



**Katuma v Republic (Criminal Appeal 074 of 2021)
[2023] KEHC 17262 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17262 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL 074 OF 2021**

FROO OLEL, J

MAY 10, 2023

BETWEEN

PATRICK MUTUKU KATUMA APPELLANT

AND

REPUBLIC RESPONDENT

***(APPEAL ARISING FROM THE JUDGMENT OF THE CHIEF MAGISTRATE
COURT AT MAVOKO – H. ONKWANI, PM IN CRIMINAL CASE
(S.0) NO.13 OF 2020 DELIVERED ON 21ST SEPTEMBER , 2021)***

JUDGMENT

1. The Appellant herein Patrick Mutuku Katuma was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *sexual offences Act* No 3 of 2006. The particulars of the offence were that on diverse days between December 2019 and 20th March 2020 in Athi River sub county he intentionally and unlawfully caused his male genital organ (Penis) to penetrate the female genital organ (vagina) of one Y.W a child aged 11years.
2. The Appellant was further in the alternative charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offence Act No.3 of 2006. The particulars were that that on diverse days between December 2019 and 20th March 2020 in Athi River sub county he intentionally and unlawfully committed an indecent act by touching the vagina of one Y.W a child aged 11 years.
3. During trial in the subordinate court the prosecution called seven witnesses who testified as against the accused person, while the Appellant opted to remain silent when put on his defence. After considering all the evidence adduced the trial Magistrate did find the Appellant guilty as the prosecution had proved their case to the required standard of beyond any reasonable doubt, on the principle charge of



defilement and proceeded to sentence the appellant to life imprisonment as provided for under section 8(2) of the Sexual Offence Act No.3 of 2006.

4. The appellant being dissatisfied by the conviction and sentence did file his petition of appeal pursuant to leave granted by Justice G.V Odunga on 30.11.2021. He further filed his amended grounds of appeal on 08.09.2022 where he raised the following grounds of appeal.
 - a. That the trial Magistrate erred in law and in fact by failing to find that the element of the offence (penetration) was not conclusively proved to warrant a conviction.
 - b. That, the learned trial Magistrate erred in law and fact in relying on the evidence of PW1 whose integrity was questionable.
 - c. That the trial magistrate erred in law and fact by failing to find that the *voire dire* was NOT conducted in the present case in violation of the law.
 - d. That the trial Magistrate erred in law and in fact by relying on the prosecution evidence that was contradicting and questionable to convict the appellant.

Facts of the Case.

5. PW1 Y.W. underwent *voire dire* examination and the trial magistrate did determine that she had sufficient intelligence and understood the meaning of taking an oath. She gave sworn testimony. She testified that she was a class 5 student at [Particulars Withheld] Primary school and resided at Rasta Fara estate before they moved to upcountry. On a certain date in December 2019 just before Christmas she and her younger brother were going to palal to watch a movie, but had to pass by the home of Mama Bilal to drop fire hood. en-route they meet the appellant, who normally repairs shoes. The appellant called the complainant but she refused to go to him. The following day, which was on a Saturday after the complainant's parents had gone to work, the appellant came to the complainant's home and directed her younger brother to go and play. The appellant then commanded the complainant to follow him and threatened to kill her and members of her family, if she did not comply.
6. When they reached his house, the appellant directed her to remove her clothes, the jeans and T-shirt which she was wearing and directed her to sleep on the mattress. All this happened while the appellant had put a panga on her neck to enforce his threat. He then proceeded to do, "bad manners" to her. According to the complainant the appellant removed his cloths and laid on her, he proceeded to insert his penis into her vagina. The appellant defiled the complainant for 10 minutes. During the ordeal she felt pain and after the appellant was done, he peeped through the door and saw that there was nobody around and proceeded to release the complainant. He threatened her not to tell anybody and if asked she should say she was from the toilet.
7. The second time the appellant defiled the complainant was again on a different Saturday, when she was left alone to clean their house. The appellant again came and threaten her with a panga, before proceeding to defile her. The third occasion also happened when the appellant found the complainant outside their house, while washing dishes. He proceeded to pull her into his house and defiled her. The last time was in January when one early morning the appellant called her and defiled her.
8. These incidents of defilement were eventually unearthed when the complainant mother found her watching a video on the appellant's phone, while seated on his laps and demanded to know what relation the minor had with the appellant. The appellant told PW1 mother to cane her, and further confessed, telling her what had transpired. The minor was taken to Nairobi Women Hospital -kitengela branch, where she was treated and the matter was also reported to the police who arrested the appellant. PW1 also testified that they stay in house 1, while the accused stays in house 2. The appellants house



