REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 85 OF 2017

JACKSON MUTUA MUTISYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence in Machakos Chief Magistrate's Court

(Hon. Y.A Shikanda, SRM), in Criminal Case No. 1034 of 2013 and judgement

delivered on 13th June, 2017)

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON MUTUA MUTISYA.....ACCUSED

JUDGEMENT

1. The appellant, **Stephen Kikumu Mutisya**, was charged before the Machakos CM's Court in Criminal Case No. 1034 of 2013 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the ***Sexual Offences Act, No. 3 of 2006***. The particulars were that the appellant, on the 13th day of August, 2013 in Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of **JWM**, a child aged 5 years. Alternatively, he was charged with the offence of indecent act with a child contrary to section 11(1) of the same Act, the facts being that on the said day at the said place, he intentionally touched the vagina of JWM, a child aged 5 years with his penis.

2. Upon being found guilty, the appellant was convicted of the offence of defilement and was sentenced to life imprisonment. Being dissatisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

a. Failure to abide by the provisions of Article 25(c) and 50(a) of the Constitution.

b. THAT the learned magistrate failed in point of law and fact by not considering that the prosecution did not discharge one of the elements of the offence, that is whether the alleged act was committed to Pw-2 by the appellant.

c. That the learned trial magistrate erred in law and fact by not considering that his mode of arrest was blurred with inconsistencies that were more questionable.

d. That there was misapprehension of facts by the learned trial magistrate.

e. That the learned trial magistrate failed to evaluate and analyse the entire trial record.

f. That the Honourable trial magistrate erred in points of law and fact by not resolving the explicit contradictions apparent

in the prosecution evidence in favour of the defence.

3. In support of the prosecution's case the prosecution called 5 witnesses.

4. Pw1, **DMK**, testified that on 13th August, 2013, at about 4pm she was with her child, **JW**, the complainant who had come from [Particulars withheld] Nursery School. PW1 then went to the bathroom but upon returning to the house she did not find **JW** in the house having gone out to play with her school mates, **M** and **N**. Her search for **JW** from the neighbours did not bear any fruit. However, she met **JW** coming from the direction of Kalimoni crying while touching the area around her genitals and there was a laceration. According to PW1, **JW** informed her that she did not know the person who had hurt her. Following **JW** was one **Mwangangi** (PW3) who informed PW1 that he had found **JW** with the appellant in a trench on a farm and that the appellant ran away upon seeing PW3, who then informed PW1 that he was escorting **JW** home.

5. PW1 took **JW** to the hospital then called **JW's** on phone after which she reported the matter to the police. According to PW1, she knew the appellant before as s distant neighbour from the neighbouring village. It was PW1's evidence that at the time of the incident, **JW** was 5 years old. She proceeded to identify P3 form, PRI form, health card and copy of **JW's** birth certificate. PW1 confirmed that both herself and **JW** recorded their statements at the police station.

6. In cross-examination she confirmed that she knew the appellant by name having seen him severally though on the day of the incident, she did not see him.

7. After *voir dire* examination, **JW** was sworn and testified as PW2. According to PW2, the complainant, she was at the time of her testimony 8 years old in standard 4. It was her evidence that while she was looking for her father, she met a man who got hold of her hand and asked her to accompany him so that he could buy sweets for her. The man then took her to a farm where he removed her clothes and lay on her and removed his clothes. It was her testimony that she felt pain in her genitals and bled. According to her, the said man did not utter a word.

8. However, there was a person who was passing by who spotted them by which time the assailant was not lying on her and reported to her mother. She was later taken to the hospital. It was her evidence that she had never seen the man who lay on her before and that that was the day she saw his face. She disclosed that the person who reported the matter to her mother was PW3.

9. PW3, **Francis Mwangangi**, testified that on 13th August, 2013 at around 4.30pm he was on his way from work, when he met the appellant, who was his classmate, in some bushes with a girl whose hand he was holding while the girl was crying. Upon inquiring from the appellant what was wrong the appellant informed him that he had met the girl on the way and did not know why she was crying and that he did not know the girl's parents. PW3 then asked the girl whether her father was Muendo and she nodded then walked away. It was PW3's testimony that he knew the girl's parents. The appellant then ran away and PW3 followed the girl. On the way they met the girl's mother and PW3 informed her of what had transpired.

10. It was PW3's evidence that he did not know where the appellant and the girl had been as he just met them on the way while the girl was crying. After explaining what he saw to the mother, PW3 left the child with the mother. When the villagers appeared, they decided to look for the appellant whom they found bathing in the stream and apprehended him after which he was taken to the police station by the child's father and neighbours. The next day, PW3 recorded his statement at the police station.

11. In answer to the questions put to him by the court, PW3 stated that there was nothing unusual with the girl's clothing but she was just crying.

