MW v Republic (Criminal Appeal E012 of 2024)
[2024] KEHC 13918 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13918 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E012 OF 2024

JN NJAGI, J

OCTOBER 11, 2024

BETWEEN

MW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon S.K. Arome P.M. in Marsabit SPM's Court MCSO case No.E003 of 2023)

JUDGMENT

1. Appellant was convicted for the offence of attempted defilement contrary to section 9(1) as read with 9 (2) of the *Sexual Offences Act* No.3 of 2006. The particulars of the offence were that on the 23rd, 24th and 27th March, 2023 at (Particulars withheld) village within Marsabit County he intentionally attempted to cause his penis to penetrate the vagina of A.S. (herein referred to as the complainant), a female child aged 11 years.

2. The appellant was sentenced to serve 10 years imprisonment. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal are that;

    1. That the learned magistrate failed to take into account that the evidence of the complainant was not corroborated.

    2. That the learned trial magistrate failed to take into account the appellant's defence and version of what transpired on the day stated.

    3. That the learned trial magistrate erred in law and fact in holding that the prosecution had proved its case beyond reasonable doubt when in fact it had not.

4. That the learned trial magistrate erred in law and fact in failing to independently analyze and/or evaluate the evidence on record hence an erroneous determination.

5. That the learned trial magistrate erred in failing to appreciate and find that all the charges preferred against the appellant had not been established and proved as required by law.

6. That the learned trial magistrate erred in shifting the burden of proof onto the appellant.

7. That the learned trial magistrate erred in law and fact in failing to consider the appellant's defense which was not at all displaced by the prosecution side as provided by law under section 212 as read together with section 309 Criminal Procedure Code, Cap 75 Laws of Kenya thus a prejudice.

8. That the learned trial magistrate erred both in law and facts by convicting and sentencing the appellant to 10 years without any credible evidence from the doctor's evidence.

9. That the learned trial magistrate erred in law and fact in convicting and sentencing the appellant without sufficient evidence and in rejecting the appellant's defence.

10. That the learned trial magistrate erred in law and fact in imposing a very harsh and excessive sentence without considering the appellant's mitigation and the circumstances of the case.

11. That the learned trial magistrate erred in law and fact in considering the an incredible and maligned pre-sentencing report to arrive at the sentence.

12. That the learned trial magistrate erred in law and fact in failing to acquit the appellant of the charges against him for want of proof beyond reasonable doubt.

Case for prosecution

3. The prosecution called 5 witnesses before the trial court at the close of which the appellant was placed to his defence. The appellant defended himself and called no witness.

4. The complainant who was PW1 in the case testified that she was at the material time aged 10 years. That the appellant was her uncle and a neighbour. That on the material day she was at home when the appellant called her to his room. She went and entered into his house. The appellant lifted up her dress and removed her underpant. He then opened the zip of his trousers and inserted his penis into her vagina. He did so for a few minutes and finished. He gave her 40/= and she went back to her home. On some two subsequent days, he called her to his house and did the same thing after which he gave her Ksh.50/= on each of the occasions. She told her kid sister. Later her mother saw the money and asked her where it had come from. The kid sister said that it was from the appellant. Their mother asked the complainant about the money. She revealed to her mother what the appellant had done to her. Her mother took her to the police and they reported. She was issued with a P3 form and taken to hospital.

5. The mother to the complainant, PW3, testified that on the 2/4/2023 she saw her daughter called YH some sweets. She asked her where she had gotten money to buy sweets and she told her that the appellant had given her sister, the complainant money to buy sweets. PW3 interrogated the complaint who told her that the appellant had on the 23/3/2024 removed her pants and touched her vagina after which he gave her Ksh.50/=. That on the second occasion he gave her Ksh.40/= and on 2/4/2023 he gave her Ksh.100/= and requested her to perform sex with her. That on receiving the information she reported to the village elder, Somo Aro, who advised her to take the child to hospital. She did so. The child was examined and treated. The appellant was then arrested and charged.

6. The village elder, Somo Aro PW4 testified that on the 2/4/2023 he was at his home in the evening when the complainant`s mother PW3 reported to him that her daughter had been defiled by the appellant. That on following morning he went to the home of the appellant. He convened a meeting with three other people. He informed the appellant of the accusations. He said that he had touched the child`s breasts and genitalia and gave her Ksh.100/= on the last occasion. He then went and told the parents of the child to take her to hospital and report to the police. The complainant`s mother did so. He, PW4, took the police to the appellant and he was arrested.

