issued with the P3 form on 26th June, 2020 but the same was dated 29th June, 2020.

32. It is the Appellant's further submission that, the Contradictions had far-reaching implications for the outcome of legal proceedings and in this case the learned trial magistrate erred in law and in fact, as

a professional jurist, by failing to carefully assess and address contradictions in evidence in order to ensure a fair and just resolution of the case. The contradictions in this case also left the evidence of the complainant in this case uncorroborated.

33. That the Appellant associated with the Case law of Chila v republic 1967 EA 722-723 where the appellate judge held:

> " The judge should warn himself of the danger of relying on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, that the conviction will honestly be set aside unless Court is satisfied that there has been no failure of justice"

34. In regard to the second ground, as to whether the prosecution's case was proved beyond reasonable doubt? The Appellant contends that, one of the critical ingredients forming the offence of Defilement as judiciously held in the case law of Dominic Kibet Mwareng vs. Republic [2013] eKLR) is the proof of penetration and that, the offence of defilement is provided for under Section 8(1) of the *Sexual Offences Act* No. 3 of 2006 which conviction can only be sustained if penetration is proved.

35. The Appellant enumerates the various inconsistencies as follows;

i. That there was no bed but a mattress,

ii. That the incidence took less than a minute.

iii. That the accused was in a short but in the next line states that he was in a trouser.

iv. That she felt pain and declined to proceed with the act.

v. That the description about the alleged defilement that was given by the complainant cannot be used to sustain a conviction. The same raises the following doubts:

vi. How could the complainant confuse on where the incidence happened: whether on a bed or on the floor?

vii. How could have penetration be made for the first time in less than a minute?

viii. How could she have failed to detect blood if indeed the hymen was broken for the first time?

ix. How could she fail to give an account of what happened after the incidence?

x. The evidence failed relationship by the complainant mother.

36. That, it is trite law that the complainant should laconically give details on how the alleged act happened, as was held in the case of Julius Kioko Kivuva vs. Republic [2015] ekLR where the Court held in part as follows:

> " Evidence of sensory details, such as what a victim heard, saw, felt. and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. ..."

37. That the absence as such sensory details and specificity in the evidence of PW 1 rendered it ambiguous and could not be used to secure a safe conviction and that, the evidence of PW1 although sworn, lacked corroboration.

38. The Appellant refers to the decision by the Appellate Court in the case law of Johnson Muiruru Vs. Republic 1983 KLR 445 that,

> " where a child of tender years gives sworn evidence no corroboration is required; I wish to associate myself with the same decision which in part also held that the assessors must be directed that it would be unsafe to convict when there was no corroboration".

39. The Appellant attacks the medical evidence adduced in Court by PW4, the P3 form and a PRC form. That, the P3 form produced was dated 29th June, 2020 but was issued on 27th June, 2020, the date of the P3 form is indicated by the issuing authority, how then the contradiction?

40. That, despite the medical officer conclusion, that there was penetration, it was on the basis of absence of the hymen only. She admitted in cross-examination that, a hymen can be broken by any other means.

41. Reference is made to the case of PKW Vs. Republic [2012] eKIR, where the Court of Appeal while resolving the issue of the absence of a hymen observed;

> " Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences, we have dealt with, Courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding and gymnastics, there can also be a natural tearing of the hymen".

42. That the medical evidence adduced by the prosecution did not create any nexus between me and the alleged offence. No seminal or any other form of masculine discharge was seen by the complainant during and after the incidence or during the medical examination therefore the prosecution failed to prove penetration beyond any reasonable doubt as required by law.