12. PW4, **PC Priscilla Nyamu**, was in August, 2013 attached to Machakos Police Station. On 13th August, 2013 at 9pm she received the accused, whom she did not know previously, from members of the public who included a child and her mother. It was alleged that the child had been defiled. Shen the placed the appellant in the police cells and referred the girl to Machakos Level 5 Hospital for examination and issued her with a P3 form which was returned after filing by the doctor. She also received the clothes that the girl had won on the material day as well as a trouser and pant which was bloodstained. However, the pant was not analysed. She then proceeded to charge the appellant after recording PW2's statement. PW4 then produced PW2's birth certificate and her clothes as exhibits.

13. PW5, **Dr John Mutunga**, attached to Machakos Level 5 Hospital produced the P3 form on behalf of **Dr Emmanual Leiposha** who examined PW2 on 22nd August, 2013 filled the P3 form for **JW** who was aged 5 years old then. According to the said report, it was alleged that the child had been defiled on 13th August, 2013 by a person known to her and there was a bloodstained pant. While there were no physical external injuries, there were bruises on the external genitalia and the hymen was freshly broken and there was bleeding from the vagina. HIV and STI tests were however negative. After treatment, the degree of injuries was assessed as grievous harm. PW5 produced both the P3 form and the PRC form as exhibits and concluded that the minor had been defiled.

14. In his unsworn statement, the appellant stated that he was aware of the charges facing him but that he did not do anything to the child.

15. In his judgement, the learned trail magistrate found that the minor told the truth as her evidence was corroborated and that the prosecution satisfied the ingredient of penetration for the purposes of defilement. He found that there was sufficient evidence to prove that the minor was below the age of 18 years at the time of the alleged offence. He also found, based on the evidence that although the minor did not know the appellant, her evidence coupled with that of PW3 positively links the appellant to the offence.

16. The court then proceeded to find that the evidence against the appellant was overwhelming since the inculpatory facts relied on by the prosecution as evidence was incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis that that of his guilt. Further, there was no other co-existing circumstances which would weaken or destroy the inference of the

appellant's guilt or rather raise any reasonable doubt in the prosecution's case.

17. The court therefore found the appellant guilty and convicted him of the offence of defilement and sentenced him to life imprisonment.

18. In this appeal it is submitted by the appellant that it was stated that he was not in his proper state of mind when the incident was alleged to have been committed. The appellant therefore submitted that it was imperative that he be provided with an advocate pursuant to Article 50(2)(h) of the Constitution.

19. It was further submitted that considering the inconsistencies and contradictions which went to the root of the trial, there was no fair trial since he was presumed guilty. In this regard he referred to the evidence of PW1 and PW2.

20. It was submitted that PW2 did not identify the person who defiled her.

21. According to the appellant there was a need to conduct a parade and the proper procedure for conducting *voir dire* ought to have been followed and the questions and answers out to have been set out in deciding whether the complainant understood the nature of the oath. In this case it was submitted that the learned magistrate did not state whether the minor was intelligent enough to give sworn evidence or not as required by law, hence evidence that ensued from the same witness ought not to have formed a justification for conviction. It was submitted that the trial magistrate did not record his decision as to whether the child possessed of sufficient intelligence and whether she appreciated the importance of telling the truth. Accordingly, it was submitted that the evidence of the complainant was of no use to the court.

22. The appellant relied on **Woolmington vs. DPP [1935] AC 462 at 481**, **Miller vs. Minister of Pensions [1947] 2 All ER 372**, **Walter vs. R [1969] 2 AC 26**, **R vs. Gray 58 Cr. App. R 177 at 183**, and **R vs. Lifchus [1997] 3 SCR 320**.

23. It was further submitted that the learned trial magistrate ought to have summoned crucial witnesses that were supposed to have apprehended the appellant.

24. In conclusion the appellant submitted that the prosecution did not prove its case against him beyond reasonable doubt and that the evidence adduced was shrouded in irregularities.

25. On behalf of the Respondent, it was submitted that age was proved beyond reasonable doubt by the complainant's birth certificate and in any case age was not contested by the appellant.

26. As regards penetration, it was submitted that both the evidence of the complainant and the evidence of PW5 conclusively determined that there was penetration hence this element was proved.

27. As regards the identification of the appellant, it was submitted that the appellant committed the offence in broad daylight and that the complainant was able to see him very well on the material day. The appellant not only talked to the complainant but walked with her for a distance hence the complainant had enough time to see and identify him very well. Further the evidence of the complainant was corroborated by PW3 who met the appellant holding the complainant's hand and that PW2 was crying. That the appellant ran away was evidence that he was aware that he had done something wrong to the complainant.

