**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CRIMINAL CASE NO. 32 OF 2017**

**JTW.....APPELLANT**

**- VERSUS -**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against both conviction and sentence***

***DATED 6th October 2017 in Criminal Case No. 44 of 2015***

***in LOITOKTOK Law Court before Hon. Okuche –P.M*)**

**JUDGEMENT**

The appellant herein, JTW was charged with an offence of incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that in December 2014 within Kajiado County unlawfully and intentionally caused his penis to penetrate the vagina of SW who was to his knowledge his niece. The Appellant also faced an alternative charge of committing an Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act. The Appellant pleaded not guilty to both counts.

When the Criminal Case No.44 of 2015 came up for hearing on 14/7/2017 before Hon. Okuche, P.M the prosecution applied to amend the charge for a reason not indicated in the Trial Court Proceedings. The Trial Court allowed the application and the substance and element thereof was stated by the court to appellant in Kiswahili being the language that he understands after which the court hearing of the case hence determination of the same.

The appellant having dissatisfied by both the conviction and sentence meted by the Trial Magistrate he timeously lodged this appeal on 17th October 2017. The grounds of appeal are clearly set out in the Petition of Appeal dated 17th October 2017. The said grounds are as follows:

> ***a) The Learned Trial Magistrate erred in law and fact in convicting the Appellant on charges which were not proved beyond reasonable doubt.***
>
> ***b) The Learned Trial Magistrate erred in law and fact in admission of evidence contrary to section 124 of the Evidence Act also Section 19 of the Oaths and Statutory Declaration Act (Cap 15).***
>
> ***c) The Learned Trial Magistrate erred in law and in fact in convicting the Appellant on evidence which was not unequivocal.***
>
> ***d) The Learned Trial Magistrate erred in law and fact when he relied on hearsay evidence to convict the appellant.***
>
> ***e) The Learned Trial Magistrate erred in Law by failing to appreciate that the Appellant was accorded a right to fair trial contrary to Article 50(1) and (2) of the Constitution.***
>
> ***f) The Learned Trial Magistrate erred in Law and fact in imposing an excessive sentence on the Appellant.***

The issues raised in this regard by the grounds of appeal and arguments made by the Appellants are: whether the appellant was accorded his rights as provided under Article 50 of the Constitution of Kenya 2018 and Section 214 of the Criminal Procedure Code and whether the prosecution proved its case beyond reasonable doubt.

As regards whether the Appellant was accorded his rights in terms of Article 50 of the Constitution, the Counsel for the Appellant humbly

submitted that the trial court disregarded the Appellant's right to a fair hearing. It was his contention that, according to the trial court proceeding which are before this court, the trial court omitted to promptly inform the Appellant of his right to legal representation by an advocate of his choice and in the event that the Appellant could not afford one, the state had a duty to assign for him an advocate at its expense. In support of his argument, he cited Article 50(1) and (2) of the Constitution of Kenya 2010. Further, it was averred that the Trial Court failed to apprise the Appellant of the seriousness of the offence and in the event of a conviction, the sentence that it carries and that would have necessitated the Appellant to seek the services of an advocate. In that regard, it was the Appellant's view in terms of the constitution that it is mandatory that the abovementioned rights are made known to an accused person and failure the Trial Court to do as such constitutes an infringement of the accused person's fundamental right to fair hearing.

The Appellant also submitted on Section 214 of the Criminal Procedure Code. The Appellant in support of his proposition, made reference to page 25 of the record of Appeal, on 13th July 2017, PW5 a witness was stopped from testifying to enable the prosecution to amend the charge sheet, which application was allowed without an objection from the accused (as he then was). He further averred that the Trial Magistrate failed to grant him his rights after the amendment was done and there is no indication from the proceedings that he was informed of his rights upon the amendment. He argued that the same is contrary to section 214(ii) of the Criminal Procedure Code. In support of his argument, the applicant relied on the decision in the case of **Peter Maina Macharia- Vs- Republic, Criminal Appeal No. 392 Of 2007.** It was the appellant's contention that the Trial Court denied him of his right to either start the case afresh or to cross examine the witnesses that had already testified before the amendment was effected on the charge sheet. He further contended that the Trial Court failed to remind the Appellant of his right to a fair trial after the amendment as at no point in the trial court proceedings are the same indicated. Neither was the Appellant's response to the same indicated. In that regard the Appellant humbly submitted that for the above reasons, it is not in doubt that his fundamental right to a fair trial was infringed and the appeal must be allowed.

