



**AKK v Republic (Criminal Appeal E022 of 2021)
[2023] KEHC 3406 (KLR) (11 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3406 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E022 OF 2021
SM MOHOCHI, J
APRIL 11, 2023**

BETWEEN

AKK APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against the Conviction and sentence in CMCC SO No.32 of 2017 - Eldoret, Republic v Allan Kipchirchir Koskei, delivered by Hon. C. Menya, S.R.M. delivered on 26.03.2021)

JUDGMENT

1. The brief background of the trial case is that the appellant was charged with offence of defilement contrary to Section 8 (1) as read together with Section 8(2) of the [Sexual Offences Act](#).
2. The Particulars are that, the appellant on February 15, 2017 at [Particulars Withheld] trading center within Uasin Gishu County, intentionally and unlawfully, caused his genital organ (penis) to penetrate the genital organ (anus) of IC a child aged 6 years old.
3. He is faced an alternative count of committing an indecent act with a child contrary to section 11(1) (2) of the [Sexual Offences Act](#).
4. Being aggrieved, the appellant contests his conviction and imprisonment to life sentence for the offence of defilement contrary to Section 8(1) as read together with Section 8(2) of the [Sexual Offences Act](#) No 3 of 2006 on the following eight (8) grounds;
 - i. That, the Trial Magistrate erred in matters of law and fact by failing to hold that the charge sheet was defective.
 - ii. That, the Trial Magistrate erred in law and fact by failing to consider that the appellant was below 18 years when he committed the offence.



- iii. That, the Trial Magistrate erred in matters of law and fact by basing the conviction on identification evidence that was not conclusively proved.
- iv. That, the Trial Magistrate erred in matters of law and fact by failing to find that the prosecution shifted the burden of proof from its back yard to the appellant.
- v. That, the Trial Magistrate erred in matters of law and fact by failing to find that the circumstantial evidence did not connect the appellant to commission of the offence.
- vi. That, the Trial Magistrate erred in matters of law and fact by failing to note that there were contradictions and inconsistencies in the prosecution's case.
- vii. That, the Trial Magistrate erred in matters of law and fact by failing to hold that penetration was not conclusively proved.
- viii. That, the Trial Court erred in law and fact by failing to observe that this matter was trumped up against the appellant.

Appellant's Case;

5. The appellant filed his written submissions on the January 23, 2023 and appeared in person for highlighting of the submissions on the January 25, 2023.
6. In his oral highlights the appellant contended that the sentence imposed on him was harsh and that he had a previous similar case that he had appealed against and released on probation he thus urged the court to release him on probation.
7. He orally submitted that his age assessment was conducted during trial and a report is on record indicating his age assessment being seventeen (17) years old at the time of the trial and forms part of the record.
8. The written submissions as adopted and relied upon by the appellant was in two main parts firstly the appellant being convicted while a minor and the second part where the appellant submitted in wholesome on all the other grounds of appeal.
9. The appellant contends that his conviction while being a minor contravened his fair trial rights as enshrined in article 50(2) p of the Constitution by failing to consider the report of the Moi Teaching and Referral Hospital as indicated in the Radiology request form dated 23rd November 2017 thus further contravening his inherent right to dignity as enshrined in Article 28 of the Constitution.
10. The appellant sought to invoke Article 165(3) b jurisdiction of the high court to determine the question whether any of his fundamental rights had been denied, infringed, violated or threatened.
11. The Appellant sought reliance on the case of *Wanyiri Kiboro Cr. App No 151 of 1998* where the court held;

“the Constitution of Kenya does not permit the police or any other law enforcement agency to break the law in order to detect crime”



12. He also cited the case of *Amos Karuga Nyatu* (Nyeri) Cri Case No 12 of 2006 (unreported) where Makhandia J (as he then was) held: -

“A prosecution in breach of the law is a violation of the rights of the accused and is therefore a nullity.”
13. On all the other grounds of appeal it was the appellant’s submission that the charge sheet was fatally defective as the particulars of the charge had been altered by hand by substituting the word “vagina” with the word “anus” and that it was the prosecutions effort in fixing him.
14. The appellant submitted that argued that the altered charge sheet contravened the provisions of section 133(1) of the penal code.
15. The appellant further submitted that contradiction in the witness testimony as to when the offence was committed, with the complainant stating the February 15, 2016, PW2 stating the February 11, 2016 and PW6 stating 1st February, 2016 which ought to have been considered to his advantage.
16. The appellant urged the court to allow the appeal, quash his conviction, set aside his sentence and set him free.