28. It was submitted that in his defence, the appellant merely denied having defiled the complainant without explaining the circumstances under which he was found with the complainant. It was therefore submitted that the prosecution's case was not shaken. To the Respondent, the sentence was equivalent to the offence committed.

29. It was the Respondent's submission that the court duly analysed the evidence led by the prosecution and the defence and was satisfied that the appellant did commit the offence a decision which was well reasoned and supported by evidence. This court was therefore urged to uphold both the conviction and the sentence.

Determination

30. This is a first appellate court, as expected, this court is obliged to analyse and evaluate afresh all the evidence adduced before the lower court and draw its my own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding 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 vs. Sunday Post [1958] E.A 424."**

31. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and 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.

32. Section 8 of the ***Sexual Offences Act*** provides as follows:

8. (1) 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.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence to a charge under this section if -

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

33. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013,** where it was stated that:

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

34. In the case of **Kaingu Elias Kasomo vs. Republic,** the Court of Appeal in Malindi criminal appeal No. 504 of 2010 stated as follows:

"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

35. The importance of proving the age of the complainant in sexual offences was emphasized in **Alfayo Gombe Okello vs. Republic (2010) eKLR** where the Court stated that:

"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)…proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."

36. In **Dominic Kibet vs. Republic Criminal Appeal No. 155 of 2011** it was held that:

"…while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof."

37. In this case, PW1 testified that at the time of the incident, on 13th August, 2013, **JW** was 5 years old. **JW** also testified that at the time of her testimony she was 8 years old in standard 4. This was on 17th January, 2017. The birth certificate which was produced as exhibit 4 showed that the complainant was born on 14th July, 2008. It follows that there was sufficient evidence to prove that the complainant was 5 years at the time of the incident.

38. In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."**

39. In **Chipala vs. Rep. [1993] 16 (2) MLR 498** the Malawian High Court held at 499 that:

> **"It seems to me that other than a certificate of a medical practitioner, or his oral testimony, to the effect that, in his opinion, such a person has or has not attained a specified age, or other documentary proof, or the testimony of a person who has personal knowledge gained at the time of such person's birth, such as parents, no other evidence is receivable as proof of the age of such a person."**

40. I therefore find that the age of the complainant was proved beyond reasonable doubt to have been 5 years old.

41. As regards penetration, 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.***

42. In this case the only evidence of what happened between the appellant and the complainant was the complainant's evidence. According to the complainant, the man who assaulted her took her to a farm where he removed her clothes and lay on her and removed his clothes. As a result, she felt pain in her genitals and bled. When the complainant was examined by PW5, it was found that there were no physical external injuries but there were bruises on the external genitalia and the hymen was freshly broken. There was also bleeding from the vagina though the HIV and STI tests were negative. Although PW5 concluded that the complainant had been defiled, he did not lay any basis for this. The learned trial magistrate however seems to have relied on circumstantial evidence in his finding that the complainant was defiled.

43. The rule on circumstantial evidence is however now well documented. As held by the Court of Appeal in **Sawe –vs- Rep [2003] KLR 364**:

> **"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

44. I however agree with the position adopted by the Supreme Court of Uganda in **Bassita Hussein vs. Uganda, Criminal Appeal No. 35 of 1995**, that:

> **"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt."**

45. In this case the evidence was that after the assailant removed the complainant's clothes, he also removed his. The next thing that the complaint felt was pain and she bled. Had the evidence not gone further and stated that the appellant also removed his clothes, there obviously would have been a doubt as to whether what caused the complainant injuries was the genital organ of the appellant and not anything else. However, since there is evidence that the appellant removed his clothes as well, the court may well have been justified in finding that in the absence of any other implement used by the assailant, there was penetration for the purposes of defilement.

46. As regards the identity of the appellant, the appellant according to PW3 was found in the company of the complainant holding the complainant's hand. In his evidence, the appellant simply said that he did not do anything to the complainant. He never tried to controvert the damning evidence against him. While the burden of proof was not upon him to prove his innocence, where the evidence adduced by the prosecution requires the accused to do no more than a mere denial, the comments by the trial court that the accused's was a mere denial does not necessarily amount to shifting of the burden to the accused. The appellant's defence was a mere denial. This was appreciated by the Court of Appeal in **Isaac Njogu Gichiri vs. Republic [2010] eKLR** when it held that

> **"With regard to failure by the superior court to give due consideration to the appellant's defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: *'I find that the defence of the 5th accused is not true.'* We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: '*The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances.*' We agree with this confirmation."**

47. It was therefore stated in the court of appeal case of **Ernest Abanga Alias Onyango vs. Republic CA No.32 of 1990** that:

> **"The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he**

may reasonably be expected to be able and interested to explain…This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution."