Lastly, the Appellant submitted that the prosecution failed to prove its case beyond reasonable doubt to warrant the sentence and conviction of the Appellant. He averred that the prosecution failed to place the appellant at the scene of the crime, failed to call crucial witnesses, failure by the prosecution to produce crucial exhibits and he also challenged expert evidence pointing out that evidence given in court by PW6, a medical doctor was misleading and unsatisfactory hence the court ought not to have relied on it. In support of these arguments, he cited numerous judicial authorities including: **Bukenya & Another V Uganda (1972) EA 549; James Mwanyala –Versus- Republic, Vol 1 HC. Criminal Appeal No. 5 Of 2017.**

**Determination and Analysis**

As this a first Appeal, this court is required to re-evaluate the evidence tendered in the trial court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. The role of the Court of the first instance is well settled in the case of ***OKEMO VS. REPUBLIC (1977) EALR 32*** and further buttressed in the Court of Appeal decision in revisit the evidence tendered before the trial Court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter. This task must have regard to the fact that I never saw or heard the witnesses testify thus the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence.

In the determination of the appeal at hand, this court is to satisfy itself that the record is in compliance with the law and that the ingredients of the offences herein were proved. The issues for determination in this matter are as follows:

> **(a) Whether or not the Appellant was denied a fair hearing. On this this score, three issues were raised by the Counsel for the Appellant which include; that the Appellant was denied his right to legal representation yet the offence was serious, that the Trial Magistrate erred in not recalling the witness so as to either start the case afresh and/or to cross examine and the failure by the court to inform the Appellant of the seriousness of the charges he was facing and the nature of sentence that would be imposed upon conviction.**
>
> **(b) Whether or not the prosecution proved its case beyond reasonable doubt so as to warrant both sentence and conviction for the offence of defilement as imposed by the Trial Court.**

On the first issue, the Counsel for the appellant contended that the trial court failed to inform the appellant promptly as of his rights to legal representation by an advocate and if he was capable to afford one, the state had a duty to assign him one at its expense. Further, that the trial court failed in discharging its duty to informing the appellant the nature of sentence that would be imposed upon him in the event of a conviction. It was said that, had the trial court informed the appellant of the said right, that would have necessitated him to seek legal services.

The right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before the law. This fundamental right is recognized in a myriad of states due to its importance in ensuring that the process is just, credible and transparent. Thus legal representation is a cardinal principle of fair trial. The criminal justice system in Kenya places the right to fair trial at a much higher pedestal, and in that respect and in the context of this matter; the accused is placed in somewhat advantageous position. Therefore, legal representation is a fundamental constitutional dictate envisaged under article 50 of the Constitution of Kenya 2010. Relevant in this case is article 50(2) (b) (g) (h). The same provides as follows:

> ***"50(2) every accused person has the right to a fair trial, which includes the right –***
>
> ***(b) To be informed of the charge, with sufficient detail to answer it;***
>
> ***(g) To choose, and be represented by an advocate and to be informed of the right promptly.***
>
> ***(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."***

Generally, article 50(2) (g) of the Constitution guarantees a fair trial to every accused person which includes the right to be represented by an advocate and to be informed of that right promptly. Perhaps at this juncture, it is noteworthy in the above context to venture into the provisions of the Legal Aid Act, 2016 which came into force on 10th May 2016.

The above mentioned act in its preamble states that, its focus is to "give effect to article 19(2), 48, 50(2) (g) and (h) of the constitution to facilitate access to justice and social justice." Section 43 of the Act lays down the duties of the court before which an unrepresented accused person is presented. The same provides as follows:

> ***"A Court before which an unrepresented accused person is presented shall:***
>
> ***a) Promptly inform the accused of his or her right to legal representation;***
>
> ***b) If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and***
>
> ***c) Inform the service to provide legal aid to the accused person"***

The key words under article 50(2) (g) and (h) of the Constitution and section 43 is "***to be informed promptly of the right".*** In order to fully comply with the dictates of article 50(2)(g) and (h) and section 43(1) of the Legal Aid Act, trial courts as a matter of constitutional duty and the interest of justice, ought to give the information to the accused person and/or make a preliminary inquiry at the earliest opportunity possible. A determination must be made as to whether or not the accused person would require legal representation before commencing with the hearing of the case. The earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearings. The trial court is under a duty to look at the whole indictment and satisfy itself that substantial justice will not be occasioned and that would inform the court's decision as regards whether or not to proceed to the hearing with an unrepresented accused person. If through the above scrutiny, the court finds that substantial justice would be occasioned, it would then move from the provision under article 50(2) (g) to 50(2) (h) and make a finding and/or orders to the effect that a state funded counsel be provided to the accused person for not only justice to be done but for justice to be seen as having been done.

