



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 28 OF 2018

POLYCARP SIMON MCHORE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

The appellant **Polycarp Simon Mchore** was charged with defilement contrary to section 8(4) of the sexual offences Act no 3 of 2006. The particulars of the offence were that on the 12th day of November 2017 at [Particulars withheld] Trading centre within Kajiado south sub county in the Republic of Kenya, intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of DPS a child aged 17 years. He was also faced with an alternative charge of committing indecent act with a child contrary to section 11 (1) of the sexual offences act, the particulars of the offence were that on 12th day of November 2017 at [Particulars withheld] trading centre at Kajiado south sub county in the republic of Kenya intentionally caused contact with the vagina of DPS a child aged 17 years with his penis.

The appellant was convicted for the principal offence of defilement in pursuant to section 215 of the criminal procedure code and sentenced to 15 years' imprisonment vide the judgment dated 20th June 2018. The appellant was aggrieved by his conviction and sentence of the trial court. He now appeals against the conviction and sentence by lodging a petition of appeal dated 12th July 2018 and filed on 13th July 2018. Grounds of the appeal can be summed up as follows:

- 1) The trial magistrate erred in law and fact by holding that pw1 hymen was found to be broken, on examination on 3/11/2017 was proof that it had been so broken due to penetrative intercourse that had taken place on the 12th day of November 2017.**
- 2) The trial magistrate shifted the burden of proof to the accused to explain how pw1 hymen could have been broken and in default of such proof that it could only have occurred from penetrative sex on 12/11.2017.**
- 3) The appellant alleges the victim's testimony was false.**
- 4) Further, the prosecution failed to prove its case beyond reasonable doubt.**

Mr. Githuka Ndung'u, counsel for the appellant opposed the conviction and sentence through his written submissions dated 8th October 2018 and filed the same day and the points were highlighted in oral submissions wherein counsel submitted that the lack of legal representation was prejudicial to the defence hearing; that there were glaring inconsistencies and contradictions in PW1, PW2, PW6, PW7 and DW2 testimonies, lastly the magistrate placed undue weight on the broken hymen and the trial court was wrong in arriving at the conclusion that the hymen could only be broken by penetrative sex. The appellant seeks for the judgment be set aside, conviction and sentence be quashed.

Mr. R. Meroka, the principal prosecution counsel for the respondent supported the conviction and sentence. He submitted that the state proved all the ingredients under the charges thus discharged its burden thereby the trial court founded the conviction and sentence as per the required standards. The respondents submitted that the victim was aged 17 years and she was competent to give an account of events as they happened and that the victim and the perpetrator knew each other as he was her teacher. Evidence was corroborated by the minor PW2, it was submitted that pw1 and PW2 placed the appellant at the scene where the alleged assault occurred, and appellant was arrested inside his house. On the issue of the hymen, the respondent contends that the broken hymen as observed by the trial magistrate was one of the considerations. Further, the respondent states that even if there were inconsistencies in narration during trial, the same did not go to the root to vitiate the general chain of events.

Issues Arising for Determination

1. Whether the inconsistencies and contradictions of the prosecution witness testimonies impeached the credibility of these witnesses

2. Whether the lack of legal representation to the appellant was prejudicial to his case?

3. Whether the offence of defilement was proved to the required standards against the appellant.

4. Whether the prosecution proved its case beyond reasonable doubt

Analysis and Resolution

As a first appellate court we are required to evaluate all the evidence and come up with our own conclusions and determinations about the case. We are actively aware that we did not have a chance to observe or hear the witnesses as they testified and make an allowance for that (*See Okeno v Republic*).

1. Whether the inconsistencies and contradictions of the prosecution witness testimonies impeached the credibility of these witnesses

On the first issue, it was contended on Ground 4 of the appellants petition of appeal that the trial magistrate erred in holding that pw1 is a truthful witness and thus relied on her evidence lock, stock and barrel. The appellant's counsel advances this argument by pointing out in his written submissions specifically paragraph 14-18 that PW1, PW2, PW3, and PW6 testimonies were marred with inconsistencies and contradictions.