Respondent’s Case;

17. The respondent submitted by recalling the charges and particulars giving rise to the judgement dated March 26, 2021 urging that the prosecution discharged its duty of proving its case beyond reasonable doubt and that the evidence tendered was by first hand witnesses and was unshaken by the appellants defence case.
18. It was the respondent’s submissions that all the ingredients of the offence being age, penetration and identification were satisfied in proof and that the charge sheet contained sufficient particulars to enable the appellant to understand the charges he was facing and respond to the same and that the onus of proof was never shifted to the appellant at any time in the trial.
19. The respondent submitted that the sentence imposed by the trial court was lawful and proper and that the appeal lacked merit and ought to be dismissed.

Analysis and Determination

20. This is a first appeal. The duty of the first appellate court in criminal cases 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”.
21. Being a 1st Appeal Court I must, weigh conflicting evidence and draw conclusions, (*Shantilal M. Ruwala -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.



22. The Court has re-valuated the entire body of evidence as it is enjoined to do and as it was established in the case of *Gabriel Njoroge v. Republic* [1988-85]1 KAR 1134, that;
- “As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect (see *Pandya v. R.* [1957] E.A 336, *Ruwala v. R* [1957] E.A. 570). If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly, misdirection and non-directions on material points are matters of law.”
23. In the evaluation of the record of appeal this court has refined the issues under consideration to be: -
- a. Whether the prosecution’s case was proved beyond reasonable doubt?
 - b. Whether the charge sheet was fatally defective? and
 - c. Whether the trial magistrate imposed an unlawful sentence?
24. The Prosecution called five (5) witnesses IC - the complainant, PW1, JN, PW2, the complainant’s mother, AG, PW3, the complainant’s neighbor, Doctor Rono, PW4 the expert witness, and corporal Victor Ruto, the investigating officer.
25. The appellant was arraigned before court and charged on the February 21, 2017 and the trial lasted for four (4) years with judgment being rendered on the 2March 6, 2021.
26. It is noteworthy that during the trial the appellant fully participated, at times being represented by counsel, cross examining all witnesses, recalling witnesses for further cross examination and ultimately offering his defence case on oath without calling any witness(es).
27. PW1 told the Court that she goes to Cheptiret Primary School and that she was born on October 6, 2009. She stated that on February 15, 2016 while at home, her mother sent her to the shop to buy Royco and on her way back home, she started tossing it in the air when it fell over the fence. The appellant was on the other side of the fence and he asked her not to jump over the fence but she opted to just jump anyway. As she was climbing the fence, the appellant pulled her to the other side and covered her mouth and warned her not to scream.
28. That the appellant at the time was armed with a knife and took her to the forest and slept on her. She said that the appellant removed her clothes and another man arrived then the appellant ran away. She stated that the appellant did bad manners to her. She told the Court that the appellant removed his black thing and that the thing looks like a stick and that the appellant inserted it in her anus and she felt pain.
29. She went on to state that another man arrived and the appellant ran away, the man who had arrived took her to the shop and asked the shop-keeper if he knew her parents. That another customer went and called her mother who responded while screaming, then reported the matter at Cheptiret Police Station.
30. That she was taken to hospital in Burnt Forest after which she was taken to the Moi Teaching and Referral Hospital. She identified her clinic card which was marked MFI 1. The treatment notes from



