Muli v Republic (Criminal Appeal E012 of 2022)
[2024] KEHC 10771 (KLR) (18 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10771 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E012 OF 2022

FR OLEL, J

SEPTEMBER 18, 2024

BETWEEN

JOSEPHAT NYAMAI MULI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(BEING AN APPEAL FROM THE CONVICTION AND SENTENCE DELIVERED ON 30 th DECEMBER 2022 BY HON K.KENEI (RM) IN MACHAKOS CMCR (S.O) NO 21 OF 2019)

JUDGMENT

A. Introduction

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* of 2006. The particulars were that on the 26th day of July 2016 in Mwala Sub County within Machakos County, intentionally and unlawfully caused his penis to penetrate the anus of JNG a child aged 15 years old

2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* of 2006. The particulars were that on the 26th day of July 2016 in Mwala sub county within Machakos county, intentionally touched the anus of JNG a child aged 15 years old.

3. During trial the prosecution called five witnesses who testified in support of their case. The appellant was placed on his defence, gave sworn evidence and called one witness in support of his case. The trial magistrate considered all the evidence adduced and found the Appellant guilty of the offence of defilement and proceeded to sentence him to 20 years imprisonment.

B. Facts At Trial

4. PW1 JNG , testified that he was a student at [Particulars withheld] special school located with Machakos county and was born on 26th July 2004. On 26th July 2016 he was in school and was asleep on the last bed near the window at one of the dormitory of the said school. The accused called him through the window and asked him to open the door slowly and follow him to his room located behind the kitchen. He did so and when he reached the accused house, the accused removed his trouser, showed him his penis, he applied saliva and oil on the complainant's anus, proceed to insert his penis in his anus and proceeded to have anal sex with him. When done the appellant took a towel and wiped PW1 anus with it. The following morning, the complainant reported this matter to his head boy one M, who in turn reported the incident to Madam M, the deputy head teacher.

5. The deputy head teacher (PW3) summoned PW1 and he narrated to her what had transpired. She instructed him to go to class and later called him back and they went and had the matter reported at the local police station. PW1 later was attended to at Katanga hospital, where he was examined by the doctor and treated. Later the accused was arrested by the head teacher and he confirmed PW1 was a person known to him. In cross examination PW1 stated that the incident had occurred at night and could not recall the number of students who were in the dormitory on the said night. Further the caretaker was off duty and one Matole was holding his fort, but was asleep. PW1 also confirmed that the accused's house was near the dormitory.

6. PW2 GKM stated that he was a teacher at [Particulars withheld] special school. On 26.07.2016 he reported to work and later was called by the deputy principal Madam CM and when he went to her office, he found her accompanied by teacher Joan and PW1. She briefed him that PW1 had been defiled by the appellant, who was the school cook and PW1 also re narrated to them what had transpired. They reported the incident at Katanga patrol base and later took PW1 to the hospital, where the doctor observed that PW1 was bruised in the anal area. The following day as he was driving his motor cycle to school, he meet the accused person and gave him a lift to work. Later in the day the accused was arrested and handed over to the police. PW2 confirmed that he was in charge of the boy's dormitory and also confirmed that the said dormitory had about 30 students on each wing.

7. Upon cross examination, PW2 confirmed that the incident had occurred at night, he was not aware if other students had heard the accused call PW1 and the dormitory usually had a caretaker but on the material day he was off duty. PW2 also confirmed that he had not witnessed the accident but PW1 had positively identified the accused as the assailant.