7. It was the evidence of the clinical officer, Diba Dika Halo PW2, that he examined the complainant herein on the 4/4/2023. He did not find any injuries on the genitalia nor did he find any evidence of defilement. However, from the history given he found there was attempted defilement. He filled the P3 form that he produced in court as exhibit. P.Exh.1.

8. The Investigating officer, PC Winnie Wafula PW5 of Marsabit police station testified that the complainant and her mother went to the police station on 4/1/2023 wherein the complainant`s mother reported that her daughter had been defiled. She booked the report and took the complainant to hospital after which she issued her with a P3 form and recorded her statement. The complainant mentioned the appellant as the person who had attempted to defile her. She said that the appellant had given her Ksh.50/= on the first occasion, Ksh.40/= on the second occasion and Ksh.100/= on the third occasion. She arrested the appellant and charged him with the offence. During the hearing the investigating officer produced the complainant`s birth certificate and post rape care form as exhibits, PExh.2 and 3 respectively.

Defence Case

9. In his defence the appellant stated in a sworn statement that he is a neighbor to the complainant`s family but they are not related. That he did not meet the complainant on the 23/3/24 and on 24/3/2024. He denied that he defiled her or that he gave her money. He said he and his wife had sold his piece of land and he gave his wife Ksh.1.9 million. That when he asked her about the money, she told him that the money will not be used in his burial. It was his evidence that the case was fabricated by his wife and the complainant`s mother. That the father to the complainant beat him up and he relocated from his plot.

Appellant`s Submissions

10. The appellant through counsel submitted that the case was not proved beyond reasonable doubt. That the complainant in her evidence stated that the appellant inserted his penis into her vagina which meant that there was penetration. That this contradicted the evidence of the clinical officer PW2 whose evidence was that he did not find any evidence of penetration.

11. It was submitted that the complainant at the same time stated that the appellant touched the top of her vagina with his penis. That she gave contradictory evidence on whether it was at the beginning or end of Ramadhan. Counsel submitted that the witness was not credible.

12. It was submitted that the mother to the complainant PW3 told the court that she found the complainant with Ksh.100/= which the appellant had given her to buy sweets. However, that such crucial evidence was not tendered in court as exhibit.

13. The Appellant submitted that the prosecution did not call the other people who attended the meeting convened by the village elder PW 4 to corroborate the evidence of PW4. That the complainant`s mother did not explain why she did not attend the meeting. That failure to call the said persons leads to the

conclusion that the prosecution was influenced by some oblique motive. The appellant in this respect cited the case of Julius Kalewa Mutunga v Republic (2006) eKLR where it was 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....

14. The appellant also cited the case of Bukenya & others v Uganda (1972) EA 549 where it was held that where the evidence called by the prosecution is barely adequate, the court may infer that the evidence of a witness not called would have tended to be adverse to the prosecution.

15. It was submitted that the trial court failed to consider the appellant`s alibi defence that he was on the 24/3/2024 at work. That the appellant had no duty to proof his alibi. The appellant relied on the case of Kiarie v Republic (1984) KLR 739 where it was held that:

> " An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

16. The appellant submitted that the pre-sentencing report tendered in court was biased against him in that it depicted him as a paedophile who had several related criminal records which were settled by elders and further alleged that were the appellant to be released he would kill the complainant. It was submitted that the trial court relied on the biased report in sentencing the appellant which led to a miscarriage of justice.

17. It was submitted that the sentence imposed by the trial court was harsh and excessive and against the Sentencing Guidelines and Policy. That the court failed to consider the appellant`s mitigation. That the court imposed the minimum mandatory sentence imposed by the *Sexual Offences Act* despite the fact that the court was at liberty to impose a lesser sentence. The appellant in this respect cited the case of Maingi & 5 others v Director of Public Prosecutions & another (Petition No.E017 of 2021 (2022) KEHC 13118 (KLR) (17 May 2022) where it was held thus:

> To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of *the Constitution*. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