- the Moi Teaching and Referral Hospital were marked as MFI 2 and the P3 form as MFI 3. She stated that the person who defiled her was a neighbor and that she used to see him around the neighborhood.
31. In cross examination she stated that she knew the appellant and that she did not know where the appellant stays but that she usually saw the appellant around. She reiterated the fact that the appellant did bad manners to her and that she was assisted by a good Samaritan who took her to the shop.
 32. She again reiterated the fact that it was the appellant who defiled her and that he took her to the forest. She stated that there are cyclists in the area but that material time and date they were absent. She stated that it was at night but not very dark and that she could identify the appellant.
 33. In re-examination, she stated that there was a good Samaritan who took her to the shopkeeper.
 34. PW1 was further recalled on the appellant's application, she gave further evidence in chief here stating that she could identify the appellant from security lights, that he was without his spectacles on that night, The Appellant elected not to cross-examine the witness he had just recalled.
 35. PW2 JN stated that on 15th of February 2017, at 6.30 pm she was in the house when she sent PW1 to purchase Royco. Having waited after a short time she did not come, PW2 stepped out to find out from the shop she had gone. she started looking for her without much success until 7.00pm because it was a market day she extended her unsuccessful search to the market before she started asking neighbors returned to the house,
 36. PW2 then heard people screaming near the shop she rushed there and found PW1 was with one of her neighbors and she narrated how she had been defiled and she was not looking properly. She availed PW1 to the police station at Chepterit then went to Moi Teaching and Referral Hospital where she was told to go back the next day. That they were issued with the P3 form, it was filled at Moi Teaching and Referral Hospital by Dr. RoNo
 37. She stated that PW1 was born on 6th of June 2009 and was by then 7 years old. She identified the appellant on the dock stating that she had seen him another day when some women complained that he committed a similar offence by raping a neighbor's child.
 38. In cross examination she stated that her daughter was defiled on a Wednesday 11th of February. The appellant was arrested on Sunday the same week; it was on 19th. He the appellant, came to that plot on Sunday and in her presence the police officer asked why he defiled the minor and the appellant did not answer, the appellant, was seen at the plot peeping and is the suspect.
 39. The offence happened 1 km away in a forest, the appellant, warned her against screaming. There are people, the appellant, was cheating that the child is his.
 40. She was in the house with Agnes Wekesa. That the appellant, is the suspect, posing the question, what he was doing in the plot where he was arrested as he never lived there. That Agnes did not allow him the appellant in the compound. Agnes was with her in her house.
 41. PW3 AG testified that on 1st of February 2017 she was at her door step when PW2 came to inquire whether her child PW1 was at her place? PW1 was not at her place but she joined PW2 in looking for the child. She heard people screaming and found some other women beating appellant at the road near where she lived. They said appellant had raped PW1 who couldn't walk. She together with others took PW1 to the police station then to Ngeria hospital where the doctor referred them to Moi Teaching and Referral Hospital. She did not know who committed the act, that PW1 is 6 years old. The P3 form was issued and filed. It was filled by doctor RoNo She identified the appellant in the dock.



42. In cross-examination she indicated knowing the appellant by the name Chirchir. That the appellant, never used to come to the plot but after PW1 was defiled the appellant came. She clarified that the complainant was defiled on 15th February 2017, the appellant, came on 19th February 2017 when he was arrested at night in that plot. The police arrested the appellant, in the compound not from her house.
43. She has never met the appellant at night at Cheptiret and that she is not known by the name Agnes Cheptiret. That the appellant is used to doing that on children. That the appellant, is known to commit that kind of act.
44. Upon re-examination, PW3 stated that the appellant is known for defiling children has another case involving another child before court.
45. PW3 was further recalled upon application by the appellant where she recalled her evidence in chief and was not cross examined by the appellant.
46. PW4, doctor Rono from Moi Teaching and Referral Hospital recalled that on 22nd February 2017, a child 6 years old was brought to hospital. There was grease and grass on her pants. The complaint was that she had been defiled. She had injuries in her private parts. he filed the P3 form which he produced as exhibit No 1 and the treatment notes as exhibit No 2, the prescription form as exhibit No 3, the attendance card as exhibit No 4. PW4 was never cross-examined.
47. PW4 Doctor Lilian Tokasan Tabin was recalled on behalf of doctor Rono who was unavailable handing another matter in another court. The witness recalled the evidence in chief adding that PW1 was examined on 16th of February 2017. Physically she was okay. Genital examination there were obrouse on penetration. There were also hymenal tears at 6.00 o clock. There is no discharge from vagina she was HIV negative and VDRL was negative.
48. There was evidence of penetration consistent with the finding. The nature of the object used is blunt.
49. Upon Cross-examination by the defense counsel, the witness stated that the vagina appears like around there are rushes which root at the act, that the hymeneal can be torn due to the force around. The hymen is pink. Hymeneal tear cannot occur without penetration and that the findings are on section C of the P3 and from the laboratory.
50. On re-examination the witness described “Posterior Faciet”, as a rush inside the joining on the vagina at the area where the ankle joins. There was penetration, there were some abrasions and reasserted his findings is that the girl was defiled.
51. PW5 corporal Victor Ruto recalled that on the 1/2/2017 at 8.00pm when on duty, PW2 in company of PW1 reported that PW1 had been defiled. He referred the complainant to hospital and issued her with the P3 form. He took statement from witnesses and doctor confirmed that PW1 had been defiled.
52. That on 20th of February 2017 at 10 midnight he was told that the accused had been arrested in the complainant’s compound. he re-arrested the appellant and took him to the police station. That PW1 was 5 years old. He had a copy of her birth notification, a copy of her health card indicating that she was born 6th of October 2009.
53. On cross-examination he admitted being the investigating officer in the case. That a woman came to the police station and reported the case. That the child was defiled on the 15th of February 2017. That the appellant was arrested in the complainant’s home not outside and had already been arrested in the complainant’s compound. That he re-arrested him and took him to the police station.



