Malika v Republic (Criminal Appeal E068 of 2022)
[2023] KEHC 19742 (KLR) (5 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19742 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E068 OF 2022

TM MATHEKA, J

JULY 5, 2023

BETWEEN

PETER MWONGELA MALIKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence by Hon. C.A. Mayamba (PM) in Kilungu Principal Magistrate's Court Criminal Case No. 66 of 2020 delivered on 27th July, 2021)

JUDGMENT

1. Peter Mwongela Malika was charged with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the 23rd day of December 2020 in Mukaa Sub County within Makueni County, the appellant intentionally attempted to penetrate the vagina of AMM a child aged 11 months.

2. In the alternative he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the same day and place, he intentionally touched the vagina of AMM, a child aged 11 months.

3. The appellant pleaded not guilty and after a full trial, the learned trial magistrate convicted him on the main charge and sentenced him to 30 years' imprisonment.

The Appeal

4. Aggrieved by that decision, the appellant filed a memorandum of appeal and raised the following grounds;

    a. The prosecution case is based on twisted hearsay and no proper investigation was conducted to prove the allegations.

b. The trial court erred in law and fact by failing to conduct a holistic scrutiny of the whole evidence on record to base its conviction and sentence.

c. The trial court erred by admitting and overseeing a prosecution case which lacked merit to warrant or sustain conviction.

d. The trial court erred in law and fact by failing to give his defense adequate consideration as required by section 169 (1) of the Criminal Procedure Code.

e. The trial court erred in law and fact by shifting the burden of proof to the appellant contrary to the general rules of practice in a criminal trial.

f. That the learned trial magistrate erred in law and fact when he relied on the evidence of prosecution witnesses i.e. PW1 which was mere suspicion.

g. The trial magistrate erred in law and fact when he relied on insufficient, uncorroborated and unreliable evidence.

h. The trial magistrate erred in law and fact when he failed to consider whether the evidence of PW1 reached the standard of credibility as required by law.

i. The trial magistrate erred in law and fact when he convicted and sentenced him without any exhibit in court.

j. The trial magistrate erred in law and fact by failing to consider that the evidence was untrue and unbelievable.

k. The trial magistrate erred in law and fact when he failed to consider that the evidence by the investigation officer was inconclusive and hard to believe.

The Evidence

5. The prosecution's case was that; the appellant was employed as a shamba boy by PW1, the minor's mother. On 23/12/2020 the appellant worked with PW1's husband in the farm up to around 3pm. They returned home and were given food by PW1. The husband excused himself to take food to his mother. They live near the church and PW1 who at that time was the custodian of the keys was asked for church keys... She took her 11 months old child, placed her at the door and went to check for the keys. She heard the child crying from a different direction from the one she left her and upon checking, she found the appellant holding the child on his lap.

6. She testified that the child had a dress but no pant and the appellant had loosened his trouser. He had also smeared her genital with a lot of jelly oil. The child was crying and appellant was holding the child's mouth. PW1 slapped him and asked him what he was doing to the child. PW1 took the child and started screaming for help. The appellant ran away. She called the headman who arrived and advised her to take the child to the hospital. The appellant was later arrested at his grandmother's place at Kyambeke.

7. The prosecution called 5 witnesses to wit; the complainant's mother (PW1), the headman (PW2), the Appellant's cousin (PW3), the investigating officer (PW4) and the Clinical Officer (PW5). The following exhibits were produced; Treatment notes (P. Ex 1), PRC form (P. Ex 2), P3 form (P. Ex 3) and a copy of the clinic book (P. Ex 4).

8. The appellant gave a sworn statement and denied the charge. He testified that PW1 had given him some work and after finishing, he went back home. That he had a disagreement with PW1 because

he refused to be employed on monthly basis. That PW1 insisted that she would plant something on him. On cross-examination he said that his work was to water PW1's tomatoes at a pay of Kshs 400/= which he would get every Saturday. He agreed that he did not report PW1's threats to anybody. That she owed him Kshs 500/= prior to leaving her home.

9. Directions were given that the appeal be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

The Appellant's Submissions

10. The appellant submits that he was sidelined when the trial court allowed the substitution of the charge sheet. That the trial court seems to have taken sides with the mistakes of the prosecution. He relies on the case of Thomas Gilbert Cholmondeley –vs- R; Criminal Appeal No. 116 of 2007 where the court stated;

> " The duty of a prosecutor acting on behalf of the republic is not to secure conviction at all costs but to be a minister of justice i.e. to help the court arrive at a just and fair decision in the circumstances of each case. Any prosecutor who sees his or her duty as being to secure convictions misses the point. As ministers of justice, public prosecutors must place before the court all evidence whether it supports his or her case or whether it weakens it and supports the case of the accused person."