18. The appellant urged the court to allow the appeal and set aside the conviction and the sentence.

Respondent`s submissions

19. The respondent cited the ingredients of the offence of attempted defilement as held in the case of Kimotho v Republic (Criminal Appeal E034 of 2021) (2023) HEHC 26249 (KLR) (5 December2023) (Judgment) that:

> " A conviction on a charge of attempted defilement contrary to section 9(1) and (2) of the *Sexual Offences Act*, entails proof by the prosecution of all other elements of defilement save for penetration. The elements of attempted defilement therefore are; that the complainant was a child; intention to commit defilement; steps towards execution of his intention, by means adopted to its fulfillment and manifest his intention by some overt act, but did not

> fulfill his intention to such an extent as to commit penetrate the victim. The appellant should be positively identified as the perpetrator of the offence within that framework. Attempted defilement can be simply termed failed defilement."

20. The respondent submitted that the age of the complainant was proved by production of a birth certificate. That the evidence of the complainant was that the appellant inserted his penis into her vagina and therefore the appellant may have been charged with defilement. However, that attempted defilement is a cognate offence to defilement and has all the elements of defilement other than penetration. Therefore, that the appellant was properly convicted of the offence of attempted defilement.

21. The respondent submitted that the inconsistencies alluded to by the appellant did not go to the root of the matter but is an issue for recollection by the witness. The respondent cited the case of Philip Nzaka Watu v Republic (2016) eKLR where the court of Appeal held as follows on inconsistencies in evidence:

> In Dickson Elia Nsamba Shapwata & another v. The Republic, CR. App. NO. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:
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> > " In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

22. It was submitted that the evidence that the appellant committed the offence was corroborated by his own admission to the village elder, PW4 and other people that he touched the child`s breasts and genitalia and removed her pants up to the knee level. The respondent cited the case of Sango Mohamed Sango & another v Republic (2015) eKLR where the Court of Appeal held that:

> We do not see anything in the *Evidence Act* as amended that prohibits an accused person voluntarily making a confession to a private citizen.

24. It was submitted that there was no oblique motive that has been shown to have influenced the prosecution not to call other members of the meeting convened by the village elder.

25. The respondent submitted that the trial magistrate stated the reasons for believing the complainant as against the defence offered by the appellant. That the magistrate correctly applied Section 124 of the *Evidence Act*. The case of Moses Nato Raphael v Republic (2015) eKLR was cited where the Court of Appeal stated that:

> As to whether the sole evidence of the child was sufficient to found a conviction, the law on this issue is well settled. Section 124 of the *Evidence Act*, Cap 80, Laws of Kenya provides a proviso that permits admission of evidence from a victim without corroboration in sexual offences cases only.

26. It was submitted that the appellant offered an alibi in his defence but there was no indication throughout the trial that that the appellant would put up a defence of alibi. The respondent in this

respect cited the case of Victor Mwendwa Mulinge v Republic (2014) eKLR where the Court of Appeal stated that:

> It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja v Republic [1983] KLR 501.....this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

27. It was submitted that the trial magistrate was correct in dismissing the appellant`s defence upon weighing it against the prosecution evidence. That the appellant was correctly convicted for the offence of attempted defilement.

28. On sentence, it was submitted that the trial court heard the appellant`s mitigation, the victim`s sentiments and also called for a probation officer`s report. That there is no indication that the trial magistrate acted under the impression that he did not have discretion to impose any other sentence other than the 10 years imprisonment. That the calling of a probation report showed that the magistrate knew that he had discretion to impose any other sentence. The respondent cited the case of Maingi & 5 others v Director of Public Prosecutions (supra) where it was held that:

> .....However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

29. It was submitted that the magistrate exercised his discretion by imposing the sentence of 10 years imprisonment and this court should not interfere with it. That there is no valid reason to term the sentence as harsh, unlawful or given in consideration of the wrong principles of the law which would warrant it being interfered with.

Analysis and Determination

30. This being a first appeal to the High Court, it is an appeal on both facts and the law. The duty of the first appellate court was succinctly captured by the Court of Appeal in Kiilu & Another V Republic, [2005] eKLR, as follows:

> " An appellant on a first appeal 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 conclusion. 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 conclusion; it must make its own findings and draw its own conclusion. 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."

31. The appellant was facing a charge of attempted defilement under section 9(1) of the *Sexual Offences Act* which defines the offence of 'attempted defilement' as follows:-

> " 9 (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."