43. That, the legal burden of proof in criminal cases never leaves the prosecution's backyard as was held in the case law of R. V. KIPKERING ARAP KOSKE & ANOTHER [1949] 16 EACA 135, where the Court of Appeal for Eastern Africa held that:

> " The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."
>
> My lord guided by this, the legal standards of proof in criminal matters is that of beyond any reasonable doubt. The test of proof of beyond any reasonable doubt was meant to ensure that no one suffers in the hands of law. bundles of decisions have been made both locally and internationally at trial and appellate levels emphasizing on the need to ensure that criminal trials do not precipitate miscarriage of justice.
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> In the Case of Republic Vs. Stephen Kiprotich Leting & 3 Others Criminal Case 34 Of 2008 [20091 Eklr, Maraga J (as he then was).
>
> Captured the purpose of the requirement of proof of beyond reasonable doubt and opined thus:

"Given the importance of this case and for the benefit of the public, I wish to state a truism in our criminal jurisprudence: out of 100 suspects, it is better to acquit 99 criminals than to convict one innocent person. Because of that our law requires that for a conviction to result, the prosecution must prove beyond reasonable doubt the case against an accused person. That is why many suspects are released. Courts therefore decide cases on evidence as by law required. If they fail to do that the critics will be the first ones to lambaste them with allegations of incompetence."

44. Further reference is made by the Appellant to the United States, Supreme Court decision in RE WINSHIP 397 US 358(1970}, AT PAGES 36l-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 stigmatized 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".

45. That, further to this, the Supreme Court of Canada in RVS LIFCHUS {1997)3 SCR 320 discussed presumption of innocence and what constitutes reasonable doubt as follows;

> " 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 reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for very long time and is a part of our history and traditions of justice 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 guilt of the accused beyond reasonable doubt. On the of her 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."

46. The Appellant urges this Court will agree with his submission that, the prosecution failed to prove its case beyond any reasonable doubt and that, the trial Court relied on the evidence of PW1 which was contradictory and not corroborated was evidence of a single witness urging the Court to consider the decision of the Appellate Court in Musikiri Vs Republic (Nyeri) HCCRA No. 120 Of 1986 where the Court held inter alia:

> " it has been held again and again that the case of alleged sexual offences. it is really dangerous to convict on the evidence of the woman or a girl alone, it is dangerous because human experience has shown that girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute; such stories are fabricates for all sort of reasons and sometimes for no reason at all..."

47. With regards to the third ground that the sentence was imposed, was in mandatory terms with reference being made to the following authorities

    i. Happyton Mutuku Ngui Vs Republic (2019) eKLR,

    ii. Dismas Wafula Kilwake V R [2018] eKLR,

    iii. Hashon Bundi Gitonga Vs Republic (2020) eKLR

    iv. Philip Mueke Maingi and 5 Others

    v. Samuel Achieng Alego Vs Republic, High Court Mombasa Criminal Appeal Number 187 of 2015,

    vi. Allister Anthony Pereira Vs State of Maharashtra

    vii. Santa Singh V State of Punjab [1976] 4SCC 190

    viii. The Sentencing policy guidelines 2016.

48. The Appellant submits in a nutshell thus urges that he was a first offender, since incarceration he has not committed an offence, that he has been disciplined while in prison, that he is an aged man with a sick and weak wife who solely rely on him and that his family is thus ready to receive him back urging that the Court finds in favor of his appeal, quashes the conviction and set him free.

Respondents Case

49. The Respondent had been availed multiple opportunities on the 31st January 2024, and on the 20th February 2024, to comply and file written submissions, with the final opportunity having been on the 18th March 2024, a day the judgment date was fixed, and the Court directed the submissions be filed within 24 hours.

50. Its unfortunate to note that, the Respondent failed in this important aspect, by not complying until this judgment was prepared.

Analysis and Determination

51. It is the duty of this first appellate Court for an exhaustive examination of the trial Court proceedings in criminal cases as was restated in the case of Charles Mwita –vs- Republic, C. A. Criminal Appeal No. 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that;

> " In Okeno v R [1972] E.A. 32 at page 36 the predecessor of this Court stated: - "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] EA. 336) and to the appellate Court's own decision on the evidence".

52. Being a 1st Appeal Court, I must, weigh conflicting evidence and draw conclusions, (Shantilal M. Ruwalla –v- R [1957] EA 570) it is not the function of a 1st Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Courts findings and conclusion; 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."

53. This Court has carefully considered the entire record of Appeal and shall not regurgitate verbatim what transpired but rather consider the issues immerging against the grounds argued.