Where the trial court finds that substantial justice would be occasioned if the accused person proceeds to the hearing of the matter unrepresented, the court must have an advocate assigned to the accused person by the state at its expense, and the court should or must once again inform the accused of this right promptly pursuant to article 50(2) (h) as read with section 43(1) (b) 0f the Legal Aid Act no. 6 of 2016.

It is instructive to note that the trial record of proceedings must indicate or communicate that the accused was duly made aware of his rights under article 50(2) of the constitution and that the process expounded above was conducted where it is relevant. The court is the custodian of law and ought to ensure that these constitutional safeguards are jealously protected and upheld at all times. Therefore, it is incumbent upon the courts to ensure that the trial is judicious, fair, transparent and expeditious as well as ensuring compliance with the basic rule of law.

Back to substantive arguments, I now endeavour to examine the provisions of article 50(2) (h) of the constitution and section 43(1) (b) of the Legal Aid Act of 2016 which envisages the state funded legal representation. At this juncture, I shall also look at authorities from Kenya as well as other jurisdictions for jurisprudential guidance. In criminal matters, there is a very big distinction between an unrepresented and a represented accused person. This follows the logic that the adversarial system is so complex that an accused devoid of requisite legal skills may find it difficult to comprehend the trial proceedings.

However, the right as regards legal representation is not absolute and there are instances where the same can be limited. This was succinctly dealt with in this case of ***S V HALGRYN 2002, (2) SACR 211 ((SCA) PARAGRAPH 11***, Herms JA stated that:

> ***"Although the right to choose a legal representative is a fundamental one and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations."***

A close reading to article 50(2) (h) of the constitution and section 43(1) (b) of the Legal Aid Act, 2016 on the right to legal representation divulge that an accused person's entitlement to legal representation at the expense of the state is not automatic but qualified. Thus, this right is not entitled to every accused person. It therefore appears from the above provisions of law that legal representation at the expense of the state is only available where there is likelihood of substantial injustice to occur to the detriment of an unrepresented accused person. It is therefore incumbent upon the accused person to prove that unless he or she is assigned an advocate by the state, substantial injustice would occur.

"*Substantial injustice"* is not defined in the Constitution. Thus, there is no legal definition of the same. Neither does the constitution enumerate circumstances under which an accused person is entitled to a state funded Counsel. In an attempt to define the concept of substantial injustice, both local and foreign jurisprudence may provide guidance on the issue.

In the African Commission in ***ADVOCATS SANS FRONTIERS (ON BEHALF OF BWAMPANYE) V BURUNDI, AFRICAN COMMISSION ON HUMAN RIGHTS, COMM. NO. 213/99 (2000)*** it was observed that:

> ***"…Legal assistance is a fundamental element of the right to fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case…"***

In the same respect, the United State Supreme Court in the Land Mark Decision of ***GIDEON V. WAINWRIGHT, 371 US 335 {1963},*** held

that the noble ideal of fair trial before an impartial tribunal in which every defendant stands equal before the law, cannot be realised if the poor man charged with a crime has to face his accusers without a lawyer.

Further, in the most celebrated case of ***PETT V GREYHOUND RACING ASSOCIATION, (1968) 2 All E.R 545, at 549, Lord Denning succinctly*** stated that:

> ***"It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task?"***

The South African Constitutional Court in the case of ***FRASER V ABSA BANK LIMITED, (66/05) [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC)*** (15 December 2006) stated:

> ***"Without the recognition of the right to legal representation in*** *section 26(6)****, the scheme of restraint embodied in POCA might well have been unconstitutional. However, the right embodied in*** *section 35(3)(f) of the Constitution* ***does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation. Financial constraints necessarily play a role and competing needs and demands have to be balanced. An accused also has the right to have a legal practitioner assigned at the state's expense in terms of*** *section 35(3) (g)* ***where substantial injustice would otherwise result, as acknowledged by the Supreme Court of Appeal. The extent to which this might be appropriate or sufficient in a particular case will depend on all relevant prevailing factors, including the complexity and seriousness of the criminal charges."***

In Kenya, this issue first came up for interpretation before the Court of Appeal in the case of ***Macharia v R***. The court after reviewing the past and current law stated that 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 court 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."***

In a more recent case of ***KARISA CHENGO & 2 OTHERS V R, CR NOs. 44, 45 & 76 OF 2014,*** it was stated:

> ***"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the*** *David Njoroge Macharia case (supra)* ***seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result? and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."***

In view of the principles expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a court ought to consider in addition to the relevant provisions of the Legal Aid Act, various other factors which include: the serious or nature of the offence in question thus serious offences may attract public interest to the extent that the public may require that some form of representation to be accorded to the accused person to conduct his own defence; the severity of the sentence, thus legal representation is to be provided where the offence carries a death sentence and or life imprisonment ;the ability of the accused person to pay for his own legal representation; whether the accused is a minor, the ability of the court to comprehend the court proceedings thus the literacy of the accused and the complexity of the case which is discernible from the issues of fact and law which may not be comprehend by the accused.