11. He submits that the trial magistrate breached his right to a fair trial which cannot be limited under Article 25 of *the Constitution*. That it was noted that he did not have a sound mind to enable him answer the questions put to him during the trial. That he pleaded not guilty and still maintains his innocence.

12. He submits that the trial magistrate joined hands with the prosecution to convict him on a case which had omissions. He submits that on 22/03/2021, he pleaded that he was unwell but the trial court informed him that he could stand for plea. He contends that he was prejudiced in the first instance. He submits that the trial court did not describe to PW1 whether she was to give a sworn or unsworn statement. That her evidence was unconstitutional because there is no room for any person other than the state counsel to be informed on the proceedings in a trial court.

13. He submits that PW1's evidence is unbelievable because there were elder children present in the homestead when the alleged offence took place. He wonders why PW1 did not interrogate the other children. He questions whether it is possible for a person to hold another in his lap and engage in sexual intercourse in that position. He submits that the evidence of PW1 does not indicate whether she had direct vision of his male organ placed on the genital organs of the child. He wonders why the prosecutor declined to disclose the name of the child yet children are given names after birth.

14. He submits that the age of the child was not proved. He submits that the evidence of PW4 should be interrogated as she informed the court that the report made to her by PW1 was that the child had slight bleeding. That the blood should have been availed for scientific examination to prove beyond reasonable doubt that it was from the child victim. He relies on the case of Zahira Habibullah Sheikh & Anor –vs- State of Gujarat & Anor AIR 2006 SC 1367 where the Supreme Court of India stated;

> " It has been understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical or comprehensive or exhaustive definition of the concept of a fair trial and may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage

of justice has resulted...failure to accord fair hearing either to the accused or the prosecution violates every minimum standard of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one not a sham or mere farce and pretence. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law but also in recognition and just application of its principles in substance to find out the truth and prevent miscarriage of justice."

15. He submits that Sultan Hamud hospital did not disclose any slight bleeding in the private parts of the victim that the prosecution did not bring any vital exhibit like the blood and the trial court failed to reconcile the inconsistencies. He contends that the whole case was a suspicion and relies on the case of Parvin Dhalay –vs- R; CR. APP. CA NO 10 of 1997 where the court held that;

> " Suspicion remains just that and cannot and should never form the basis of a conviction as happened in the present case."

16. He submits that the trial magistrate did not give cogent reasons for disbelieving his sworn defence which alleged the possibility of being framed up due to an existing grudge.

17. He submits that PW1 did not disclose how he was able to run with his trouser loosened. He contends that for a person to run, his/her clothes should be tightly worn.

18. The appellant faults the trial magistrate's description of his defense as improbable and unfounded. He contends that it is an indication that he had already formed an opinion of convicting him and was only looking for excuses to effect his opinion. That it was unfortunate and caused miscarriage of justice. He relies on the case of Adedeji –vs-the State (1971) 1ALL NLR 75 where it was held;

> " Failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed."

19. He submits that the trial court shifted the burden of proof to him as he had no obligation to prove his innocence by explaining what led to the perceived grudge between him and PW1. That he also had no obligation to bring witnesses. He relies on the case of Dorcas Jemutai Sang –vs- R (2018) eKLR where the court stated;

> " In the present case, we are satisfied that both courts below shifted the burden of proving innocence on the appellant. This we say in light of quotations we have produced above. Where the learned trial magistrate stated that the appellant ".... did not call witnesses to support her defence..." and the learned judge remarked that," ....it was a significant fact that the appellant did not call any witness at the trial.". By these sentiments, both courts below appeared to say that the appellant was obliged to call witnesses to prove her innocence. As stated above, that was a wrong approach regarding the burden of proof in a criminal prosecution and therefore we allow the appeal on this ground."

20. He submits that PW1 did not elaborate why she concluded that she had to find the child at the exact place she had left her. That the prosecution did not avail the alleged oil which had been smeared on the vagina of the child. He relies on the case of R –vs- Harris & Others (2005) E. W.C.A CRIM 1980 where the learned Judge stated;

> " It is crucial that experts are instructed who are capable of conveying their findings and conclusions in a way that is easily understood by the lay person. As a participant in a

criminal proceeding, the expert has a duty to ensure that evidence whether disputed or not is presented in the clearest and shortest way. Reports should be robust, logical, transparent and balanced (CROWN CRIM PROCEDURE RULES 3.2.2 UK)."