54. That there was no case of trespass. And that the appellant had three (3) other similar cases. That the appellant was arrested at midnight and was not with the complainant when he was arrested.
55. That at first when the case was reported they did not mention his name that it was at night nobody could have seen the appellant. he brought enough witness in court and didn't know the relationship between the witness. That he came to rescue the appellant from being killed by the mob.

Defense Case

56. Having been found with a case to answer, the appellant elected to give sworn evidence stating that he is a boda boda rider and with regard to the charges, he stated that on February 19, 2017 he was arrested at around 4.00 p.m. he had been sent to do his work. He met A who works in a bar at Cheptiret. she asked him for Kshs 1,000/= . She took him to her place and asked him for the Kshs 500/= he had. She said she shall buy vegetables. she did not come back. he saw 2 people who are police from Cheptiret who said that he could be killed, he found over 40 women outside. he was handcuffed and brought to the station until Monday. he told the police he had another matter in court. his finger prints were taken and he was told that he defiled IC . and was brought to court.
57. The complainant's mother said he had another similar case. They suspected him and only 2 sisters testified against him while the person who purportedly rescued the child did not testify.

Issue 1: Whether the prosecution's case was proved beyond reasonable doubt?

58. From the onset it is important to point out that the scrutiny and analysis reveals inconsistencies and contradictory evidence by crucial firsthand witnesses as to the date(s) when the offence is alleged to have been committed.
59. The scrutiny and analysis equally reveal that the appellant's case is a "borderline case" owing to the age of the appellant as a minor, during trial and the failure by the trial court to consider an age assessment report.
60. The Scrutiny and analysis reveal that the handwritten charge sheet dated February 21, 2017 was amended in the particulars by substituting the word "Vagina" with the word "Anus" in the main count, while the alternative charge was amended in the particulars by substituting the word "Vagina" with the word "Anus and buttocks".
61. While the appellant argues that the defect on the charges were fatal, it is important to consider substantively the import and effect of the same and whether prejudice was occasioned.
62. The Appellant contends that the charge sheet relied on by the trial court to convict him was defective. In determining whether a charge sheet is defective or not, the Court of Appeal in *Sigilani -vs- Republic* (2004) 2 KLR, 480 held as follows: -

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.



63. On the other hand, Section 134 of the *Criminal Procedure Code* provides for what the components/ ingredients of the charge sheet constitute as follows:-

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.

64. In the case of *Isaac Omambia v Republic*, [1995] eKLR, the Court of Appeal considered the ingredients necessary in a charge sheet and stated as follows:-

“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.”

65. Similarly, this Court while faced with the same issue in *Isaac Nyoro Kimita & another vs. R* [2014] eKLR echoed those sentiments as follows:-

“In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants “jointly” defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term “jointly” in the particulars of the charge”

66. Looking at the record and entire evidence one cannot say that the appellant did not understand the nature of the charges against him. It is quite clear from his cross-examination questions to the prosecution witnesses that he understood he was accused of having inappropriate sexual contact with IC and in fact from the Appellant himself and from PW2 and PW5 it is conceded and disclosed that the applicant faced similar case(s) before other courts.

67. The handwriting alteration of the charge sheet was never raised or contested in trial and from the record and evidence the prosecution sought to prove the charges of defilement with the particulars of the charge being: -

“On the 15th day of February 2017 at Cheptiret Trading Center within Uasin Gishu County, intentionally and unlawfully, caused his genital organ (penis) to penetrate the genital organ (Anus) of IC , a child aged 6 years”.

68. In *Dominic Kibet Mwareng vs. Republic* [2013] eKLR the court stated as follows: -

“The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.”

