REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL CASE NO 62 OF 2013

REPUBLIC.....PROSECUTION

VERSUS

ZABLON MISIKO BUSHURU.....ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The Accused herein Zablon Misiko Bushuru, on the 18th December 2013 appeared before Chitembwe J and pleaded not guilty to a charge of ***murder contrary to section 203 as read with section 204 of the Penal Code***, the particulars of which are that on the 7th December 2013 at Shikogwe Village Malekha Sub-location, Shirungu location in Kakamega North district within Kakamega County murdered Caroline Bushuru.

2. Following the plea of not guilty, the prosecution called 7 witnesses in support of the charge against the accused person.

Prosecution case

3. The prosecution called 7 witnesses. Robai Namalwa Musungu PW1 (Robai), Caleb Mulika Caleb (Caleb), Simion Mbayachi Swani PW3(Simion), Jackson Bushuru Mulika PW4 (Jackson), Elizabeth Oyiengo PW5 (Elizabeth), Gladys Bushuru PW6 (Gladys) and No. 235443 CI Richard Kirario PW7 (CI Kirario).

4. Evidence was led that on the 6th December 2013 the deceased had in the company of her relatives attended a memorial service at Caleb's home. She returned home at about 12:30am escorted by Robai and at about 2.00am Simion confirmed that the deceased was asleep at Glady's (her grandmother) house with other children.

5. The next morning on the 7th December 2013, the deceased could not be traced and her body was later found lying in a nearby sugar plantation. According to Jackson, the accused, who is his son, had some time back made sexual advances to the deceased. He also testified that there was blood in the Gladys' sitting room and that it looked like someone had tried to clean it up. Gladys confirmed that she noticed blood in her sitting room and immediately the accused started cleaning it up and then disappeared. Later on, a blood stained shirt and jacket were recovered from the accused's house. The same were produced in evidence as P exhibit 2 and 3.

6. Elizabeth, a government analyst testified that she carried out DNA testing on the blood stains on the shirt and jacket and compared them with samples from the deceased and the accused. She confirmed that the blood samples on the shirt and the jacket matched those of the deceased.

7. CI Kirwa, PW7 stated that the body of the deceased was found by herds boys. He stated that photographs of the body were taken and that it was clear that the deceased had bruises around her neck, and fresh blood was oozing from her private parts. Photographs of the same were produced in evidence. Upon arrest the accused wore a vest and trousers which were blood stained. CI Kirwa confirmed in cross examination that the house where the deceased had slept the night before her death had blood marks on the floor and that it looked like there had been a struggle there. He clarified that the accused had defiled the deceased before although the deceased had been afraid to report him.

Defence case

8. By a ruling dated 7th June 2018 accused person was found to have a case to answer and accordingly put on his defence. The accused testified that on the date of the alleged murder he was at the memorial service and stayed there till 11.00am the following day when he went back home and was informed of the deceased's death. He stated that he assisted Jackson and Gladys move the deceased's body to a different spot and said that was how he got blood stains on his clothes. He denied having had or demanded sexual relations with the deceased and stated that he had been implicated by his parents as he had stopped them from leasing their land. The accused person did not call any witnesses.

Submissions

9. The state did not make any submissions at the close of the hearing. The accused through his counsel Ms Wilunda submitted that although the DNA test confirmed that the blood stains found on the accused person's clothes matched the deceased, the prosecution did not prove how those stains got on the accused person's clothes. She also stated that the cause of death was not proved as there was no postmortem report and there was no nexus between the acts of the accused and the death of the deceased.

Burden of proof

10. It is trite that the burden of proof in criminal cases rests entirely on the prosecution and never shifts to the accused. The accused person has no burden to prove his innocence. He is presumed innocent until proven guilty. Whether the defence was a mere denial or that the offence is very serious does not and can never shift the burden on him. In **Republic V Stanley Muthike Tiire [2018] eKLR t**he court stated that issue:-