32. He was in the alternative facing a charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No.3 of 2006 whose particulars were that on the same dates and place as in the main charge he intentionally touched the buttocks of the above said complainant with his penis, a child aged 10 years.

33. The elements of the charge of attempted defilement are as those in a charge of defilement save for the element of penetration. The elements of defilement are proof of the age of the victim, penetration and identity of the offender.

34. A birth certificate in this case was produced that showed that the complainant was at the material time aged 10 years. The prosecution did thereby prove that the complainant was a child in terms of the *Sexual Offences Act*.

35. The appellant and the complainant were persons well known to each other as they were neighbours. The appellant admitted that he was a neighbour to the complainant. Identity of the appellant was therefore proved.

36. That leaves the question of attempted defilement. An attempt to commit an offence is defined in section 388 of the Penal Code as follows:

    (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

    (2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

    (3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

37. In Karbanet HCCRA NO. 192 OF 2017 Kakurut Ngoletom Lesikiriatum v. R of 25th February 2019, Muriithi J. discussed the law on attempt as follows:

> " Principles of the law of attempt
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> 8. In accordance with the definition of attempt in section 388 of the Penal Code, the test for attempt requires a demonstration of an intention to commit the offence and overt act towards the commission of the offence which is sufficiently proximate or immediately connected to the attempted offence. See Mwandikwa Mutisya v. R (1959) EA 18 and Mussa Said v. R (1962) EA 454.
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> 9. In discussing the principles of law on attempt in the case of attempted larceny, Spry, J. (as he then was) in Mussa s/o Said v. R (1962) EA 454, 455 Letters C-D said:
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> > " The principles of law involved are very simple but it is their application that is difficult. If the Appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny. (Penal Code, s. 380). The burden on the

prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence.

The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that the act must be of such a character as to be incompatible with any other reasonable explanation. Secondly, even if the intention is established, the act itself must not be too remote from the alleged intended offence."

10. In Keteta v. R, (1972) EA 532, 534, Madan Ag. CJ. (as he then was) put the matter succinctly as follows:

> "A mere intention to commit an offence which is in fact not committed cannot constitute an attempt to commit it. There must also be an overt act which is immediately and remotely connected with the offence intended to be committed and which manifests the intention to commit the offence. A remotely connected act will not do."

38. The complainant in her evidence told the trial court that the appellant inserted his penis into her vagina. She at the same time stated that he touched the top of her vagina with his penis.

39. The trial magistrate in his judgment said that the clinical officer who examined the complainant confirmed that there was bruising and or trauma in the genitalia. The magistrate considered the credibility of the complainant in the case and said that:

> "I saw and heard the minor testify in court. She was composed, confident and consistent. She knew what she was saying. I believe her. The accused`s defence is a general mere denial".

40. The court found the complainant a credible witness and thereby dismissed the appellant`s defence. He convicted the appellant for the offence of attempted defilement.

41. I have reviewed the evidence adduced before the trial court. Though the magistrate said in his judgment that the clinical officer confirmed that there were injuries on the girl`s genitalia, the clinical officer did not give such evidence. The evidence of the clinical officer was that the genitalia was normal with no injuries noted. The trial court therefore got it wrong in holding that there were bruises on the genitalia.

42. The case against the appellant rested on the credibility of the complainant. It was the evidence of the complainant in her evidence-in chief that the appellant gave her money on three different occasions. That on the first day he gave her Ksh.40/=, on the second occasion Ksh.50/= and on the third occasion Ksh.50/=. In cross-examination, she said that the appellant gave her Ksh.40/= on the first day and Ksh.50/= on the third day. In re-examination she said that he gave her Ksh.40/ on the first occasion, 50/= on the second occasion and 100/= on the third occasion. Her mother on the other hand testified that the complainant told her that on the first occasion, the appellant gave her Ksh.50/=, Ksh.40/ = on the second occasion and Ksh.100/= on the third occasion. She said that the complainant gave her Ksh.100/= that she had been given by the appellant. The investigating officer PW5 said that the complainant told her that the appellant gave her Ksh.50/= on the first day, Ksh.40/= on the second day and Ksh.100/= on the third day. The trial court made a finding that the appellant gave the complainant money on three occasions – Ksh.40/= on the first day, Ksh.50/= on the second occasion and Ksh.100/ = on the third occasion.