21. He submits that the prosecution failed completely by not providing the child's dress in order to test for finger prints to establish the person who was holding her.

22. He submits that the authorities cited by the trial magistrate in his judgment fell short of the required efficiency and truth required in criminal cases. He relies on the case of Rattram –vs- State of M.P (2012) 4 SCC 516 where the court ruled;

> " Fundamentally, a fair trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism."

23. He submits that the above was not met because he was forced to stand trial even after informing the court that he was unwell. He submits that it was erroneous for the trial magistrate to hold that the genital organs of the child were injured by the attempted defilement yet the medical evidence did not establish the probable type of weapon used.

24. The appellant submits that he was prejudiced for lack of legal representation and that the trial magistrate should have requested for a pro bono lawyer for him. He relies on the case of Moses Gitonga Kimani –vs- R, Meru Crim Appeal No. 69 of 2013 where the court stated;

> " It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense while appreciating that the framers of *the Constitution* intended the right to legal representation to be achieved progressively. We implore parliament to enact the requisite legislation."

25. He submits that the trial magistrate was biased and had a pre-conceived mind to convict him. That he did not even want to intervene and hear the reason as to why he (appellant) had demanded an increment. He contends that many times, people like him with defectiveness in psychology are deprived of their rights. That the Kshs 400/= which he was being paid by PW1 on a weekly basis translates to Kshs 54.10/= per day out of which he was also sustaining his medical needs.

Submissions by the Respondent

26. The State, through Prosecution Counsel Lucas Tanui, submits that the appeal lacks merit and the case was proved to the required standards.

27. With regard to the age of the victim, he submits that the complainant's mother, PW1, testified that the victim was born on 06/01/2020 and was therefore 11 months at the time of the offence.

28. He submits that the attempt to defile was adequately proved by PW1's evidence.

29. As to whether the appellant was properly identified, he submits that he was a neighbor and employee of PW1 hence well known to her. That in his defense, the appellant did not deny knowing PW1 but he introduced the element of a grudge which he could not prove.

30. He submits that the sentence of 30 years' imprisonment was lenient because the offence attracts an imprisonment of up to life sentence.

Duty of Court

31. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

32. Having looked at the grounds of appeal, the entire record and the rival submissions, it is my considered view that the following issues arise for determination;

    a. Whether the correct procedure was followed in substituting the charge sheet.

    b. Whether the appellant was fit to stand trial.

    c. Whether PW1's evidence was admitted properly.

    d. Whether the appellant was prejudiced by lack of legal representation.

    e. Whether the offence was proved to the required standard.

Analysis

Whether the correct procedure was followed in substituting the charge sheet.

33. The record shows that on 07/07/2021, the prosecution applied to substitute the charge sheet in order to introduce the offence of attempted defilement as the first count.

    9. Attempted defilement

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

        (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

        (3) The provisions of section 8(5), (6), (7) and (8) shall apply mutatis mutandis to this section

34. The initial charge sheet had only one count of committing an indecent act with a child.

    11. Indecent act with child or adult (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years

35. At the time of making the application, PW1 and 2 had testified.

36. The amendment meant that the appellant was now facing the likelihood of life imprisonment.

37. With regard to amendment of charges, section 214 (1) of the Criminal Procedure Code (CPC) provides as follows: -

    "(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

38. The record shows that the appellant was called upon to plead to the altered charge whereupon he pleaded not guilty and a plea of not guilty was entered. As to whether he was informed of his right to recall the two witnesses who had testified, the record is silent. However, after recording the plea, the proceedings were as follows;

Prosecutor: I am ready

Accused: I am ready. We can proceed from where we had stopped.

Court: Case to proceed from where we had stopped.

39. There is nothing on record to show that the trial court explained to the accused who was un represented that with the new charges he had the liberty to have the witnesses recalled so that he could cross examine them on the new charges. Taking into consideration the seriousness of the substituted charges, the trial court had the obligation to explain to the appellant his rights. The response of the appellant on record that the case could proceed from where it had stopped draws the presumption that the court had put to him the question whether he wanted the case to start afresh or to proceed from where it had stopped. It is not the same as to whether in view of the new charge he had other questions for the witnesses.