> ***"It is the law in Kenya as entrenched in the Constitution under Article 50 (2) (a) that an accused person is presumed to be innocent until the contrary is proved. The Evidence Act Cap 80 of the Laws of Kenya at section 107 (1) provides thus: "Whoever desires any court to give judgment as to any right or liability dependent on the existence of facts which he asserts, must prove that those facts exist."***
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> ***As to what constitutes the burden of proof beyond reasonable doubt the case of*** *Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373* ***provides as follows in a passage alluded to be considered the greatest jurist of our time Lord Denning:***
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> ***"That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of 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 doubt but nothing short of that will suffice."***
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> ***In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. That burden of proof of an accused guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person."***

Issues for determination

13. The offence of murder is defined as follows by ***section 203 of the Penal Code:***

> ***"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."***

14. This definition gives rise to four (4) crucial ingredients of the offence of murder all of which the prosecution must prove beyond a reasonable doubt for its case to succeed. These are:

a) The fact of the death of the deceased.

b) The cause of such death.

c) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person.

d) Proof that the said unlawful act or omission was committed with malice aforethought.

15. See **Anthony Ndegwa Ngari Vs Republic [2014] eKLR, in which th**e court highlighted the four crucial ingredients of the offence of murder.

Analysis and Determination

a)Whether the death of the deceased occurred.

16. The death of the deceased has been proved by Rabai, Caleb, Simon, Jackson and even Gladys who saw the deceased's body. The death has also been confirmed by the accused person who stated that he saw the body of the deceased. The accused person contends that the cause of death of the deceased has not been proved as the postmortem report was not produced in evidence In the case of **Republic V Mohammed Wanyoike & Another [2017 eKLR,** the court stated that:-

"A postmortem is normally conducted in murder cases so as to determine the cause of death. The mere fact that a postmortem is not conducted does not mean that the cause of death cannot be determined. If robbers invade a house and in the process shoot their victim dead using a rifle and he passes on, the absence of a postmortem report cannot be a good defence if the robbers are ultimately apprehended and charged with the offence of robbery with violence or murder. A postmortem report is not a condition pre-requisite to the offence of murder."

17. It was therefore not necessary in the instant case to produce the postmortem report. The death of the deceased has been proved by other evidence. Also see ***Republic versus Joseph Mulupi Okwiri [2018]eKLR***, where the court held:-

"24. The second issue for determination is whether the prosecutions failure to avail the doctor who performed the postmortem examination in this case is fatal to the prosecution's case. This question is critical for the simple reason that in a murder case, the prosecution must not only prove the fact of death but must also prove the cause of such death. In the case of Ndungu versus Republic (Supra) the Court of Appeal said that "in some cases death can be established without medical evidence." This case, taken together with Republic –versus – Cheya [1973] EA 500 were cited with approval by the Court of Appeal in Dorcas Jebet Keter & another versus Republic [2013]eKLR where the appellants were found guilty, convicted and sentenced to death for the murder of one Hillary Malakwen who was found to have been tortured and burnt to death by the appellants and their accomplices, despite the prosecutions failure to produce a postmortem report. The Court of Appeal quoted the following passage from the Cheya case in reaching the conclusion that failure to adduce medical evidence is not necessarily fatal to the prosecution's case –

"Of course, there are cases, for example, where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be obvious that the absence of a postmortem report would not necessarily be fatal. But even in such cases medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence as supporting evidence of the cause of the death in the circumstances relied on by the prosecution."

b) Whether there was Proof that accused committed the unlawful act which caused the death of the deceased.

18. The Prosecution called seven witness to testify on its behalf. There was no eye witness account to the events that led to the death of the deceased. The only available evidence is therefore circumstantial evidence.

19. In **Republic V Frankline Mugendi Miriti [2019] eKLR**, the prosecution's attempt to adduce the postmortem report faltered when for some unexplained reasons, and in spite of many adjournments granted to the prosecution, the doctor was not availed to produce the postmortem report. The prosecution thus closed its case without calling the doctor.

20. In dealing with the contention raised by the defence that the prosecution case was fatally flawed, the court took into account the ***Cheya Case*** (above) and concluded that:-

"The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a postmortem examination report of the deceased."