was a small room, therein was a mattress, a statue of a lion, a stove, two sufuria's and a panga. She reiterated that the appellant used to defile her on Saturdays and he was a fundi who repaired shoes.

9. In cross examination the PW1 stated that the appellant used to send her brother away before defiling her. Her parents would go to work on Saturdays and the appellant would take advantage and defile her early in the morning between 6.00am to 6.30am. She did not tell other children of the defilement incident as she was afraid the appellant would kill her.
10. PW2 MMW testified that she had three children. One Saturday on 22nd March 2020, she was from work and directed PW1 to wash dishes and then go take a shower once done. She went to the market and came back home late. She did not find PW1 at home. She started to look for her and found her in the appellant's house. She was seated on the appellant's laps while watching a movie on the appellant's phone. She directed PW1 to go home immediately and questioned the appellant as to what he was doing was doing with her daughter. The appellant followed her to her house and sought forgiveness from her. She then questioned the complainant who confessed that the appellant had defiled her in December 2019 and January 2020. She went and reported this discovery to her sister in law, after which they checked the child and confirmed that indeed the child had been defiled. They thereafter took the child to hospital and reported this incident to the police who arrested the appellant. She identified the medical records from various hospitals and identified the appellant in court.
11. In cross examination, PW2 stated that they had no disagreements with the appellant and trusted the appellant to the extent that she would even leave the keys to her house with him, to enable him open the door for her children when they came from school. She worked at CW construction company and would also work on Saturdays. She denied being the appellants girlfriend.
12. PW3 JWS testified that he was a casual laborer. On 22nd March 2020 at 7.30pm, he was called by his sister M and told that the accused had defiled his child. His wife explained what happened and they took the child to hospital and reported the incident to the police. He talked to PW1 who confirmed that the appellant has been defiling her and had defiled her four (4) times. The doctor also confirmed that the child had been defiled. The appellant was a good neighbor and used to repair shoes to earn a living. In cross examination the witness confirmed that PW1 had told him that the appellant defiled her four (4) times and that the appellant had confused the child with money.
13. PW4 Dr John Njuguna testified that he was a medical doctor working at Nairobi women's hospital – Kitengela branch. He held a diploma in surgery and also had pharmaceutical license No 18215. He had worked for 5 years as a clinical officer. He had documents prepared by his colleague whom he had worked with for two years, but the said colleague was away due to covid outbreak and had been sent on unpaid leave thus was not easily reachable. He was familiar with his colleague's handwriting and signature. He was allowed to produce the said documents under section 77 of the *Evidence Act*. He testified that the minor was attended to on 23.03.202 at their hospital. The history was that she had been defiled by her neighbor who was a "fundi" on at least four occasions with the last incident happening in January 2020.
14. Upon examination there were no scars in the genitalia-No injuries and hymen was not intact. She was referred to the laboratory and the results showed that she had vaginal infection. Other vaginal tests were normal. PW4 produced PRC, GVRC, P3 forms and treatment notes into evidence. In cross examination the witness stated that the appellant was not examined and there were no sperms seen as time had lapsed since the defilement incident occurred. He never knew the child but she was aged 12 years.
15. PW5 Cecilia Mbete Nzioka testified that she was the chief of Athi river location and had held that position for the last six years. On 23rd March 2020, she was in her office at about 2.00pm when she