8. PW3 CKM, the deputy Principal of [Particulars withheld] special school stated that on 26.07.2016 she was on duty, when PW1 came to her office at about 9.00am and reported to her that he had been defiled by the accused person in the anus. She felt that she could not handle the case alone and called teacher Joan and PW2 and had PW1 narrate what the appellant had done to him. She called the principal, who was away from school and he advised that the matter be reported to the police immediately. The following day the principal came and locked the accused inside the Kitchen before calling the police to come and arrest him. The accused was the school cook and had a room beside the Kitchen. PW3 further confirmed that each dormitory had a caretaker but on the material night the caretaker of the complainant's dormitory had taken a day off and was not present when the incident occurred. She further confirmed that the accused person was known as Josephat Nyamai Muli but was commonly known to the students as "Bosco". Upon cross examination PW3 confirmed that she was not present during the incident and was not sure if any other student heard the appellant call out PW1.

9. PW4 Wilson Kimanzi Ngungu stated that he was a clinical officer based at Katangi health center and had 5 years of work experience. On 26.07.2016 he had examined PW1, who alleged to have been defiled by a person known to him, while at school. He examined the genitalia, which he found to be normal but on the anal region, the victim had superficial bruises around the anal opening. They further undertook laboratory examination, which confirmed presence of red blood cells, pus cells gram positive and coccobacilli, which signified infection. Based on physical examination and laboratory tests results, he formed the opinion that PW1 had been defiled in the anus. He filled the P3 form and produced it as Exhibit 1. Upon cross examination he confirmed that he did not examine the accused person and did not know the kind of weapon he had used to penetrate the accused person

10. PW5 PN confirmed that this case was reported to their station on 26.07.2016 by two teachers, who had accompanied PW1. The said student was mentally challenged but could speak and he narrated how the accused had defiled him the previous night. On 27.06.2016, he arrested the accused and upon searching his house he found a bottle of oil, alleged to have been used during the incident. Further the accused confessed to have committed the offence and asked that they resolve the matter out of court. PW5 confirmed that PW1 was 12 years old and produced his birth certificate as Exhibit P2. In cross examination PW5 confirmed that he did not witness the incident but upon visiting the scene noted that the accused house was about 40 meters away from dormitory. He also had not taken photographs of the scene nor did he recover any clothing from PW1.

11. The appellant was placed on his defence and stated that he worked as chef at a certain hotel and denied defiling PW1. On the material day he left work in the evening and spent the night at his home. The following day while walking to school he met PW2, who gave him a lift on his motor cycle. Later while in the kitchen the principal came, locked him inside and called the police on him. He also believed the age of PW1 was 19 years and not 12 years as shown in the birth certificate. He further stated that his name was not “Bosco” and the student’s dormitory had a lock metal door and 2 security guard and it was therefore not possible to have called PW1 without attracting their attention. He also denied residing within the school. The appellant further blamed PW3 for framing him and believed she couched PW1 to lie about him as they had a grudge arising from refusing to accept her advances to be her lover.

12. Upon cross examination, he confirmed that he worked as a chef at [Particulars withheld] special school, but denied being known as “Bosco”. The dormitory to the changing room was about 50m away and PW1 knew him well. He did not have any documentation to show that he had signed out of school on the material day but was sure that after work he had left at 5.00pm and the school watchman and the other chef could affirm to this fact. He reiterated that he had been framed by PW3 as he had refused her love advances. DW2 Jacinta Nyamai. confirmed that the accused was her husband and on the material night of 25.07.2016 he came home in the evening and slept at home. Later he returned to work on 27.07.2016, where he was arrested. In cross examination she confirmed that the accused nickname at home was “Bosco”.

13. The trial court considered the evidence adduced and found the Appellant guilt of the offence of defilement. The Appellant was allowed to mitigate and was thereafter sentenced to serve twenty (20) years imprisonment. The Appellant being dissatisfied by the conviction and sentence filed his Amended petition of Appeal on 21.02.23, raising the following grounds of Appeal ;

    a. That the learned Trial Magistrate erred in fact and law by convicting and sentencing me yet the case is riddled with contradiction and inconsistences.

    b. That the learned trial magistrate erred in fact and law by failing to find the witnesses were unreliable, untrustworthy and therefore incredible.

c. That the learned trial magistrate erred in both fact and law by failing to appreciate that key elements of the offence were not proved.

d. The learned Trial Magistrate grossly erred in fact and law by disregarding my cogent defence.

e. That the learned trial magistrate erred in fact and law by failing to appreciate that this was a case of clear frame-up.

f. That, key and vital witnesses in the case were not brought to court.