21. In its further deliberation on the challenge posed by the prosecution's failure to adduce medical evidence, the court in the ***Frankline Mugendi Miriti Case*** (above) went on to state:-

"What I gather from these decisions is that there are circumstances where death of a person may be proved without expert evidence. This is the hint I read from the Court of Appeal's pronouncement that the Cheya decision "does not illustrate the proper application of the principle that in some cases death can be established without medical evidence." What this statement suggests is that there exists a principle to the effect that in certain instances one does not need medical evidence to prove death except that the Cheya judgment was not the appropriate decision in which this principle was illustrated. The point was made even clearer when court proceeded to cite cases such as cardio injuries arising from stab wounds, shattered skulls or disappearance of a person as instances where the cause of death is so obvious that the absence of medical evidence or, to be specific, the postmortem report, may not necessarily be fatal to the prosecution.

It is important to remember that the specific instances cited by the Court are not exhaustive; in other words that list does not purport to exclude other circumstances that merit consideration in determination of the question whether or not medical evidence is necessary in offences of murder. And the Court could not possibly restrict the list to specific cases because they are bound to be the sort of scenarios that, in all likelihood, would be unpredictable or unforeseen and therefore the most reasonable cause would be to determine each case based on its peculiar circumstances.

The approach taken by the Court of Appeal is what one would refer to as a common-sense approach; it is an approach which to a greater degree acknowledges the basic understanding that as much as expert opinion is necessary in certain instances, a trial judge is not so detached from reality that he cannot see the consequences that would naturally arise from a set of uncontroverted facts or make a rational decision from such facts without the help of an expert. I suppose it is for the same reason that in law, a court is not bound by expert opinion if in its view, the criteria employed to test the accuracy of his conclusions is inapplicable to the facts before it or inconsistent, in some way, with those facts. (See Mutonyi versus Republic (1982) KLR 204).

22. In **Republic v Joshua Ruito Kaui [2019] eKLR.** court held that

> ***"In saying these things, I am aware that the lack of a postmortem report is not fatal to the prosecution case. And a person may be charged and convicted for murder even where medical evidence or the body is not available. See Charles Tatiro Iresa v Republic [2015] eKLR where the court relied on WAHIH & ANOTHER V UGANDA (1968) EA 278 where Spry JA had this to say.***
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> ***"There have been cases in East Africa where persons have been convicted of murder although the body of the victim was never found and the case against the appellant depended entirely on circumstantial evidence. There may be other cases where medical evidence is lacking but where there is direct evidence of an assault so violent that it could not but have caused immediate death..."***
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> ***17. In Ndungu v Republic [1985] KLR 487 the Court of Appeal emphasized that medical evidence on the cause of death is vital in a murder trial unless the cause of death is too obvious. The Court stated at page 493 as follows:-***
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> ***"Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post- mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced."***
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> ***18. There lies the ultimate test; medical evidence should be availed to establish that the nature of the injury sustained made death an obvious outcome"***

23. From the authorities cited above it is clear that failure to produce a postmortem report is not fatal to the prosecution case depending on the circumstances of the case when such circumstances would give an inference that the injuries sustained by the deceased led to her death.

24. In the instant case, the body of the deceased was found to have several bruises around the neck the chest and limbs. There is also evidence that the deceased was bleeding from her private parts, and there having been no eye witness, the prosecution heavily relied on circumstantial evidence. The Prosecution adduced photographic evidence of the body of the deceased. The photographs show that the deceased had bruises and cuts on her body in addition to bleeding from the nose and the private parts.

25. I am satisfied that in this case, the prosecution's failure to produce the postmortem report was not fatal tot he prosecution's case. The deceased had been seen alive and well at around 2.30am on the fateful morning. By 6.00am she was nowhere to be seen. Her body was that morning found lying in a nearby sugarcane plantation with the injuries seen from the photographs. There can be no doubt that those injuries are the ones that led to or caused the death of the deceased.

c. Whether there was proof that the accused committed the unlawful act which caused the death of the deceased

26. It is the prosecution's case that the death of the deceased was caused by the unlawful acts of the accused person, though the only available evidence is circumstantial in nature.

