REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 12 OF 2017

BETWEEN

LIVINGSTONE WINJIRA .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence of 20 years imprisonment for the offence of

Defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006

in a judgment delivered by Hon. Susan N. Mwangi, Senior Resident Magistrate

on 9th May,2014 in Vihiga Criminal Case No. 1088 of 2013)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Background and Brief Facts

1. This appeal stems from the judgment of the learned trial magistrate aforementioned which was filed by the appellant on 13th February 2017 challenging the conviction and sentence on grounds *inter alia* that:-

> ***1. The learned trial magistrate grossly erred in law and facts in rushing me through the trial without considering that her failure to compel the prosecution and the prosecution failure to supply me with their evidence in advance seriously infringed on my rights to a fair trial as guaranteed under Article 50(2) (c) and (i) of the Constitution.***
>
> ***2. THAT the learned trial magistrate gravely misdirected herself in law and facts in taking me through a trial with serious consequences if found guilty without promptly informing me of the right to legal representation which seriously infringed on my rights to a fair trial as enshrined under article 50(2) (h) of the Constitution.***
>
> ***3. THAT the learned trial magistrate grossly erred in law and facts in holding the unsworn and unchallenged evidence of PW1 as absolutely truthful thereby excluding the same from the possibility of error, frame up and doubt.***
>
> ***4. THAT the learned trial magistrate grossly erred in law and facts in placing inordinate weight on the medical evidence presented without inquiring into the lapse of time between the alleged date of commission and when such evidence was obtained.***
>
> ***5. THAT the trial magistrate misdirected herself in law and facts in basing conviction on suspicion and conjecture not supported by a conclusive DNA report.***
>
> ***6. THAT the learned trial magistrate grossly erred in law and facts in shifting the burden of proof to the accused.***
>
> ***7. THAT the trial magistrate erred in law and facts in ignoring my defense without viewing the same.***

2. The Appellant was charged with ***defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006*** *and* an alternative charge of ***committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, 2006***. The particulars were that the appellant on the 12th day of October 2013 within Vihiga County intentionally and unlawfully caused his penis to penetrate the genital organ, namely, vagina of a girl named MHC who was 12 years old.

3. At the conclusion of the trial, the trial magistrate convicted the appellant on the main charge of ***Defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006*** and sentenced him to 20 years imprisonment. The learned trial magistrate acquitted the appellant on the alternative charge of committing an ***indecent act with a child contrary to section 11(1) of the Sexual Offences Act, 2006.***

4. This is the first appellate court and as such it is guided by the principles set out in the case of ***David Njuguna Wairimu V – Republic [2010] eKLR*** where the Court of Appeal stated:-

> ***"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

Issues for Determination

> **a) Whether or not the Appellant was accorded a fair trial.**
>
> **b) Whether the learned trial magistrate conducted a v*oire dire* examination in accordance with section 19 of the Oaths and Statutory Declarations Act and whether MHC ought to have been cross-examined.**
>
> **c) Whether the MHC's age was assessed and determined correctly by the trial court.**
>
> **d) Whether there was improper, intentional and unlawful penetration of the genital organ of MHC.**
>
> **e) Whether the Appellant was positively identified as the culprit.**

Whether or not the Appellant was accorded a fair trial

5. The Appellant submitted that he never saw the charge sheet in the trial court after he was arrested. The appellant further stated in his Petition of Appeal that the prosecution failed to supply him with their evidence in advance thereby seriously infringing on his rights to a fair trial as guaranteed under ***Article 50(2) (c) and (i) of the Constitution***. The Appellant further contended that the learned trial magistrate failed to inform him of his right to legal representation which also seriously infringed on his rights to a fair trial as enshrined under ***article 50(2) (h) of the Constitution.***

6. ***Article 50(2) of the Constitution of Kenya*** provides in part as follows:

> ***"(2) Every accused person has the right to a fair trial, which includes the right—***
>
> **……**
>
> ***(c) to have adequate time and facilities to prepare a defence;***
>
> **…….**
>
> ***(h)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;***
>
> **…….**
>
> ***(i) to remain silent, and not to testify during the proceedings;***
>
> **……."**

7. In the case of ***Joseph Ndungu Kagiri v Republic [2016] eKLR,*** Mativo J held that:

> ***"In the Kenyan criminal jurisprudence, the accused is placed in a somewhat advantageous position. The criminal justice administration system in Kenya places the right to a fair trial at a much higher pedestal. In our jurisprudence an accused is***

presumed to be innocent till proved guilty, the accused is entitled to fairness and true investigation and the court is expected to play a balanced role in the trial of an accused person. The court is the custodian of the law and ought to ensure that these constitutional safe guards are jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 50 of the Constitution of Kenya 2010. The Right to a Fair Trial is one of the cornerstones of a just society."