- was called by a village elder, who reported a defilement incident which had taken place at [Particulars Withheld] area. She proceeded to the said village and found the complainant who she interrogated and who confirmed to her that the appellant had defiled her four times. She also found the appellant and interrogated him. Initially he denied defiling PW1, but later admitted to have defiled the minor. She arrested the appellant and Identified him as the accused person in court. In cross examination she confirmed that the appellant confessed to defiling the minor and she did not force the appellant to admit the same. She also arrested the appellant at his place of work.
16. PW6 James Mwaka testified that he was a village elder at [Particulars Withheld] village within Athi River. On 23.03.2020 he was at work when he received a call regarding a defilement case. He went to the home where the incident is alleged to have happened and found the minor with her mother. They explained to him what had transpired and they also knew the perpetrator. He called the area chief and proceeded to arrest the appellant. In cross examination he confirmed that he only interrogated the child and did not interrogate the neighbors. There was also a medical report to confirm defilement.
 17. PW7 CPL Emily Mbaire testified that she was based at Athi River police station and was attached to crime desk. She was the investigating officer. On 23.03.2020 she was at the police station, when the area chief came accompanied by the complainant, her parents and the appellant, who was being accused of defiling the minor on different dates between December 2019 and March 2020. She interrogated the minor who confirmed the incidences. She referred them to hospital and the results showed that the child had been defiled. she visited the scene and confirmed the testimony of the child. She also obtained the panga used to threaten the child. At the scene there was no bed just a mattress on the floor. She obtained the child's birth notification which confirmed that the child was 11 years, she produced the same as Exhibit 2.
 18. In cross examination PW7 testified that the appellant resided alone in his house and no neighbor saw him defile the minor. There was a small hole on the iron sheet, which the accused could peep through to confirm there was no neighbor around before proceeding to release the minor, when there was nobody watching. Further there was no bed on the appellants house only a mattress on the floor. The appellant also was not medically examined as the incidents had happened on various days.
 19. The prosecution closed their case and the appellant was placed on his defence. He opted to keep quiet. The trial court proceeded to convict the appellant on the basis of the evidence presented and sentenced him to life imprisonment, which he challenges vide this appeal.

Appellants Submissions

20. The appellant filed his submissions on 08.09. 2022.He submitted that penetration was not proved as nowhere in the evidence of PW1 did she state that there was penetration. The appellant further challenged the medical evidence adduced and stated that it was not reliable as it was presented by a doctor who had a biased mind and was out to support the prosecution case. Reliance was placed on "The Tracy Peerage (1939) 10 CI &F 154 & P.K.W Vrs Rep. The appellant reiterated that in absence of conclusive proof of penetration of the genital organ of PW1 it was unsafe to convict him and therefor the offence of defilement was not proved.
21. The appellant further submitted that PW1 was not a credible witness and her testimony was full of contradictions and had grey areas which made her evidence inconsistent and unreliable. He submitted that PW1 was coached to lie and he was convicted on the basis of these lies. If indeed it is true that he was defiling her, one of the neighbor's would definitely have heard her screams for help in the "plot" and they would have come to her rescue. PW1 testified that she was 12 years yet the investigating officer testified that she was 11 years.Further PW1 was not sure of the dates of the incidents. The medical



evidence revealed that there was no scar and no injuries in her genitalia and thus did not support the defilement claim.

22. The appellant also submitted that the *voire dire* evidence was not properly conducted and PW1 was not asked if she knew the meaning of oath. This was crucial and failure by the court in this aspect vitiated the entire prosecution case. PW1 evidence could therefore not be used to convict him. The appellant relied on Joseph opando Vs Republic, Cr App No 91 of 1999 & wamuyu Wanjiru Vs Republic Cr App No 6 of 2009.
23. The appellant finally submitted that the prosecution did not prove their case beyond reasonable doubt as the evidence present had weak inferences which the court ought to have been slow in accepting while considering the same and which inferences were not supported by facts as tendered before court.