The question we ask ourselves were the inconsistencies and contradictions in witness testimonies material to the case? In the criminal appeal case of **Erick Onyango Ondeng vs Republic (2014) eKLR** the court held that not every contradiction warrants rejection of evidence. The court relied on the case of **Twehangane Alfred vs. Uganda, 2003(UG, CA,6)**, as the court puts it:

“With regard to contradictions in the prosecution's case the laws set out in numerous authorities is that grave contradictions unless satisfactory explained will usually but not necessarily lead to evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness if they did not affect the main substance of the prosecution's case.”

The testimony of PW1 was central to prosecution's case, in the appellant's written submissions, counsel asserts that PW1's narration of the sequence of events on that day were different in regards to the chain of events on how the defilement took place. The appellant took issue with the fact that PW1 stated in her witness statement that she was defiled on a sofa set and in court she testified that she was defiled while standing. The most consistent statement both in her witness statement and court's testimony was that she was defiled by the accused and he inserted his penis into her vagina. In my view this is the most important point to prove in a sexual defilement case; the different narratives of whether she was defiled while standing or sitting is immaterial.

In regard to the testimonies of PW2, 3 and 6, it was expressed in the case of **Philip Nzaku Watu vs. Republic [2016] EKLR**, "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest details some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, it has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as usual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

PW2 was a minor and the magistrate conducted a voir dire to establish whether the minor understood the importance of telling the truth, which according to the court records she did and proceeded to give sworn evidence against the accused. PW3 and PW6 had no interest in this matter, nor was there any bad blood between them and the accused hence there was no probable reason they would lie to the court.

The appellant's counsel brings to the attention of this court in his written submissions in paragraph 24 the variance of time of the incident taking place. The appellant adduces that there were inconsistencies; pw1 and pw2 testified that the incident took place between 2 p.m. and 3p.m., PW3 and PW6 stated that the incident took place at 5p.m., PW7 says he received a call from Elerai AP at 7p.m. and DW2 testified that it was 7p.m.

On evaluation of the court records the variance of time can be warranted and it does not go to the root of the trial. PW1 and PW2 gave the same timeline as to when the incident took place. PW3 stated that at 3p.m. he was at Elerai market and it was not the time the incident happened. PW6 testified that at 5p.m. is the time he was alerted of the alleged defilement. PW7 testified that at 10 p.m. he received a call from Elerai administration police camp that the accused was arrested for defilement. DW2 testified that at 7p.m. he was at Elerai town.

Therefore, the inconsistencies and contradictions in the court testimonies can be explained and it does not go to the substance of the prosecution's case. The variance of time is reasonable; the witnesses did not testify that the incident took place on different dates but on the same date just different timelines which were adequately explained by the witnesses. Variance as regards the said time of the commission of the offence is not material and no prejudice at all has thereby been caused to the appellant.

2. Whether the lack of legal representation to the appellant was prejudicial to his case?

Article 50 (2) provides for the right of an accused person to have legal representation; in sub-article (g) it provides that the accused person should have the right to choose and be represented by an advocate, and to be informed of this right promptly. In sub article(h) it provides 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;

Mr. Githuka, counsel for the appellant espoused in his written submissions in paragraph 10 and 14 that failure of the appellant being represented was detrimental to his defence hearing. In paragraph 10 it states, " That when the accused was unrepresented and unfamiliar with the process of the court and especially on what cross examination entailed, he was hopelessly unable to bring out the inconsistencies to the attention of the court. In paragraph 14 it states that, ***"The accused did not have a lawyer representing him this was no excuse for the prosecutor to ride roughshod over the hapless accused person."*** counsel further asserts in paragraph 26 that lack of legal representation was detrimental to the defence hearing.