On the issue of the charges not having been proven beyond reasonable doubt

54. This Court is well guided by Jesse Njage J in Mohamed Boru Guyo v Republic [2022] eKLR citing with Approval in J.W.A v. Republic 2014 the Court held that:

> " corroboration in sexual offences is not mandatory. It is therefore clear from these authorities that medical evidence to connect an accused person to the offence of rape is not necessary for a conviction to be entered. The law is that the Court can convict on the basis of oral or circumstantial evidence. More so, the Court can convict on the basis of the evidence of a single witness if it believed that the evidence was trustworthy. All that the Court is required to do is to warn itself of the dangers of convicting on the evidence of a single witness and convict if it is fully satisfied that the evidence points to the culpability of the accused.
>
> The Court of Appeal in Chila v. Republic (1967) E.A 722 articulated this position and held that:
>
> "The Judge should warn ... himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless Court is satisfied that there has been no failure of justice."

55. In the premises, the argument by the Appellant that the evidence was uncorroborated is sustainable in law if there was some other evidence to support the charge even in the absence of medical evidence.

In the second issue as to whether the sentence imposed was harsh and excessive.

56. It is trite law and in tandem with Para 7.17 of the Sentencing Policy Guideline 2016 that where a mandatory minimum sentence is prescribed the Court does not have discretion and must met out the prescribed sentence as a minimum. In this instance this Court finds no fault in sentencing by the Trial Court.

57. Section 8(3) of the *Sexual Offences Act* is couched in minimum terms what in law is called mandatory minimum which in this instance is "imprisonment for not less than twenty (20) years" it thus follows that the Appellant was sentenced to what was minimum and that the trial Court had no upper limit that it could not impose on the Appellant. This Court thus finds the same not being excessive in any way or harsh and that the ground of appeal and all arguments made thereon fails and the same is dismissed.

Disposition

58. This Court notes that, the Trial Court failed to warn itself on reliance on the uncorroborated single witness evidence and that the cocktail of contradictions revolved around the events of the 14th June, 2020 which this Court finds to have been substantial and significant.

59. The unsafe character of convicting an accused person on the basis of a single witness uncorroborated evidence, calls for careful consideration by the Trial Court and whenever substantial contradictions emerge in this instance a trove of evidence that was ignored includes the alleged 100 shillings given to the complainant that was never availed or presented and maybe the phones were rich in the data that would have corroborated what might have transpired between the complainant and the Appellant.

60. In the absence of the medical evidence, the lack of corroboration of evidence relating to what transpired on the 14th June, 2020 at Mzee Wanyama area, Nakuru East Subcounty within Nakuru County, that the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of PW a girl aged

13 years old, the conviction such as this would rightly be deemed to have been an unsafe conviction subject to setting aside.

61. To cite Maraga CJ emeritus (as he then was judge) in the Case of Republic Vs. Stephen Kiprotich Leting & 3 Others Criminal Case 34 Of 2008 [20091 Eklr

> " Given the importance of this case and for the benefit of the public, I wish to state a truism in our criminal jurisprudence: out of 100 suspects, it is better to acquit 99 criminals than to convict one innocent person. Because of that our law requires that for a conviction to result, the prosecution must prove beyond reasonable doubt the case against an accused person. That is why many suspects are released. Courts therefore decide cases on evidence as by law required. If they fail to do that the critics will be the first ones to lambaste them with allegations of incompetence."

62. I accordingly find that, the second ground of appeal succeeds, the prosecution failed to prove this case beyond reasonable doubt and that, the trial magistrate was in err by failing to explicitly warn himself on the fact and explicitly observe that the Court was persuaded as to the truthfulness of the sole witness whose evidence was uncorroborated but the basis of the conviction.

63. The Court accordingly quashes conviction and set-aside the twenty-year (20) imprisonment sentence imposed, the Appellant shall forthwith be set free unless, otherwise lawfully held.

It is so ordered.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 8TH MAY 2024

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MOHOCHI S.M

JUDGE

Quorum;

Applicant- Present

Ms Jacky Prosecution Counsel for the state

Schola; CA