43. There were contradictions on the amount of money the appellant is said to have given the complainant on the first day with the complainant saying that it was Ksh.40/= while her mother and the police officer said that it was 50/=. The law when it comes to inconsistencies and contradictions in a case is that minor discrepancies and inconsistencies in the prosecution case can be ignored while grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected -see the Court of Appeal decision in *Erick Onyango Ondeng' v Republic [2014] eKLR Criminal Appeal No. 5 OF 2013*) as cited in Josephat Kibet Tanui v Republic [2020] eKLR.

44. In my view the contradiction as to whether the amount given on the first day was 40/= or 50/= or whether the amount given on the second day was 40/= or 50/= are not major contradictions in the case. That the complainant did not in her evidence-in-chief and in cross-examination mention of having been given Ksh.100/= and only mentioned the same in re-examination was in my view not a major contradiction in the case. The complainant told her mother and the police officer of having been given the Ksh.100/= on the third occasion. From the totality of the evidence, I am in agreement with the finding of the trial court that the appellant gave the complainant money.

45. The prosecution submitted that the appellant confessed to the village elder PW4 that he committed the offence. A confession is defined in section 25 of the *Evidence Act* as follows:

> A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.
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> Section 26 provides that:
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> > " 26. Confessions and admissions caused by inducement, threat or promise. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

46. The village elder PW4 told the trial court that he made inquiries on the appellant about the complainant`s allegations and he told him that he had touched the girl`s breasts and genitalia and that he had removed her underpants up to the knee level. That he gave her Ksh.100 on the last occasion.

47. In Sango Mohamed Sango & another v Republic [supra], the Court of Appeal said that there is no law barring an accused person voluntarily making a confession to a private citizen and that a confession to a private citizen is admissible and may be proved in evidence against an accused person as long as the court is satisfied beyond reasonable doubt that the confession was made voluntarily and that the admission has the ring of truth in it.

48. The village elder PW4 testified that he was a relative to the appellant. There was thereby no reason for him to lie against the appellant in favour of the complainant. A village elder is not a person in authority. The appellant voluntarily made the confession to PW4. The confession was admissible and can be considered against the appellant. I find the evidence of PW4 that the appellant told him that he

removed the underpants of the complainant, touched her genitalia and that he gave her Ksh.100/ on the last occasion to be corroborative to the evidence of the complainant that the appellant attempted to penetrate his penis into her vagina after which he gave her money. That the other people who attended the sitting were not called to testify on the same issue is of no consequence as the law does not require any particular number of witnesses to prove any particular fact. I find the evidence of PW4 to have been sufficient on that issue.

49. I find that there was sufficient evidence that the appellant attempted to defile the complainant. That he pulled down her underpants to her knees, and tried to insert his penis into her vagina was evidence that manifested his intention to defile the complainant. There was no truth that the case was fabricated by the mother to the complainant and the accused`s wife. The appellant admitted that he had no evidence to that end. His defence was therefore rightly dismissed. I find the prosecution to have proved beyond reasonable doubt the charge of attempted defilement against the appellant and I accordingly dismiss the appeal.

Sentence

50. The charge of attempted defilement carries a minimum sentence of 10 years. However, the current jurisprudence is that the court has discretion to impose what it considers to be the appropriate sentence even where minimum sentences are prescribed. The trial court in its judgment seems to have imposed the minimum sentence without any indication that it had discretion to impose a lesser sentence. I find that to be sufficient reason to interfere with the sentence.

51. I have considered the mitigation tendered by the appellant to the trial court and the pre-sentence report filed in the case. The appellant has a family. He was a first offender. Considering that the complainant was a child aged barely 10 years, I am of the view that a sentence of 7 years imprisonment would be sufficient in the case. The sentence of 10 years imprisonment is thereby set aside and substituted with one of 7 years imprisonment. The same to commence from the date of plea, i.e on 19th April 2023.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 11TH OCTOBER 2024

J. N. NJAGI

JUDGE

In the presence of:

Miss Otuko holding brief Mr. Sichangi for Appellant

Mr. Ngigi for Respondent

Appellant - Present

Court Assistant – Jarso

14 days R/A.