In this matter, the appellant was convicted of the offence of incest and sentenced to life imprisonment. I have gone through the trial record and nowhere does it communicate whether or not the accused was informed of his rights under section 43 (1) of the Legal Aid Act and Article 50(2)(h) and (g) of the constitution regarding the right to legal representation. Furthermore, given that the accused was charged with an offence which carries a severe sentence of life imprisonment but however he was not accorded his right to legal representation as required by law. In that regard, there is substantial injustice unless represented.

The trial court ought to have at least informed him of this right. I therefore find that the appellant, according to section 41 of the Legal Aid Act is eligible to make the application to the National Legal Service Aid in person or through any other person authorised by him in writing. The mandatory duties imposed on trial courts by section 43(1) of the said Legal Act and article 50 of the constitution were therefore not complied with, and in the circumstances I find that the trial proceedings were conducted in a manner prejudicial to the appellant and caused grave injustice to the appellant. Such proceedings ought not to stand.

Moving on to the second limb of this case, Section 214 of the Criminal Procedure Code, Chapter 75 Laws of Kenya provides for instances where a charge can be amended and what ought to follow once the amendment is allowed. The said section states that:

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

***Provided that-***

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

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

***(2) ……...***

***(3) ……..."***

Article 50 of the constitution provides for the fundamental right of every accused person, to wit, the right to a fair trial. Applicable in the matter at hand is sub-article 2(b) and (k) which provides as follows:

***"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

***(2) Every accused person has the right to a fair trial, which includes the right—***

***(b) to be informed of the charge, with sufficient detail to answer it"***

***(k) to adduce and challenge evidence."***

It must be noted that the right to a fair trial extends throughout the entire trial and it is a non –derogable right just like thee rights outlined in article 25 of the same aforementioned constitution. It therefore follows that if the trial court at any point allows an amendment to be effected to the charges, the appellant is entitled as of right to be informed of the amendment with such details so that to enable him answer the amended charge. The accused person should also be accorded a fresh opportunity to plead to the amended charge.

The accused also remain at liberty to adduce their evidence pursuant to subsection (k) of the above mentioned article, against the amended charge and to rebut also to adduce evidence in rebuttal of the evidence produced by the prosecution in support of the amended charge. That is guaranteed constitutionally.

In the instant case, the prosecution applied for the amendment of the charge which application was allowed by the court. The appellant did not object to the amendment when the court accorded him an opportunity to respond to the application. The appellant was then given a chance to plead to the amended charge and a plea of not guilty was duly entered. The issue that was raised by the appellant's Counsel is with regards to the fact that after the amendment of the charge, the appellant was only accorded an opportunity for a fresh plea but was not accorded the opportunity to re-examine the witnesses who had already testified. From the record of proceedings in the trial court five witnesses had testified, including the complainant. Only one witness had not testified before the amendment was effected.

The foregoing issue was also addressed on several instances by the Court of Appeal in the case of ***Harrison Margie Njuguna v. Republic Criminal Appeal No. 90 of 2004(unreported)*** the Court of Appeal held that: -

***"……..the right to hear the witness further evidence a fresh on the amended charge or to cross examine the witness further is a basic right going to the root of a fair trial."***

The issue dealt with in the case of ***Harrison Margie Njuguna (supra)*** was further addressed by a differently constituted bench in the case of ***Joseph Kamau Gichuki V. Republic (2013) eKLR*** **where Hon. Justice Mwera, JBM Kariuki and M' Inoti, JJA** has the following to say: -

***"Before we leave this point, we would like to observe that the case of HARRISON MIRUNGU NJUGUNA V R (supra) relied upon by the appellant is not a relevant authority in the present appeal. That case involved amendment of a charge under Section 214 of the Criminal Procedure Code. The Code requires that once a charge is amended, the accused person should be called upon to plead to the amended charge and further entitles him to demand the recall of witnesses who have already testified to give their evidence afresh or to be further cross examined. In that case the charge was amended but the accused person was not called upon to plead to the amended charge. This Court held, correctly in our view, that the trial was substantially defective. The effect of amending the charge was to alter the case that the accused person had to meet. Hence, he had to plead to the amended charge afresh and had to be informed of the right to re-call witnesses to testify on the charge as a mended and to be cross-examined."***