69. Section 2 of the *Sexual Offences Act* defines penetration as: -



- The partial or complete insertion of the genital organs of a person into the genital organs of another person;
70. The complainant testified that the appellant penetrated her anus, that “He did to me bad manners. He removed his black thing, it looks like a stick, he put it in my anus”.
 71. The evidence of PW 3, the medical examination and the exhibit no 1 (P3 form) reveals that the victim was examined on February 16, 2017 and that the genito-anal examination was centered on the vagina. No examination was undertaken on the anus of the victim to determine penetration.
 72. The trial court misdirected itself in finding that the hymenal tears at 6.00 o'clock on medical examination as documented on the P3 form was a clear indication of penetration of the anus.
 73. While the medical examination and the resultant P3 form confirmed penetration of the Vagina the evidence did not corroborate the complainant's evidence of being defiled in the Anus.
 74. The trial court on the November 20, 2017 ordered for age assessment of the appellant to be undertaken when his advocate indicated that the Appellant was 17years old when he committed the offence.
 75. The appellant was on the November 24, 2017 escorted to the Moi Teaching and Referral Hospital Eldoret and his age assessment was conducted by exray on his Pelvic and wrist and a radiology report suggested his age to be 17 years old. The report and forwarding letter from the Eldoret prison was filed in court on the November 29, 2017.
 76. The scrutiny of the record further reveals that, while the age assessment report was on record, the court failed to act on the same until 21st of may 2018 when the appellant's advocate once more raised the issue and the trial court for the second time ordered the age assessment be undertaken. It is note worthy that on the 30th of May 2018 during a mention, the prosecution conceded that the appellant was seventeen (17) years old but the same escaped the attention of the court.
 77. This Court finds that the appellant was a minor when he committed the offence and was subjected to the criminal trial process as an adult being deprived off all his entitled protection of the law.
 78. The *Constitution of Kenya*, the *Children Act* as well as international instruments on rights of children are explicit on protection and rights of children especially when they come into conflict with the law; that such child in conflict. Such child is presumed to need protection and care.
 79. The Trial court and all court are under obligation to address the needs of, *inter alia*, children and is bound by Article 21(3) of the *Constitution* which provides as follows: -

“ All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, and youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.”
 80. Article 53 (2) of the *Constitution* provide for the overriding principle that; A child's best interests are of paramount importance in every matter concerning the child and this is in addition of the other guarantees as enshrined in Article 53(1) including; the right of every child not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time; and separate from adults and in conditions that take account of the child's sex and age.
 81. Section 186 of the *Children Act* provides for statutory guarantees to a child accused of an offence to include that: -



Every child accused of having infringed any law shall—

- a. Be informed promptly and directly of the charges against him;
- b. If he is unable to obtain legal assistance, be provided by the Government with assistance in the preparation and presentation of his defence;
- c. Have the matter determined without delay;
- d. Not be compelled to give testimony or to confess guilt;
- e. Have free assistance of an interpreter if the child cannot understand or speak the language used;
- f. If found guilty, have the decisions and any measures imposed in consequence thereof reviewed by a higher court;
- g. Have his privacy fully respected at all the proceedings;
- h. If he is disabled, be given special care and be treated with the same dignity as a child with no disability.

82 Section 191 (1) of the [Children's Act](#) provide for the methods of dealing with child offenders as follows:

- (1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—
 - a. By discharging the offender under section 35(1) of the Penal Code (Cap. 63);
 - b. By discharging the offender on his entering into a recognizance, with or without sureties;
 - c. By making a probation order against the offender under the provisions of the [Probation of Offenders Act](#) (Cap. 64);
 - d. By committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;
 - e. If the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;
 - f. By ordering the offender to pay a fine, compensation or costs, or any or all of them;
 - g. in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;
 - h. By placing the offender under the care of a qualified counsellor;
 - i. By ordering him to be placed in an educational institution or a vocational training programme;
 - j. By ordering him to be placed in a probation hostel under provisions of the [Probation of Offenders Act](#) (Cap. 64);
 - k. By making a community service order; or



l. In any other lawful manner.

83. From the foregoing it is apparent the Appellant was a child in need of protection when he committed the offence and stood trial and the trial court failed in its cardinal duty to afford him the requisite protection.
84. The constitutional and statutory failing by the trial court fatally contaminated the trial against the appellant, thereby leading this court to hereby declare that the CMCC SO No32 of 2017 - Eldoret, Republic v Allan Kipchirchir Koskei was mistrial.
85. This court is alive to the plight of the victim and her quest for justice, however the next question is whether or not this court should order a retrial. The applicable principles were restated by the Court of Appeal in *Pius Olima & Another -vs- Republic* [1993] eKLR as follows:

“Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are: - Ahmed Sumar – Vs- Republic [1964] EA 481; Manji –Vs-Republic [1966] EA 343; Mujimba –Vs- Uganda, [1969] and Merali & Others –Vs- Republic, [1971] 221. The principles that emerge are that a retrial may be ordered where the original trial as was found by the High Court.....is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case.”

86. I am unpersuaded if any justice shall be served with an order for retrial as the same shall not remedy the breach of law upon the Appellant and the palpable prejudice upon the appellant is apparent.
87. Having found and declared a mistrial, I hereby set aside the conviction and sentence imposed and order that the appellant shall forthwith be set free from custody unless otherwise lawfully held.

It is so ordered.

Right of Appeal 14 Days

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 11TH APRIL 2023

.....

MOHOCHI S.M

JUDGE

04.2023

In the Presence of;

Appellant in Person

Mr. Mugun for the Republic

Mr. Kenei C.A