8. The Learned Judge referred to a number of other cases among them ***Thomas Patrick Gilbert Cholmondeley versus Republic [2008] eKLR*** where the Court held that a guaranteed fair trial under the ***Constitution of Kenya 2010*** requires the prosecution to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial copies of documentary exhibits to be produced at the trial and such like items, in accordance with the common law duty as well as comparative decisions from other jurisdictions.

9. Similar views were expressed by Kamau J in ***David Musenge Sande v Republic [2018] eKLR.*** The leaned Judge added that where substantial injustice would accrue to an accused person by the non-observance of these rights, the court should not entertain any compromise. Also see the Court of Appeal in the case of K***arisa Chengo & 2 others*** for similar holdings namely that legal representation ought to be availed to an accused person where substantial injustice would otherwise occur.

10. It is also to be noted that as was held by the Court of Appeal in the ***Karisa Chengo Cas***e (above) the right to legal representation is progressive in nature and only hoped that the right to assign legal representation to **all** (emphasis by court) accused persons will be realized progressively but sooner than later. The case of ***Erick Ochieng versus Republic [2015] eKLR*** in which Sitati J quashed a sentence of 20 years imprisonment because the appellant had not been supplied with witness statements before hand is also relevant.

11. The Court of Appeal, in the case of ***Peter M. Kariuki v Attorney General [2014] eKLR,*** held that:

"What constitutes adequate time and facilities or proper opportunity for preparation of a defence will certainly depend on the circumstances of each case, so that what may suffice as adequate time for an accused person who is out on bail or bond may not amount to much for an accused person who has been in solitary confinement, without access to an advocate or visitors for a long period before trial."

12. In the instant case, and from the record of the trial court on 25th October 2013, the proceedings were as follows:

"The substance of the charge and every element thereof stated to the accused(s) by the court in Swahili language the accused person(s) understand(s) and the accused person(s) asked whether he/she they admit or deny the charge(s) and accused person(s) reply in Swahili language:

Accused: Si Ukweli

Alternative count Accused states: Si ukweli

13. The record clearly indicates that the substance of the charge and every element of it was read out to him in the Swahili language which he understood. He denied the charge using the same Kiswahili language. It is therefore untrue for the appellant to aver that he had no knowledge of the charge sheet.

14. The proceedings of the lower court on 25th November 2013 were as follows:-

"Prosecutor: I am ready to proceed with all the 5 witnesses.

Accused: Am not ready to proceed as I haven't been supplied with witness statements.

Prosecution: We shall supply him with witness statements but court should not….There were five witnesses (all of them) and we were ready to proceed.

15. Thereafter, on 29th January 2014, the proceedings of the trial court show that the prosecution was ready to proceed with three witness to which the appellant responded that he was also ready to proceed:

"Prosecutor: Am ready to proceed with 3 witnesses Accused: Am also ready"

16. Similarly on 5th February 2014, the proceedings of the lower court show that the prosecution was ready to proceed with 2 witnesses to which the appellant responded that he was also ready to proceed:

"Prosecutor: Am ready to proceed with 2 witnesses Accused: Am also ready to proceed"

17. When the appellant stated on all these occasions that he was ready to proceed, this court is entitled to draw an inference that he was supplied with the witness statements by the prosecution. Had the appellant not been supplied with the same after he made the request on 25th November 2013, he would have raised the issue then just like he did before. Furthermore, the appellant stated that he was ready to proceed

when he was placed on his defence, drawing a further inference that he had prepared well for his defence. It is therefore not true that the appellant was never given adequate time and facilities to prepare his defence nor supplied with the evidence the prosecution intended to rely on in the case. That ground of appeal lacks merit and is accordingly dismissed.

18. I now move on to the issue of legal representation which the appellant says was denied. As was stated by the Court of Appeal in the case of ***Moses Gitonga Kimani v Republic, Meru Criminal Appeal No. 69 of 2013,*** the right to legal representation for all is a progressive one and the said right can only be enforced in the strict sense when substantial injustice might otherwise result on the part of the accused or when the subject matter involves complex issues of law or fact or where the accused is unable to conduct his own defence or where public interest requires that representation be provided.