D. The Appeal

14. The merits of this Appeal was canvassed by way of written submissions. The Appellant submitted that the trial Magistrate erred in convicting him on evidence which was full of contradiction and inconsistencies. It was inconceivable that all the thirty students in the dormitory and security guards did not see or hear him talk to PW1 and that was the surest proof that nothing had occurred and put into doubt the truthfulness of the PW1 to PW3. The appellant further faulted the trial Magistrate for failing to consider the merits of his defence that he was off duty and was not within the precinct of the school, which too had been confirmed by PW2. PW5 also had stated that he received a report of the incident on 26.07.2016, but purported to have visited the crime scene on 27.06.2016, which was one month before the incident occurred and this too also confirmed the fact that he had been set up and the case based on purely on vendetta perpetuated by PW3. Reliance was placed on *Bakare v State* (1987) 1 NWLR (Pg 52) 579 , *MTG Vrs Republic* Criminal Appeal Number E067 of 2021 (2022) KEHC 189 (KLR) & Criminal Appeal No 76 of 2012 *Philip Muiruri Vrs Republic*

15. The appellant further submitted that the evidence of the clinical officer (PW4) did not prove penetration. Anal membrane was light and was predisposed to bruises and tear even at the slightest friction, including that of rough faecal matter. The anal bruise therefore did not prove defilement and/or penetration and that piece of evidence did not corroborate the assertions made by PW1. The appellant also faulted the prosecution for failing to call key witnesses including; Mutuku, the head boy, any of PW1's dormitory mates, Teacher Joan, who was a born again and upright teacher, the head teacher and the two security guards who were on duty on the material night and this went to show that they had something sinister up their sleeves and therefore the evidence adduced should have be taken with pinch of salt.

16. The final issue raised was that PW1 had testified in March 2020 and stated that he was 19 years old. That meant that in 2016, he was 16 years old and that meant that he had been charged and sentenced under the wrong provision of the *sexual offences Act*. He should have been charged under section 8(1) as read together with section 8(4) and not 8(3) of the *sexual offences Act*, No 3 of 2006. Based on the above analysis, the appellant prayed that the court finds that his conviction was not safe and proceed to set aside both the conviction and sentence as passed by the trial court

C. Analysis & Determination

17. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by The Court of Appeal case of *Okeno – v – Republic* (1972) EA 32 where it was stated as follows: -

> " An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function of the 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 conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

18. In the case of *Republic v Edward Kirui (*2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of *Murugan & Another v State by Prosecutor*, Tamil Nadu & Another (2008) INSC 1688 where the case of Bhagwan Singh v State of M. P. (2002)4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

19. Having considered the lower court record, the grounds of appeal and the submissions of the appellant, I do find the following as issues for determination;

    a. Whether the prosecution proved their case beyond reasonable doubt?

    b. Whether the sentence passed should be reviewed?

20. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller v. Ministry of Pensions* (1947) 2 All ER, 372 stated as follows:

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

21. The ingredients for the offence of defilement can be summarized as follows;

    a. Age of the victim (must be a minor),

    b. Penetration and

    c. Proper identification of the perpetrator.

22. On the age of the victim, The Court of Appeal in *Edwin Nyambogo Onsongo v. Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think

that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added).

23. Similarly, in in *Hadson Ali Mwachongo v. Republic* [2016] Eklr;

> " 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. In *Alfayo Gombe Okello v. Republic* Cr. App. No. 203 of 2009 (Kisumu). This Court stated as follows;
>
> > "In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."

24. Also, in the case of *Joseph Kieti Seet v Republic* [2014] Eklr the court held that;

> " It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of *Francis Omuroni v Uganda*, Court of Appeal Criminal Appeal No 2 of 2000, it was held thus:
>
> > "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..."