Respondents Submissions

24. The respondent did file written submissions on 20th March 2023, where they submitted that all the ingredients of defilement were proved. The birth notification was produced which confirmed the minors age, the appellant was an immediate neighbour of the minor and was positively identified and as regards the issue of penetration, the minor's evidence was corroborated by the medical evidence.
25. The respondent also pointed out several inconsistencies and contradiction noted in the proceedings and in particular submitted that PW1 action was inconsistent with her evidence and it was unlikely that she would be comfortably sitting on the laps of someone who had repeatedly threatened her with a panga and who had defiled her repeatedly. The respondent did submit that behaviour was not in tandem with the demeanour of a person who has been threatened previously by the same person and defiled while being threaten with a panga.
26. The respondent also faulted the trial court for relying on the alleged confession by the appellant. They submitted that the parameters of accepting confession before court as set out by section 25 and 26 of the *Evidence Act* were not met. Specifically, the confession ought to have been made before a judge, magistrate or a police officer not below the rank of a chief inspector. The confession allegedly made to the investigating officer and other witnesses could not stand.
27. The final issue raised by the respondent was that the trial court failed to adhere and comply with provisions of Article 50(2)(g) and (h) of *the constitution* of Kenya 2010, which are mandatory in nature and affected the entire substance of the trial. The appellant was not promptly informed of his right to counsel and to have a counsel assigned to him at state expense, lack of compliance with this provision lead to substantial injustice. The stated relied on the citation of Migori Criminal Appeal No 33 of 2019 chacha Mwita Vs Republic & Nyeri Criminal Appeal No 69 of 2012 Joseph Ndungu Kagiri Vs Republic.

Analysis and Determination

28. It is now well settled that a trial court has a duty to carefully examine and analyse all the evidence adduced a fresh to enable it come up with its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanour. See Okeno versus Republic (1972) EA 32 and Pandya versus Republic (1975) EA 366.
29. Further being the first appellant court, it must itself also weigh conflicting evidence and draw its own conclusion. In Shantilal M. Ruwala versus Republic (1975) EA 57, it was held that;

“It is not the function of the first appellant court to merely scrutinize the evidence to see if there was some evidence to support the lower court findings and conclusion. The court



must make its own findings and draw its own conclusion only then can it decide whether the magistrate's finding 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.

30. Upon consideration of the facts of this case, the grounds of Appeal and the submissions made by the parties, the following issues are pertinent for consideration:
 - a. Whether the offence of defilement was proven to the required standard thereby warranting a conviction. (Grounds 1)
 - b. Whether the Voire dire was not properly conducted. (Ground 3)
 - c. Whether the evidence tendered was full of contradiction. (Ground 2 & 4)

Whether the offence of defilement was proven to the required standard thereby warranting a conviction.

31. It is trite law that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller vs. 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.”

32. The conceptual framework for burden of proof to be discharged by the prosecutors consists of two components i.e the burden of proof and evidential burden which duty is clearly enunciated by Fidelis in his book *Modern Nigerian Law of Evidence*, University of Lagos Press, Lagos (1999) 379 when he stated that;

“The term burden of proof is used in two different sense. In the first sense, it means the burden or obligation to establish a case. This is the obligation which lies on a party to persuade court either by preponderance of evidence or beyond reasonable doubt, that the material facts which constitutes his whole case are true, and consequently to have the case established and judgment given in his favour. The other meaning of the expression burden of proof is the obligation to adduce evidence on a particular fact of issue. This evidence in some cases, must be sufficient to prove the fact or issue to justify a finding on that fact or issue, in favour of the party on whom the burden lies. It is called the evidential burden. This is the sense in which the expression is more generally used.

33. That enormous task of proof beyond reasonable doubt by way of directing or circumstantial evidence rests with the prosecution and the fact the accused is put on his defence does not shift that burden and standard of proof in any way.
34. Section 8(1) of the [Sexual Offences Act](#) provides as follows:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.



- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

35. 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.

(see *Wamukoya Karani Vs. Republic* Criminal Appeal No 72 of 2013 and *George Opondo Olunga vs. Republic* [2016] eKLR)

36. This court will look at each element exclusively starting with the first element which is age. The Court of Appeal in *Edwin Nyambogo Onsongo vs. 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).