19. In the instant case, I see no prejudice that was suffered by the appellant because of lack of having an advocate. The appellant confidently responded to the charges when same were read to him and he was able to ask for witness statements from the prosecution meaning he knew about this legal duty of the prosecution. He was able to cross-examine witnesses and at no point did he raise an issue of finding difficulty in understanding or appreciating the case he was facing. The appellant was able to conduct his defence and the record indicates clearly that ***Section 211 of the Criminal Procedure Code*** was explained to him after which he elected to give unsworn testimony and call no witnesses.

20. It is therefore not true that the appellant was not informed about his right to remain silent and not give testimony in the trial court contrary to ***Article 50(2) (e) of the Constitution***. This ground of appeal lacks merit and is accordingly dismissed. I equally find that the appellant's claim that he was not promptly informed of the right to legal representation not substantiated, and in my considered view there was no infringement of any of the appellant's constitutional rights in this regard.

Whether the learned trial magistrate conducted a *Voire dire* examination in accordance with section 19 of the Oaths and Statutory Declarations Act and whether MHC ought to have been cross-examined

21. The appellant stated in his Petition of Appeal that the learned trial magistrate grossly erred in law and facts in holding the unsworn and unchallenged evidence of MHC as absolutely truthful thereby excluding the same from the possibility of error, frame up and doubt

22. The record of proceedings in the trial court shows that though MHC was taken through a *voir dire* examination, she was never cross-examined after she gave her testimony and that it was the learned trial magistrate who informed the appellant that he could not cross-examine MHC. The Prosecution equally admitted that MHC, who was the complainant/victim gave unsworn testimony which was not cross-examined by the appellant.

23. Section 124 of the Evidence Act provides as follows:

> **"124. Corroboration required in criminal cases**
>
> ***Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

24. The above provision clearly stipulates that the Court can convict the Accused person in a case involving a Sexual Offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief: (**George Kioyi V R Criminal Appeal 270 of 2012 (Nyeri)** and **Jacob Odhiambo Omumbo V R. Criminal Appeal 80 of 2008 (Kisumu).** This belief can only come about after the trial court has taken the complainant's evidence both in examination in chief and in cross-examination. I also think that evidence given in cross examination is the real test of the veracity of the witness's testimony.

25. ***Section 19 of the Oaths and Statutory Declarations Act*** (hereafter section 19 of the Oaths Act) provides that:

> ***19(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.***

26. Under the above section, where a child of tender age is called as a witness in a proceeding, there are two things the trial court must be completely satisfied about, namely:

1) whether the child understands the nature of an oath; or

> ***2) if the child, in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth*.** See the case of ***Julius Kiunga M'birithia v Republic [2013] eKLR.***

27. ***Section 208 (2) and (3) of the Criminal Procedure Cod****e* provides that

> ***(2)"The accused person or his advocate may put questions to each witness produced against him."***
>
> ***(3)"If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer."***

28. The right to challenge evidence adduced against an accused is one of the basic tenets of a right to a fair trial provided for under ***Article 50 of the Constitution.***

29. In the case of ***Rashid Wachilu Kasheka v Republic [2015] eKLR,*** the Court stated as follows:-

> ***"In Odongo v. Republic (1983) KLR 301, the Court held that the unsworn statement of an accused is not evidence and could therefore not be used against his co-accused. If the statement of an accused made not on oath is consistently rejected by the courts as being 'not evidence' as in Odongo, supra, and many before it and others after it, it must follow that the consequences of unsworn evidence given by a prosecution witness who should have been sworn is equally worthless and cannot be relied upon to found a conviction. Moreover, in permitting the receipt of unsworn evidence, whether by mistake or otherwise, is an illegality that renders the trial defective and a 'nullity' as in R. v. Marsham ex. parte Pethick Lawrence [1912] 2 K.B 362 DC."***
>
> **…….**

30. ***Section 382 of the Criminal Procedure Code*** provides for the following*:*

> ***"382. Subject to the provisions herein-before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the Court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

31. The Court of Appeal in the case of ***Sahali Omar v Republic [2017] eKLR*** held that:

> ***"It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR)."***

32. It is thus evident from the above authorities that failure by the trial court to allow cross-examination of each and every witness called to testify against an accused person is fatal to the prosecution's case; and the omission is not curable under the provisions of ***section 382 of the Criminal Procedure Code.*** It follows that in the instant case, the court's failure to give the appellant an opportunity to cross examine PW1 resulted in breach of ***Article 50(2)(k) of the Constitution*** which gives an accused person the right to adduce and challenge evidence.