25. Rule 4 of the *Sexual Offences Rules*, 2014 also provides that:-

> " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents."

26. In this case, though PW1 stated that he was 19-year-old, the birth certificate (Number 165XXXX) identified by PW1 to PW3 and admitted into evidence by PW5, confirmed that PW1 was born on 10.03.2004 and as at July 2016 when the incident occurred was 12 years. Age was therefore sufficiently proved. The appellant's submissions that PW1 was 19 years is therefore not correct and his testimony to that effect must also be understood from the point that PW1 had special needs and was mentally slow, but could communicate as confirmed by PW5.

27. On the issue of penetration, the same is defined in section 2 of the *Sexual Offences Act* as;

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

28. The PW1 stated that on the material night, he was asleep in the dormitory and his bed was the last one, near the door. The appellant called him, asked him to slowly open the dormitory door and accompanied him to his room, which was next to the kitchen. Once there, the appellant removed his trouser, showed him his penis, which he inserted in his anus after applying saliva and oil. Once

done the Appellant took a towel and wiped PW1's Anus and released him to go back to sleep. The following morning PW1 reported this incident to the head boy one Mutuku, who in turn directed him to see PW3, the deputy principal. PW1 was taken to hospital and indeed P4 confirmed that he had been penetrated in the anal region, which had superficial bruise around the anal opening. To ascertain penetration, he called a swab which was analyzed and it showed presence of red blood cells, pus cells, gram positive and Coccobacilli and these results confirmed his findings.

29. The evidence of PW4 scientifically corroborated the evidence of PW1 and it fully established that penetration had been sufficiently proved.

30. On the issue of identification, the Court of Appeal in the case of *Peter Musau Mwanzia v The Republic* 2008 eKLR expressed itself as follows:-

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness , in seeing that the suspect at the time of the offence can recall very well having seen him earlier on before the incident"

31. Both PW1 - PW3 were persons who knew the Appellant well as they were within the same set up at [Particulars withheld] Special school. The appellant also in defence confirmed that PW1 knew him and specifically stated that, "PW1 was well known to me and I to him". Though the evidence in place shows that PW1 is a mentally challenged child, PW5 stated that he was well oriented and could communicate well. The evidence adduced established that the parties were not strangers as appellant was a cook employed at the said school and it was also confirmed that his nick name was known as "Bosco". This fact too was also confirmed by his wife DW2. PW1 identification of the appellant was therefore solid and safe, he was a person well known to him and did not delay to inform the school authority of what had transpired.

32. The Appellant raised four primary issues in his submission's, that the evidence adduced was inconsistent and contradictory in nature thus it was not safe for the court to rely on the same, secondly that key prosecution witnesses were not called to testify, that he had been framed and finally that the trial court had erred in failing to consider his evidence in defence.

33. The Appellant did allege that PW1 to PW4 did give contradictory and inconsistent evidence relating to his presence in school at the time of the incident, age of PW1, and lack of conclusiveness of the medical evidence, which evidence in totality when considered made the witnesses unreliable and whose evidence, the court ought not to have relied upon to convict him. As was noted in *Twehangane Alfred v. Uganda*, Crime App. No. 139 of 2001, [2003] UGCA, 6:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

34. Also in *Joseph Maina Mwangi v. Republic* CA No. 73 of 1992 (Nairobi) the Court of Appeal held that: -

> " In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the *Criminal Procedure Code*, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

35. The evidence of the prosecution was cogent and direct. PW1 personally knew the appellant, who was a cook at their school and immediately reported this incident to the school administration. The complaints age was proved by his birth certificate, and the fact that the appellant was present in school on the material night too was proved. The other contractions noted were minor and did not point to deliberate untruthfulness of the prosecution witnesses. The appellant also undesirably picked out singular sentences and considered them in isolation from the rest of the statements and wrongly analyzed the same, yet the flowing narrative reveal otherwise.