Counsel for the appellant provides two case laws in support of the lack of representation by the accused; the case of **Joshua Njiiri vs R (2017) EKL**R, it was highlighted by the Honourable Justice Nyakundi R: In considering the principles of fair trial as contained in article 50 and the national values and principles of governance as anchored in article 10 of the Kenyan constitution held thus:

"This entails that there should be a level playing ground between the prosecution and the accused person(s). There is no dispute that ordinary citizens are more often charged before our courts faced with challenges of knowledge on how courts work, lack of or inadequate legal representation, the complexity of court procedures, unequal financial resources and sufficient knowledge on their rights or obligations."

In the case of **Joseph Ndungu Kagiri vs R (2016) EKL**R the Honourable Mr. Justice John N. Mativo approvingly quoted Lord Denning in the celebrated case of **Pett vs. Greyhound** {39} where he decried the state of unrepresented parties in court when he stated that:

"It's not every man who has the ability to defend himself on his own. He cannot bring out the point in his own favour or the weaknesses 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 was trained for the task."

The right of legal representation was discussed in the Supreme Court decision of **Republic VS. Karisa Chengo and 2 others, Petition 5 of 2015** the Honourable court pointed out that:

"The right to legal representation at the state expense under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitution edict without more. We must however emphasize the fact that in accordance with the language of the constitution, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result."

What constitutes substantial injustice? In the aforementioned case the Supreme Court gave a detailed explanation on what constitutes substantial injustice: It is obvious that in criminal proceedings legal representation is important, however, a distinction must always be drawn between the right to representation per se and the right of representation at state expense specifically. Inevitably, there will be instances in which legal representation at the expense of the state will not be accorded in criminal proceedings. Consequently, it is clear 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 include:

- i. The seriousness of the offence;
- ii. Severity of the sentence;
- iii. The ability of the accused person to pay for his own legal representation;
- iv. Whether the accused is a minor;
- v. Literacy of the accused; and
- vi. Complexity of the charge against the accused.

In addition, the legal Aid act 2016 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 legal aid act states that (1) 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 have an advocate assigned to him or her;
- (6) Despite the provisions of this Section, lack of legal representation shall not be a bar to the continuation of proceedings against a person.

In the trial court proceedings, the accused had no legal representation; he was not informed of this right by the trial magistrate, nowhere in

the record did he choose not to have legal representation the Coram consisted of the prosecutor, court (Senior Resident Magistrate), court assistant, and accused. In determining whether substantial injustice was suffered by the accused in his criminal trial, we will consider the factors as listed in the **Supreme Court decision of R vs. Karisa Chengo (supra)**. On the issue of seriousness of the offence, defilement is a felony that carries a custodial sentence, which in this case carries a penalty of 15 years imprisonment. The sentence acts as punishment and a deterrent to the society, moreover the person is shunned by society. We are not aware whether the appellant could afford legal representation, we will presume that he could but choose not to have one to represent him at the trial. The appellant is not a minor; he is a male adult according to the court proceedings. The accused is a teacher by profession, in the court proceedings it was recorded that he understood the charges preferred against him and the proceedings. Sexual defilement is a complex charge that needs to be explained to the accused so as to come up with a proper defence.

Right to legal representation compliments the right to a fair trial, lack of legal representation of the appellant may have resulted into substantial injustice; he was not familiar with legal procedures, terminologies and knowledge of how courts work, he could not cross examine witness or conduct a defence hearing wherein he could point out the contradictions, inconsistencies or accuracy of prosecution witness testimonies. The appellant is serving a custodial sentence of 15 years.

Every accused person has a right to a fair trial as clearly stated in Article 50 of the Constitution. The legal issues raised here in this appeal by Learned Counsel Mr. Githuka are complex in nature.

Why do I say so?