27. In the case of **Republic V Silas Magongo Onzere Alias Fredrick Namema [2017] eKLR** the court stated that:-

> ***"Death of a human being is unlawful when it is caused by another in circumstances which are not authorized or permitted by law. (See the principle in the case of*** *Guzambizi S/O Wesonga v Republic [1948] 15 EACA 65).* ***This legal proposition is consistent with Article 26 of our Constitution which provides for the right to life for every person. The justified exceptions the law recognizes is in execution of a court sentence, for the defence of property or defence of the life of self or any person from unlawful violence.***
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> ***The prosecution therefore has a duty to prove that the accused person caused the death of the deceased in this case through unlawful acts. Proving the cause of death in Kenya may either be through direct or circumstantial evidence. The circumstances which the court will hold an accused person liable for the death of another are provided for under section 213 of the Penal Code (Cap 87 of the Laws of Kenya).***
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> ***"It is trite law as espoused in the case of Joan Chebichii Sawe v Republic [2003] eKLR that "before a court of law can convict a person/accused upon circumstantial evidence, such evidence must be where the inference of guilt, the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. That such evidence must be so mathematically accurate as a basis of conviction in exclusion of any other co-existing circumstances weakening the chain of circumstances relied on by the prosecution. These principles articulate the position in law that the question as to the cause of death may either be answered by way of medical or circumstantial evidence."***

27. In the case of **Anne Waithera Macharia & 5 Others V Republic [2019] eKLR** the Court of Appeal observed that

> ***"The law of circumstantial evidence is quite settled. In MWITA vs. REPUBLIC [2004] 2KLR 60 it was stated thus by this Court;***
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> ***"It is trite that (sic) in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt; see Simon Musoke v Republic [1958] EA 715 where the following extract from Teper v R***

[1952] AC 480, 489, was quoted [1958] EA at page 719:-

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference?"

The circumstantial evidence needs to form a chain so complete as to lead unerringly to the conclusion that the accused is guilty of the offence and that the said evidence is incapable of any other reasonable hypotheses than that of guilt. See also REX vs. KIPKERING ARAP KOSKE & ANOR [1949] 16 EACA 135; SANE vs. REPUBLIC [2007] KLR and ODONGO vs. REPUBLIC [2009] KLR 261."

From the foregoing, the only issue that falls for our determination is whether the circumstantial evidence on record was sufficient to support conviction. However, there is no requirement in law that the guilt of a person must be proved by direct evidence alone.

Circumstantial evidence can also sufficiently buttress the establishment of the guilt of an accused person as was held in the case of Musili Tulo V. Republic Criminal Appeal No. 30 of 2013, where this Court pronounced itself as follows:-

"Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics."

28. In **Sylvester Mwacharo Mwakideo & Another V Republic [2019] eKLR**. The Court of Appeal observed that

"18. Over the years, courts have set the threshold which has to be met if circumstantial evidence is to be relied on to prove a case to the required standard of beyond reasonable doubt. For circumstantial evidence to form the basis of a conviction, several conditions must be satisfied to ensure that it points only to the guilt of the accused to the exclusion of others. This test has previously been applied by this Court in a myriad of cases for instance in the case of Judith Achieng' Ochieng' v. Republic, Criminal Appeal 218 of 2006, this Court stated the law as follows:-

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-

i. The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established.

ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

In other words, in order to justify a finding of guilt, the circumstantial evidence, in its totality, ought to be such that the incriminating facts lead to the unimpeded conclusion of guilt and that there are no co-existent facts that are capable of explanation upon any other reasonable hypothesis other than that of the accused's guilt."

29. It is the prosecution's contention in this case that a blood stained shirt, as well as a blood stained long trouser were recovered from the body of the accused person while a blood stained jacket was recovered from his house. While not disputing the fact of the blood stained clothes as pointed out by the prosecution, the accused person stated first that the blood was from a cow because he had assisted Caleb in slaughtering a cow for the memorial of the latter's father, and secondly that the blood splashed on his clothes as he assisted in moving the body of the deceased from one point to another when ordered to do so by Jackson and Gladys. CI Kirario also testified that upon arrest of accused person, he was found wearing blood stained clothes. He also testified that on close scrutiny of Gladys' house, there were traces of blood under the seat, though it appeared someone had tried to scrape it away.