40. The trial court had the duty to ensure that the appellant was supplied with the new charge sheet and had the time to prepare his defence. It was not about proceeding with the case, but about fair trial. To that extent the appellant was prejudiced.

Whether the appellant was fit to stand trial.

41. The record shows that when the charge was read to the appellant the first time, he pleaded guilty to the charge and the trial magistrate referred him for mental assessment. The medical assessment was conducted and it came back with every aspect of the examination marked abnormal and a recommendation was that he was not fit to take plea or stand trial. The Doctor indicated that there was need for review after two months (from 4th January 2021). The form requires the Doctor to describe what is abnormal but there was no description. On 29th March 2021, the same doctor filled another form indicating that the appellant was competent to stand trial /take plea but continue with medication. This time every aspect of examination was marked normal. The said report signed by the doctor and the recommendation given was that the appellant was competent to stand trial /take plea and he was to continue with medications. The only concern for this court is that the Doctor did not indicate the reason for finding the appellant unfit to stand trial. Neither was there any diagnosis, as to what he was undergoing treatment for. There was also no description as is required by the medical form of what was abnormal. In fact, the court's order committing the appellant to Mathare National Mental Hospital for treatment was never complied with. He remained in remand custody at Makueni

GK Prison, The Prosecution then proceeded to have him re-examined by the same doctor at Makueni Hospital and to produce a report.

42. As at the time of the trial the court had no idea what the mental illness if any the appellant was suffering from and whether it had been treated satisfactorily to warrant the hearing. Having formed the view that the appellant was mentally unfit, having directed his committal to Mathare Mental Hospital the court was required to obtain a certificate of fitness from the doctor in the facility as required by s. 163. Of the Criminal Procedure Code which provides for the Procedure where person of unsound mind subsequently found capable of making defence

    (1) If a person detained in a mental hospital or other place of custody under section 162 or section 280 is found by the medical officer in charge of the mental hospital or place to be capable of making his defence, the medical officer shall forthwith forward a certificate to that effect to the Director of Public Prosecutions.

    (2) The Director of Public Prosecutions shall thereupon inform the court which recorded the finding concerning that person under section 162 whether it is the intention of the Republic that proceedings against that person shall continue or otherwise.

43. The court was bound to follow through with the process of ensuring that the appellant was fit to stand trial as provided for in the Criminal Procedure Code.

44. While the appellant's complaint of being forced to proceed while unwell is not supported by the record the court was bound to ensure that the appellant was okay go through with the trial. Mental Health issues in the criminal justice system ought not to be brushed off lightly.

Whether PW1's evidence was admitted properly.

45. It is noteworthy that PW1 was not the victim of the offence. The Victim was the 11-month-old child. She was the key witness for the prosecution. It also evident that PW1 testified as the intermediary as defined by the *Sexual Offences Act* no 3 of 2006

> " intermediary" means a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker;

46. However, looking at the record the learned trial court did not follow the procedure for the taking of the evidence of an intermediary. The learned Magistrate proceeded to take the evidence of PW1 as if she the victim. There is no evidence that the victim was even in the court room and there is no mention that the magistrate saw the child.

47. The process for using an intermediary is set out at s. 31 of the *Sexual Offences Act* at section 31. Headed vulnerable witnesses. For necessary guidance I reproduce most of the provisions here,

    (1) A court, in criminal proceedings involving alleged the commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is

        (a) the alleged victim in the proceedings pending before the court;

        (b) a child; or

        (c) a person with mental disabilities.

(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of –

(a) age;

(b) intellectual, psychological or physical impairment;

(c) trauma;

(d) cultural differences;

(e) the possibility of intimidation;

(f) race;

(g) religion;

(h) language;

(i) the relationship of the witness to any party to the proceedings;

(j) the nature of the subject matter of the evidence; or

(k) any other factor the court considers relevant.

(3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures-

(a) allowing such witness to give evidence under the protective cover of a witness protection box;

(b) directing that the witness shall give evidence through an intermediary;

(c) directing that the proceedings may not take place in open court;

(d) prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or

(e) any other measure which the court deems just and appropriate.

(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

(6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.

(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may-

(a) convey the general purport of any question to the relevant witness;

(b) inform the court at any time that the witness is fatigued or stressed; and

(c) request the court for a recess.

(8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including-

(a) any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;

(b) any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;

(c) the need to protect the witness's dignity and safety and protect the witness from trauma; and

(d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(9) The court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.