In this case the court has to ascertain whether broadly speaking there was a failure of justice in absence of counsel at the trial of the appellant. Reliance was placed on right to counsel alive. This court holds that in so far as the rights expressed in Article 50 2(b), (c), (d), (e), (f), (i), (j) (k) (h) of the constitution. The trial magistrate acted within the requirements of the law.

There is always a presumption that court processes and procedures are complex and difficult to interpret and apply. It was in light of this the drafters of the constitution introduced right to counsel. Article 50(g) and (h). I think what trial courts have not done is to effectively carry out an inquiry to establish whether the individual before court has the ability to conduct his or her own defence. It must be appreciated from the nutshell that outridge of the applicable laws and rules of procedure and its ability to relate with them is not a monopoly of lawyers. This court takes judicial notice that there are instances where self-represented litigants in both criminal and civil proceedings are able to sieve relevant evidence, challenge the adverse party case with such vigour and c.....that at the end of it all no incalculable injustice or prejudice is occasioned. To me what trial courts fail to do is to enforce Article 50(g) and (h) on right to counsel by determining the following: The personal circumstances of the accused, his level of aptitude or ineptitude to navigate the trial by himself or herself, the extent to which he or she can cross-examine witnesses, peruse and appreciate both documentary and other exhibits and their materiality to the charge likewise whether he understands the rights governing right to silence and right against self-incriminating evidence. The other appropriate inquiry is whether by virtue of being served with witness statements and detailed information on what the case state entails he or she possess sufficient knowledge and understanding of the various legal aspects of the process of criminal justice.

It is important to determine textually as provided in the constitution that the accused is aware of his right to counsel and his ability to afford and retain one. On the other hand, a sufficiently establish that by the nature of the case legal assistance is necessary otherwise substantial injustice will result.

In either of these two situations indisputably set out in the constitution as a minimum standard. The record of the trial magistrate isthat there was adherence to the obligations conferred by the supreme law of the land.

In the instant case based on the severity of sentence the capacity of the accused to defend himself has not been impugned. Due to the determinative weight to this element evidence on his inadequacy to appreciate the rules of evidence, role of cross-examination and even more importantly the elements of the charge preferred against him by the state.

As to the merits of this ground I am satisfied that the irregularity in the court proceedings did not result in a failure of justice to render the trial unfair as canvassed by the applicant counsel.

Ground 3. Whether the offence of defilement was proved to the required standards against the appellant

It is trite that the standard of proof of beyond reasonable doubt is required for any court trying an accused person to validate the charge, enter a verdict of guilty and conviction at the very end.

The principle of beyond reasonable doubt was clearly stated in the case of **Woolmington v DPP (1935) UK HC** where the court explained that:

“The concept of proof beyond reasonable doubt does not involve proof to the hilt or to an absolute certainty it is also not proof beyond the shadow of doubt.” See also Miller v Minister of Pensions (1942 AC 1).

Consequently, the defilement offence alleged before the trial court in this appeal ought to be reaffirmed or vitiated on the basis that it was not proved beyond reasonable doubt. Essentially as an appellate court the task is to review and evaluate the evidence at the trial from both the state and the defence and their witnesses.

The appellant contended in his petition of appeal on Grounds 1, 2 and 3 and advanced his argument via written submissions that there was no proof of penetration and the hymen was not broken due to penetrative sex. At trial, the complainant Pw1 narrated to the principal act of the charges facing the accused as follows:

“I went to town with my sister Zaina. Town is Elerai near Njukini. We had gone to mill maize. I met the accused person in the market. He greeted me, he asked me to go to his house. I went to his house, we stayed there. He bought for me soda, which we drunk. He sent zaina for credit cards. Accused person grabbed me, removed my clothes. House is a bedsitter. I was putting a dress, pant and biker. He had sex with me while I was standing. Inserted his penis into my vagina. This happened at 2:00p.m. When he had Zaina to go call my uncle. I got out of the house and stood outside. My uncle came in and asked me what happened; I explained to him, uncle was accompanied by Watenge. I went to Loitokitok the following day. Examined and treated. My uncle called the police and he was treated. Uncle called the police and he was arrested. I was with my parents at the hospital. There was a P3 form filled at the hospital.”