36. As regards the appellants assertion that key witnesses were not brought to court and it made the prosecution case weak.The prosecution is required to avail to the court all relevant evidence to enable the court make an informed decision based on the evidence available. However, there is no legal requirement on the number of witnesses to prove a fact. Section 143 of the *Evidence Act* (Cap 80) Laws of Kenya provides that :-

> 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.

37. In the case of *Bukenya & Others v Uganda* [1972]EA 549 the court addressed itself thus:-

    a. The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

    b. That the Court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.

38. Similarly in *Keter v Republic* [2007] 1 EA 135 the court held inter alia thus:-

> " 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."

39. It is evident here that the prosecution did in fact call the material witnesses whose evidence as a whole it assessed to be sufficient. The appellant on the other hand is entitled to call his defence witnesses without direction from the prosecution. The evidence adduced was sufficient to establish the appellant's guilt, without the prosecution having to calling other independent witnesses and I do therefore find that there was no lacunae in not calling the said extra witnesses.

40. The appellant also did aver that the trial Magistrate had failed to consider his defence that he was away from school and was not the assailant. This defence could not hold as the appellant had been positively identified and placed at the scene of crime. His defence of being away from school therefore could not hold and was rightly rejected by the trial court.

41. As regards the sentence, This Court is guided by the principles set out in the Court of Appeal case of *Bernard Kimani Gacheru v. Republic* [2002] eKLR where it was stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

42. Sentencing is also a discretion of the court of law but the court should look at the facts and the circumstances in the entirety so as to arrive at an appropriate sentence. The Court of Appeal in *Thomas Mwamba Wanyi v Republic* (2017)eKLR cited the decision of the Supreme Court of India in *Alister Antony Pereira v The state of Maharastra* at paragraph 70 – 71 where the court held;

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

43. Under the current sentencing jurisprudence, the provision of section 8(1) as read together with provisions of section 8(3) of the *Sexual Offences Act* No 3 2006 and legislation that was in force before commencement of *Constitution* of Kenya 2010 must be considered with adaptation, qualification and exception when it comes to the mandatory minimum sentence and in particular when the said sentences do not take into account the dignity of the individual as mandated under Article 27 of *Constitution* and as appreciated in the Francis Muruatetu case and applied by courts in several cases. See Christopher Ochieng Vrs Republic Kisumu CA Criminal Appeal No 202 of 2011 and *Jared Koita Injiri Vrs Republic* Kisumu CA Criminal Appeal No 92 0f 2104.

44. The appellant however should also note that where circumstances of the case are aggravated, such as the instant case, the court in its discretion can still hand down the sentence prescribed by the *sexual offences Act* if upon proper exercise of sentencing discretion is considered and consideration of facts of each case, such sentence is deserved or merited. See *Dismas Wafula Kilwake & Another Vrs Republic* (2018) Eklr, *Kamusyi Ngulu Vrs Republic* (2020) eklr.

45. The Appellant was charged under provision of section 8(1) and 8(3) of the sexual offence *Act No 3 of 2002*6 of defiling PW1, who as at July 2016, was 12 years old and he was sentenced to serve a period of 20 years. The court has to consider the gravity of the offence, both mitigating and extenuating

circumstances. In this instance, the Appellant took advantage of his mentally challenged student and defiled him by penetrating his anus. He must be handed down a punitive and deterrent sentence, which this court under the circumstances cannot interfere with.

D. Disposition

46. The upshot, having considered the entire record of Appeal and submissions made, I do find that the Appeal as against the trial courts finding on conviction and sentence lacks merit and the same is dismissed.

47. Right of Appeal 14 days.

48. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF SEPTEMBER 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 18th day of September 2024.

In the presence of;

Appellant present form Kamiti Maximum prison

Mr. Mangare/Ms Otulo for O.D.P.P

Susan/Sam Court Assistant