37. In this case, PW1 testified that she was 12 years old and was a class 5 student at [Particulars Withheld] Primary school. PW7 Cprl Emily Mbaire also produced the birth notification of the complainant as Exhibit 2. The said birth notification shows that the minor was born on 02.09.2008 and thus as at the time of the incident in December 2019 was approximately 11 years. The age of the minor was thus positively proved beyond and reasonable doubt.

38. The second element is penetration. Section 2 of the *Sexual Offences Act* defines penetration as;

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

39. The PW1 did testify that the appellant defiled her on four different occasions. The first time it happened was on a Saturday in December 2019 while both the complainant’s parents had gone to work. PW1 testified that the appellant went to their house and found her with her younger brother Sam. The accused told him to go play. Thereafter the appellant directed PW1 to follow him to his house and threatened to kill her and all her family members if she did not do as directed. Once at the appellants house she was directed to remove her jeans and t-shirt and the appellant proceeded to do “bad manners” to her. Her verbatim evidence was that;

“I went to his house, I feared and he told me to remove the cloths .He ordered me to sleep on the mattress. I was wearing a jeans and T-shirt. I removed cloths and he had placed a panga on the neck and told me if I was asked to say I was from the toilet. He did bad manners to me. He removed his cloths and lay on me. He inserted his penis into my vagina. He threaten me not to tell anyone. I felt pain. He defiled me for 10 minutes. There was a hole on the door and he peeped and saw there was nobody and told me to go to the toilet and say I was at the toilet. My father asked me where I was and I lied. I had stomach pains.”



40. PW1 further testified that on another day after her brother had gone to play, she was left cleaning the house, the appellant came and threatened her with a panga again. It was on a Saturday and he ordered her to remove her cloths and defiled her again. Her evidence was that;

“Another day, I told my elder brother to wait for me, we go play together. They left me cleaning the house then the accused came and threaten me again. It was on a Saturday. He ordered me to remove the cloths and defiled me again. He placed the panga on my neck. He threatened to kill my family members. He then told me he was to defile me in January. The third time I was washing dishes outside the house. I had feared washing dishes in the house. Accused came and pulled me to his house and defiled me again. That was early in the morning. In January he defiled me again.

41. PW4 DR John Njuguna testified that PW1 was treated at their hospital and had a history of having been defiled four (4) times. According to the doctor the appellant would lure the minor using money. She was examined and the finding was that there was no scar or injuries in the Genitalia. The hymen was missing and laboratory tests showed that the minor had vaginal infection. The witness produced the medical reports into evidence.

42. The appellant submitted at length that the evidence of PW1 was not consistent and she was coached to lie. She testified that her father would leave for work at 4.00am and return at about 9.00am to 10.00am. While the appellant would defile her on Saturdays between 6.00am to 6.30am. (see her evidence in cross examination). Her evidence of what transpired during the defilement in December 2019 was thus unbelievable as she stated that when she left the appellants house, she lied to her father that she was from the toilet, yet by that time her father would be at work.

43. The appellant also submitted that it was not possible to defile the appellant within the plot as she would have screamed, and that would have attracted intervention from other children and immediate neighbours. Finally, the doctors evidence too was not helpful as it did not demonstrate that penetration had occurred and hardly any weight would be given to such evidence as the expert witnesses came with a biased mind to support the cause in which they had embarked on.

44. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

45. Further before the court can rely on the evidence of the complainant the same has to be consistent and the witness should not give the court the impression that she is a witness who is untruthful. See the case of *Ndungu Kimani vrs Republic* [1979] KLR 282 this Court said:-