The court of appeal further considered the same issue in **Samwell Kilonzo Musau V. Republic (2014) eKLR** where a trial court had allowed a charge of defilement to be amended to include the words ***"intentional and unlawfully"*** in the particulars of the offence. The

accused person in that case did not object to the application and the amendment was allowed. The appellant was called to plead to the amended charge after which he pleaded not guilty and a plea of not guilty was duly entered. The applicant did not indicate that he wished to have any of the witnesses who had already testified in court to be recalled and the trial proceeded. When he was convicted and sentenced, the accused person then took up the issue on appeal. The Court held that the trial court did not err in not giving the appellant an opportunity to recall any of the witnesses since the appellant did not apply to do so in the first instance. The Court also noted that the amendment was only meant to ensure technical compliance of the charge and that it did not impinge on the appellant's defence.

The question to ponder under this issue is that: what was the effect of the amendment to the appellant? Or did the amendment go to the root of the charge and did it impeach on the appellant's defence? As in the case the case of ***Samwell Kilonzo Musau (supra)***, the appellant did not indicate that he wished to recall the witness that had already testified, in court and the trial proceeded. In my view, the amendment to the charge did not impeach the appellant's defence bearing in mind that the only material difference between the offence of defilement and that of incest that the appellant was convicted and sentenced with is as regards the relationship between the appellant and the complainant, a fact that clear and undisputed. PW1, the Complaint in her testimony testified that, "*I know JT, he is my uncle…..*" This evidence was not challenged or controverted upon cross-examination by the appellant. In light of the circumstances of the case, the prosecution was still required to prove penetration on the victim's genitals, the age of the victim and to positively identify the accused so as to prove the offence of incest beyond reasonable doubt. In the same respect, the aforementioned ingredients required for a charge of incest to suffice and the same requirements that must be proved to sustain a charge of defilement and the only exception is that of the said relation between the accused and the complainant. It is therefore clear that neither was the evidence of the five witnesses that had testified nor was the appellant's defence impinged by the said amendment of the charge. Secondly, the trial court did not err in not giving the appellant an opportunity to recall any of the witnesses since the appellant did not apply to do so in the first instance.

It is very clear from the foregoing that the amendment did not in any way occasion prejudice to the accused trial. In that respect I place reliance in the case of **David Irungu Murage & Anthony Kariuki Karuri –Vs- Republic Criminal Appeal No. 184 of 2004** the Court of Appeal had this to say concerning the failure by the trial court to call upon the Appellant to plead to the amended Charges:

> ***"The issue then that arises in these circumstances is whether the appellants had a satisfactory trial. We have carefully scrutinized the records of the two courts below and we are satisfied that the irregularities and the omission arising from the lack of opportunity to plead did not occasion a failure of justice and that whatever irregularities were committed were curable under section 382 of the Criminal Procedure Code."***

51. The Court of Appeal in **Nzongo** in reiterating its decision in **David Irungu Murage** state that:

> ***"The court has used the test of whether any prejudice was occasioned by the failure to take plea in the case of David Irungu Murage & Another –Vs- Republic Criminal Appeal No. 184 of 2004 where it held that an accused person was not prejudiced when the trial proceeded on the assumption that he had pleaded not guilty."***

Even though the trial court proceedings have been found to have been done in total breach of the appellant's fundamental rights to a fair trial, it must be noted at this juncture that there exist an inescapable tension in relation to the three main competing interests. It is equally important that the interest of the society through the instrument of the state, to punish crime; the need to ensure rights and inherent dignity of the offender are protected and lastly to ensure that the victim of crime or the complainant goes with a remedy where it's in the premises, regardless of the violations of the rights of the appellant, I shall not acquit him for the purposes of safeguarding the interests of the other two concerned parties. Further, in view of the above finding, the consideration of other grounds of appeal will not add any value to this matter. I will however, consider the possible way forward that is to set the appellant on a re-trial.

In the case of **Republic v Cashanjee L. Dosani 1946 13 EACA 150** an order for retrial is necessary when an accused person has not had a satisfactory trial.

Accordingly, the appeal is delivered with a condition that a retrial be held by some other court other than the one presided over by Hon. Okuche. The primary file be and is hereby forwarded to the Chief Magistrate to comply with the order.

**Dated, delivered and signed in open court at Kajiado this 18th September, 2018.**

**.....**

**R. NYAKUNDI**

**JUDGE**

**<u>Representation</u>**

- Mr. Anam for Mungane for the Appellant – present

- Mr. Meroka for the DPP

- Applicant - present

Court Assistant: Mateli