48. While the burden is always upon the prosecution to prove the accused guilty beyond reasonable doubt and that the said burden applies to all the necessary ingredients of the offence, the Court of Appeal dealt with what amounts to "reasonable doubt" in **Moses Nato Raphael vs. Republic [2015] eKLR** where it expressed itself as follows:

"What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-

'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 proved beyond reasonable doubt, but nothing short of that will suffice.'"

49. In other words, proof beyond reasonable doubt is not the same thing as proof beyond a scintilla of doubt. What the Court is required to determine is whether the case raises reasonable doubt that the offence may not have been committed at all or not have been committed by the accused. If that is the case, then the benefit of that doubt must inure to the accused.

50. In my view where the prosecution's evidence is consistent and water tight, it requires a strong evidence to dislodge the same. This is not to say that the burden of proof shifts. What it means is that where the prosecution evidence taken on its own is strong enough to give rise to a conviction, unless some other evidence emanates from the defence which would have the effect of dislodging the prosecution case, there would be no reason to interfere with the conviction. In those circumstances it is then said the evidence of the prosecution proves the case beyond reasonable doubt.

51. In this case the circumstances in which the appellant was found in the company of the complainant soon after the incidence coupled with his conduct of running away, required the appellant to offer some explanation rather than just making a bald denial. He could have for example denied that he did not run, that he was not found in the company of the complainant and if he did run away, why he did so.

52. In the premises I find that the appellant was sufficiently identified as the complainant's assailant.

53. In this appeal it is submitted by the appellant that it was stated that he was not in his proper state of mind when the incident was alleged to have been committed hence he ought to have been provided with an advocate pursuant to Article 50(2)(h) of the Constitution. It is true that at the commencement of the trial, the appellant was found to have had some mental problems and was committed to Mathare Mental Hospital. What has given me some concern is that on 8th June, 2016, the psychiatrist, **Dr Joseph Igara Jumba**, gave his opinion in which he stated that the appellant was suffering from Schizophrenia and that at the time of commission of the offence, he may have been ill. It is submitted that considering the said circumstances, the appellant ought to have been provided with the services of a legal counsel. Article 50(2)(h) of the Constitution provides that every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

54. In **Macharia vs. Republic HCCRA 12 of 2012 [2014] eKLR** which was considered and cited with approval by the court in the case of **Joseph Ndungu Kagiri vs. Republic [2016] eKLR** which it was stated as follows:

"Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."

55. In this case, from the opinion of the psychiatrist, the appellant may have been suffering from mental disability at the time of the commission of the offence. This line seems not to have been taken up by the trial court. Though there was no conclusive evidence that the appellant was at the time of the commission of the offence mentally challenged, it is clear that such a possibility having been brought to the attention of the court, that factor in my view constituted a ground for possible substantial injustice resulting and at least the appellant ought to have been asked whether in those circumstances he required services of legal counsel.

56. In these circumstances it is my view that the possibility of a miscarriage of justice cannot be ruled out. A miscarriage of justice was discussed in the case of **Zahira Habibullah Sheikh & Another vs. State of Gujarat & Others AIR 2006 SC 1367** where the Supreme Court of India stated:-

"It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it 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 even minimum standards 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 pretense…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."

57. The Supreme Court in **Republic vs. Karisa Chengo and 2 others (2017) eKLR** stated as follows:-

"[87] Article 50(2)(h) of the Constitution provides that "[e]very accused person has the right to a fair trial, which includes the right…to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly." It does not define what "substantial injustice" means. However, in David Macharia Njoroge v. Republic, (supra), the Court of Appeal held that "substantial injustice" results to "persons accused of capital offences" with "loss of life" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are "if substantial injustice would otherwise result…" While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa v. Republic; C.A No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment."

58. In this case, the court ought to have interrogated the matter a little deeper its attention having drawn to the fact that the appellant may not have been in a proper frame of mind when the offence was committed. In the premises, I cannot say that the appellant was subjected to a fair hearing as required under Article 50 of the Constitution.

59. The appellant was arrested on 4th September, 2013 and though he was admitted to bail, there is no record showing that he was in fact released on bail. Accordingly, he has been in custody for a period of nearly six years. Pursuant to the decision of the Court of Appeal in **Jared Koita Injiri vs. Republic [2019] eKLR** regarding the constitutionality of minimum mandatory sentences, and as was appreciated by the same court in **Simon Githaka Malombe vs. Republic [2015] eKLR** as the appellant has spent nearly half a decade behind bars on a tainted conviction based on an unfair trial, I quash that conviction and set aside the sentence and set the appellant at liberty forthwith unless otherwise lawfully held.

60. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 23rd day of July, 2019.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Ms Mogoi for Respondent

CA Geoffrey