33. The effect of this omission is that the evidence of MHC has no probative value or evidentiary weight and the same cannot be relied on. The conviction of the Appellant can only be upheld if the other witnesses gave testimony and adduced evidence that is weighty enough to satisfy the ingredients for the offence of defilement contrary to ***section 8(1) as read with 8(3) of the Sexual Offences Act, 2006.***

Whether the MHC's age was assessed and determined correctly by the trial court

34. **Eric Welime**, testified as PW2, stating that he was the one who examined MHC. In the treatment chits marked *PEXH1, PEXH 2 and PEXH3* that were produced by PW2, it is indicated that MHC was 12 years old. The medical P3 form marked *PEXH5* also indicates that MHC was 12 years old. The trial court accepted that MHC was 12 years old.

35. The Sexual Offences Act defines *"Child"* within the meaning of the *Childrens Act No. 8 of 2001* which defines a *'child'* as ***"….any human being under the age of eighteen years."***

36. The Court of Appeal in the case of ***Hadson Ali Mwachongo v Republic [2016] eKLR*** stated as follows regarding the issue of age of the victim in cases of sexual offences:-

> ***"Before we conclude this judgment, it is necessary to say a word on computation of the age of the victim. The Sexual Offences Act provides for punishment for defilement in a graduated scale. The younger the victim, the more severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is life imprisonment while defilement of a child aged between twelve and fifteen is punishable by imprisonment for a term of not less than twenty years. Rarely will the age of the victim be exact, say exactly 8 years, 10 years, 13 years, etc, as at the date of the defilement to be treated as 11 years old or as more than 11 years old? If the victim is treated as more than 11 years old, to what term is the offender to be sentenced since the victim has not attained 12 years for which a sentence is prescribed. In the same vein, in the present appeal where the victim was aged 15 years and a couple of months old, but was not yet 16 years old, is the Appellant to be sentenced as if the victim was exactly 15 years or as if she was 16 years old? …."***

37. It is clear from the evidence adduced in the instant case that MHC was not over the age of eighteen years and was most probably around 12 years on the material date and thus any improper and unlawful sexual activity with her falls within the ambit of ***'Defilement'*** under ***Section 8(1)*** and the punishment within ***Section 8(3) of the Sexual Offences Act*** or ***Section 11(1)*** if the conviction is for the offence of committing an Indecent act with child or adult under the same Act. In summary, I am satisfied that the age of MHC was proved to the required standard.

Whether there was improper, intentional and unlawful penetration of the genital organ of MHC

38. PW2 stated that he was informed by MHC that she had been defiled by a person known to her and that the person used his penis on her vagina. PW2 added that on examination of MHC's genitalia, he noted bruises and pus coming out due to a bacterial infection and PW2 established that MHC had been defiled. PW2 further added that on 22nd October 2013 when MHC was seen at Vihiga District Hospital, she had a history of blood coming from her private parts. PW2 further noted that MHC was depressed, crying and could not walk well. These observations are noted in the medical P3 form that was produced by PW3 and treatment chits marked *PEXH2*. It was PW2's conclusion that MHC had been defiled and that there was penetration.

39. **Francis Suja,** who testified as PW4 stated that on 22nd October 2013 he was informed by a village elder called Lawrence Ambai that there was a girl who had been defiled. PW4 proceeded to the home where the victim was and they found MHC who was in a lot of pain. PW4 added that some ladies checked her private parts and concluded that she had been defiled.

40. The said Lawrence Ambai testified as PW5 and stated that he was informed by one Regina about the plight of PW1. PW5 then informed PW4 about the same and they both proceeded to the home where MHC was. MHC was unable to walk properly. PW5 corroborated PW4's testimony that two ladies examined MHC and concluded that she had been defiled.

41. 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. The Court of Appeal, in the case of ***Sahali Omar v Republic 2017 eKLR***, noted that:

> ***'…penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the Sexual Offences Act.'***

43. From the evidence on record, it is clear that MHC was defiled and that there was improper, intentional and unlawful penile penetration of her vagina.

Whether the Appellant was properly and positively identified.