30. Elizabeth, in her evidence confirmed that the blood found on the accused person's clothing matched the blood sample taken from the deceased. It is my considered view therefore that the circumstantial evidence of the deceased's blood on the accused person's clothing was cogent and credible and created a strong nexus between the accused person and the death of the deceased. This evidence irresistibly points to his guilt, in that the accused person's clothes having blood that belonged to the deceased is incompatible with his innocence. The deceased's blood on the accused person's clothes is thus incapable of explanation upon any other reasonable hypothesis than that of his guilt. I found the theory put forward by the accused as to how the deceased's blood got onto his clothes unbelievable because he did not raise that theory during cross-examination.

31. There is the further evidence of Caleb who testified that the person who helped him slaughter the cow was one Rashid Mukovale who was assisted by other people he could not recollect. Caleb did not mention that the accused person, who is his nephew was one of the people who slaughtered the cow. Nor were any questions put to Caleb to suggest that the accused person had helped him to slaughter the cow.

32. Caleb also testified that at around 3.00am on the material day, the accused person went to him and asked him for a torch, which he gave him. According to Caleb, the accused person went away for about three hours and returned to Caleb's home around 6.00am. Caleb stated that when the accused person took so long in returning the torch, he (Caleb) went to look for him at his house, but the accused person was not at his house. Caleb also stated that he asked other people attending the celebrations if they had seen the accused person but none of them confirmed seeing him at the celebrations between 3.00am and 6.00am on that day.

33. According to Caleb, when the accused person finally returned to celebrations at 6.00am, he interrogated him as to where he had been all

that while and the answer the accused person gave was that he had been to the toilet. There is therefore sufficient circumstantial evidence that the accused person was away during that critical interval when the deceased met her death. Caleb confirmed that he had no grudge with the accused person and therefore had no reason to concoct a story against the him.

c) Whether the accused had malice aforethought.

34. Section 206 of the Penal Code stipulates that malice aforethought is deemed to be established when any of the following circumstances are proved by evidence adduced against any defendant:

a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.

b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

c) an intention to commit a felony.

d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

35. In **John Mutuma Gatobu –V- Republic (2015) eKLR** The Court of Appeal stated;

"Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal Code……

There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought."

36. In **Joseph Kimani Njau –V- Republic (2014) eKLR t**he Court of Appeal stated the following:-

"In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution ……."

In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes of death of another."

37. In another case, **Dickson Mwangi Munene & Another –V- Republic (2014) eKLR,** the Court of Appeal expressed itself thus:-

"As stated, either of these acts, intentional or reckless, constitutes malice aforethought under Section 206 of the Penal Code which is the mens rea of the crime of murder.

In a charge of murder it must be shown that the accused's conduct caused the death. This burden is always with the prosecution to prove that the accused caused the death and that there was malice aforethought. The mens rea of murder is traditionally called malice aforethought and it connotes an existence of culpability or moral blameworthiness on the part of the accused person. In the absence of malice aforethought the unlawful killing is termed as manslaughter." Also see **Stanley Muthike Tiire** case (above).

38. In the instant case, the prosecution gave evidence to the effect that the accused person herein had been cautioned against his sexual advances to the deceased who was a daughter to his sister. According to Jackson, the matter had been discussed with the accused person earlier that night and was to come up again for further discussion. There was further evidence that the accused person had repeatedly defiled the deceased and that on more than one occasion the accused had knocked Gladys' door at odd hours asking for the deceased. On those occasions also, Gladys had found the door open and the deceased missing from the house.

39. Although motive is not necessarily required to prove murder, in this case, the accused person had the motive to silence the deceased once and for all, since the family was now aware of his sexual exploits with the deceased. That is why after assaulting the deceased, he made sure her body was hidden away from the eyes of the family. I am satisfied that the accused person knew that what he did to the deceased would probably cause the deceased's death, or cause her grievous harm, though of course in the circumstances in which he was, he did not care whether or not the deceased died or whether grievous harm was caused to her

Conclusion

40. From all the foregoing, I am satisfied that the prosecution has proved all the ingredients of the offence of murder with which the accused person herein stands charged. I accordingly find ZABLON MISIKO BUSHURU guilty of of the murder of CAROLINE BUSHURU and convict accordingly under section 322(1) of the Criminal Procedure Code.

41. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 9th day of October, 2019.

WILLIAM M. MUSYOKA

JUDGE