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a



person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

46. The complainant was the sole witness and having keenly reevaluated his evidence I do find that there are a lot of inconsistencies, which create an impression that she is not a trustworthy witness and/or deliberately mislead court. PW1 clearly stated that all the defilements occurred on Saturday’s morning between 6am and 6.30am, when her parents were away at work. But when the first incident occurred in December 20219, she alleged that she met her father immediately after the incident and lied to him that she was from the toilet. Earlier she had testified that the father would leave the house at 4.00am in the morning and return at about 9.00a.m to 10.00a.m which implies that he was not around, when the incident is alleged to have occurred.
47. Secondly PW1 testified that the second time the appellant defiled her, she was at home cleaning the house when the accused came, threaten her with a panga, which he placed on her neck, removed her cloths and defiled her. This implies that the accused defiled her within their house, which is highly unlikely. The third time she was washing dished outside the house, as she feared washing dishes inside the house, the appellant came and pulled her to his house and defiled her again. This incident happened early in the morning and in January he called her and defiled her.
48. If the appellant was a serial defiler as alleged it is likely that PW1 would be more comfortable washing the dished inside the house that outside to avoid meeting the appellant. The January incident was not explained, and more critically, it is unlikely that having been defiled severally and a panga placed on her neck, while being defiled the complainant would still be comfortable sitting on the laps of the appellant and enjoying his company while watching a video on his phone. She would have naturally been withdrawn by his presence. Further she would have been extremely uncomfortable in the company of the appellant, due to the psychological trauma suffered as a result of the defilement incidences.
49. Further PW1 alleged that on being found sitting on the appellants laps, it is the appellant who told PW2 her mother to cane her and further followed them to their house and confessed to PW2 what had transpired. This version of events again is farfetched and unlikely to have occurred considering the totality of the events as they occurred.
50. PW1, PW2, PW5 AND PW 7 all in their testimony alleged that the appellant confessed to defiling the minor and sought for forgiveness. The trial magistrate in her judgment also found that; “I find that accused person indeed sought for an apology after being discovered. He sought for an apology from the mother to the victim, the village elder and investigating officer.” This apology stems from the alleged confession made voluntarily to PW2. As pointed out by the respondent in their filed submissions, a confession can only be valid and be admitted in evidence only if made before a judge or magistrate or before a police officer (other than the investigating officer) being an officer in the rank not below the rank of a chief inspector of police. This too was a misdirection on the part of the trial magistrate.
51. Finally, PW4 did produce the medical evidence and made a finding that the complainant had no scar or injuries on the Genitalia. Further on laboratory examination the results showed that she had vaginal infection. The medical evidence was obviously taken three months after the alleged last defilement incident is alleged to have occurred in January 2020. The finding did not corroborate the other evidence of PW1 and the infection was not shown to be an STI.
52. The Respondent also submitted that the appellants right to fair trial was also breached by the courts lack of observance of provisions of Article 50(2), (g) and (h). The appellant had a right to choose to be represented by counsel and to be informed of that right promptly and further he had a right to have an advocate assigned to him and to be informed of that right. This right indeed is sacrosanct especially



in criminal proceeding where the sentence to be melted out is likely to be stiff, But the appellant never raised this issue in his appeal nor did he allege he was prejudiced by not being given an opportunity to have legal counsel.

53. Be that as it may I do hold and find that it is of greatest importance that Magistrate’s and high court exercising original jurisdiction should uphold the provisions of Article 50(2)(g) (h) of *the constitution* of Kenya 2010 during pre-trial and before commencement of proceeding. To enable the accused benefit and fully understand his rights thereunder and if need be assisted to retain a counsel.

Disposition

54. Having considered all evidence presented in this appeal I do find that the prosecution did not adequately discharge the burden of proof and a proper analysis of the evidence presented especially the evidence of PW1 shows that her evidence was unreliable and could not be used as a basis to safely convict the appellant. The respondent in their submission’s also rightly conceded that it was unsafe to uphold the said conviction and urged this court to quash the same.
55. I do find that this appeal is merited. The judgment of Hon H. Onkwani P.M dated 21st September 2021 in Mavoko CMCR NO SO NO 13 of 2020 is hereby set aside and the conviction quashed.
56. The appellant is forthwith to be set free unless otherwise lawfully held.
57. Judgement accordingly

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 10TH DAY OF MAY 2023.

FRANCIS RAYOLA

JUDGE

Delivered on the virtual platform, Teams this 10th day of May 2023

In the presence of;

Appellant

.....For O.D.P.P

.....Court Assistant