44. PW3 stated that he did not know the appellant prior to the incident and did not witness the defilement of MHC and that he only acted on the information given to him by PW4.PW4 also testified that he did not know the appellant before the incident and neither did he witness the defilement and that it was MHC who identified the appellant to him. Likewise, PW5 stated that he did not know the appellant or where he lived and that he did not witness the defilement.

45. **Obadiah Ndege,** testified as PW6 and stated that he was a Clinical Officer at Vihiga District Hospital and that he examined the appellant on 22nd October 2013. The treatment chit and lab test results were marked as *PEXL 10 and PEXL 11* respectively and indicated that the appellant had lacerations on the penis along the urethra and was HIV positive. PW6 stated on cross-examination that such bruises can be seen even after 72 hours of the act. PW6 added that he could not tell whether MHC was defiled or not because she was examined by a different doctor.

46. The appellant on his part, testified that he neither knew MHC nor the witnesses who testified in court. The appellant added that he was framed though he did not have any grudge with MHC or any of the witnesses.

47. In the absence of MHC's testimony, it is difficult to determine whether it was the appellant who defiled MHC as the other witnesses did not witness the said defilement.

Conclusion and Disposition

48. It is my considered view that the learned trial magistrate fell into error for not allowing the appellant to cross-examine MHC, an omission that materially affected the weight of evidence presented by the Prosecution. This omission was prejudicial to the appellant and infringed on his right to a fair trial. The omission further clouded the issue of identification as to whether or not it was the appellant who defiled MHC.

49. One of the ways that this omission by the learned trial magistrate can be cured without occasioning a miscarriage of justice on the appellant and the victim is by ordering a retrial if the circumstances of the case so warrant it. In the case of ***Jackson Kiragu Gitonga v Republic [2018] eKLR,*** **Mshila J** held that:

> ***"The principles for which a retrial are set out in the Court of Appeal decision of Elirema and Another vs Republic [2003] KLR 537; in which it held that where there is a gap in the evidence or other defect occasioned by the prosecution the appellate court will not order for a re-trial; but where it is found like in this instance that the gaps, irregularities and defects were occasioned by***

the trial court and it is to blame ***a retrial may be ordered provided these other factors are also taken into consideration; which factors are as set down hereunder;***

(i) There is admissible evidence that can lead to a conviction;

(ii) Where it is required in the interest of justice; provided it is unlikely to cause injustice to the appellants

(iii) The availability of the witnesses;

50. In the case of ***J A O v Republic [2017] eKLR*** T.W Cherere J held that in determining whether or not a case should go for retrial, the court must accept that each case is to be treated on its peculiar circumstances, unless of course the interests of justice require a retrial. The learned judge also went further to say that the phrase "**in the interest of justice**" connotes and indicates the right to fair trial which is a fundamental right of the accused. A fair trial will also include the time the case has lasted, the period the appellant was in prison, the weight of the evidence and the possibility of a conviction upon retrial.

51. It is my finding in this case that the irregularity of not allowing the appellant to cross-examine the victim was occasioned by the trial court and that there is sufficient evidence that could lead to a conviction ,because all the other ingredients for the offence of defilement have been satisfied save for identification which may be affirmed by the testimony of MHC. I also find that it is in the interest of justice that the assailant of MHC be brought to book because the act against her was so heinous that it caused her physical and psychiatric pain and anguish. I note that it has been five years since the appellant was sentenced. Such a period in my view is not so long as to prejudice the appellant and in any case, should he be convicted and sentenced, the time already spent in custody would be deducted from the sentence. I further note that the witnesses were from the same village and the Clinical Officers can always be summoned from their respective current stations to give evidence if at all they have since moved from Vihiga District Hospital.

52. In summary, I am satisfied that this case is suitable for a retrial so as to meet the ends of justice and so that both the appellant and MHC can enjoy the fruits of a fair trial. I accordingly make the following final orders:-

a. The appeal is allowed in its entirety.

b. The case be and is hereby remitted for retrial before the Principal Magistrate's Court at Vihiga.

c. The appellant shall be released from prison and produced before the Principal Magistrate Vihiga within seven (7) days from the date of this judgment for directions as to retrial.

53. 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 15th November, 2019

WILLIAM MUSYOKA

JUDGE

In the presence of:-

Livingstone Winjira - Appellant in person

Ms. Omondi for Respondent

Eric - Court Assistant