(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

48. It is evident from the provision that there is a clear process for appointing an intermediary. The first step is to identify whether the witness before court is the victim, a child or a person with disability. In this case it was both a child and the victim. The second step is to subject the witness fits into any of the 10 sets of criteria or combination of the same. In this case the age of the child and the nature of the offence clearly made her a vulnerable witness. Finally the Court would then set in motion the process of appointing an intermediary which starts with the declaring the witness a vulnerable witness.

49. From the record the learned trial magistrate did not follow this laid down procedure. Clearly the evidence of PW1 was not properly received.

Whether the appellant was prejudiced by lack of legal representation.

50. The appellant raised the issue of prejudice due to lack of legal representation. Article 50 of *the Constitution* guarantees the right to a fair trial and part of the fair trial rights under Article 50 (2) (h) is the right "to have an advocate assigned to the accused by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly"

51. The *Legal Aid Act* No 6 of 2016 provides for the unrepresented accused persons under section 43(1) where it bestows a duty upon the court to;

a. promptly inform the accused person of his/her right to legal representation;

b. if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and

c. inform the service to provide legal aid to the accused person.

52. Section 43 (1A) provides that in determining whether substantial injustice is likely to occur, the court shall take into consideration;

a. the severity of the sentence

b. the complexity of the case; and

c. the capacity of the accused to defend themselves

53. In this case the learned trial magistrate did not follow the law. He did not inform the appellant of his right to legal representation by counsel of his choice neither did the learned trial magistrate indicate his view as to whether or not substantial injustice was likely to occur. The learned trial magistrate is bound by the law to determine whether substantive injustice will occur using the criteria set out in in the law; the severity of the sentence; the complexity of the case; and the capacity of the accused to defend himself. There was no such determination in this case, yet the appellant faced the likelihood of long sentence of imprisonment through the complicated charge of attempted defilement. The learned trial magistrate ought to have expressed himself on that issue.

Whether the offence was proved to the required standard

54. In order to prove this offence, the prosecution must establish beyond reasonable doubt all the ingredients of the offence of defilement except penetration. Therefore, the prosecution must prove the age of the victim, the positive identity of the accused and the overt acts done by the accused towards committing the offence of defilement which was not completed.

55. However having formed the view the evidence of PW1 was not properly received, the court did not pronounce itself with regard to the appellant's right o representation, the failure of the court to inform the appellant of rights upon the substitution of the charge, and the fact that the court did not follow through with its own orders with respect to the mental health issues of the appellant, it is my view that there was a miscarriage of justice as the appellant did not get a proper trial.

56. So, what should be done? On appeal the court is empowered at s. 354 of the Criminal Procedure Code;

(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—

(a) in an appeal from a conviction— (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction;

57. The law as to when a retrial should be ordered is settled. In Fatehali Manji Vs Republic [1966] EA 343 the Court of Appeal when dealing with the same issue, gave the following guideline: -

> " In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend

on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it." (See Philip Kipngetich Terer –vs- Republic [2015] eKLR).

58. In Muiruri Vs R [2003] KLR 552, the Court held that: -

> " It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See Zedekiah Ojuondo Manyala Vs Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's."

59. In Mwangi –versus- Republic [1983] KLR 522, the Court of Appeal held at page 538 that: -

> " We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."

60. Guided by these authorities I must balance the rights of the accused to a fair trial and the interests of justice. The charge herein is serious. The victim was a child, who is a child in need of care and protection and who must look upon the adults in the justice system to ensure justice for her. The appellant also deserves a proper trial. Looking at the evidence there is the possibility that if the matter is retried there could a conviction. I have looked at the time lapses. The appellant was charged on 29th December 2020. Judgment was delivered on the 27th July 2021. This period must be taken into consideration if he is found guilty and convicted.

61. In the circumstances I find that this is a case where the outcome must be a retrial.

62. I direct that the appellant be produced before the SPM Kilungu Law Courts within 14 days hereof for retrial before a court of competent jurisdiction for plea taking.

63. In the meantime, he be released to the OCS Sultan Hamud Police Station to be produced before the court within the requisite period.

64. Orders Accordingly.

65. Right of appeal 14 days

DATED SIGNED AND DELIVERED VIRTUALLY THIS 5TH JULY 2023

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Mumbua T Matheka

Judge

Court Assistant: Mwiwa

For State Tanui

Appellant present