During cross examination the complainant narrated the following:

“I met you at the market, there was no other person at the house, I was not taken to hospital the same day and accused was also examined at Loitokitok hospital.”

The above testimony was corroborated by her sister Pw2 who is a minor, the court conducted a voir dire and she proceeded to give sworn evidence; Pw2 narrated the following:

“That the accused person directed her together with the sister to his house. They took soda and she was later on sent to buy credit card voucher of 20 kshs. She found the accused person and pw1 in the house sitting. I gave the accused the voucher. She left to call her uncle. The door was initially locked from inside. I found my uncle at a shop. She told him to go and see for himself as the house was locked from the inside. The uncle opened the door and the accused person was in the house. The uncle called the police who arrested the accused and took him to the police station.”

During cross examination pw2 testified that; ***“I gave him credit. Pw1 took her to his house. Pw1 was taken to hospital the same day. Pw1 was sitting on the chair while you were on the bed. We found the house opened and we got in.”***

Pw3 testified as follows: ***“the accused was sitting on the bed while the accused was standing. Accused person was later taken to Rombo police camp and later on went to Loitokitok hospital.”*** On cross examination Pw3 states that, ***“Pw1 was taken to Loitokitok hospital while the accused was taken with administration police officers. Accused was taken to hospital.”***

PW4 was the medical doctor who examined PW1 he testified that he was presented with allegations of defilement by the complainant. He examined the victim. There was dry whitish stain on the pants. Victim looked stressed. Hymen was missing, there was a whitish discharge from her vagina. The probable weapon used was a penis. There were no spermatozoa found in her vagina. Suspect was not available for examination. The medical doctor produced the following documents as exhibits: P3 form, PRC Form, treatment notes and lab tests. During cross examination PW4 said that you can have vaginal penetration without ejaculation.

On examination of the exhibits: The post rape care form indicates that no physical injury observed, no stains in the clothes, no hymen, type of sexual violence was vaginal. The P3 form (medical examination form) indicates that there was a whitish stain (dry) on the pants, Pw1 was distressed, genitalia normal and intact, no hymen, probable type of weapon causing injury is a penis. Treatment form states that there were no bruises, absence of hymen, no spermatozoa, and no pus cells. Lab tests form indicates that there were no spermatozoa or pus cells.

The point of contention is whether the trial magistrate placed undue weight on the broken hymen because it was penetrated by a penis or was the hymen broken by any other probable reason. Was the broken hymen sufficient proof of defilement? In the appellants petition of appeal on ground 1 and 2; The Appellant expressed doubt if PW1's hymen was found to be broken, whether examination on 3/11/2017 was proof that it had been so broken due to penetrative intercourse that had taken place on the 12th day of November 2017. On ground 2 the appellant states that the trial court shifted the burden of proof to the accused to explain how pw1 hymen could have been broken and in default of such proof that it could only have occurred from penetrative sex on 12/11.2017.

In the appellant's written submissions through his counsel they relied on the court of appeal case of **Davis Mwingira versus Republic {2017} eKLR** where in the judges discussed the issue of the broken hymen, it was held thus:

“We think it was an error for the learned judge to form a firm conclusion of defilement from the fact alone of the broken hymen. The appellant very helpfully drew our attention to the decision of this court (Maraga and Rawal, JJA) as they were) on P.K.W VS. R. on the issue of the view that courts ought to take on the fact of a broken hymen, without more.”

15 in their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the findings that the child's hymen may have been broken. Was this justified? Is hymen only ruptured by sexual intercourse?

16. Hymen also known as vaginal membrane is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences, we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse, these include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding and gymnastics, there can also be natural tearing of the hymen. See Canadian case of the **Queen vs. Manuel Vincent Quintannila (1999) AB QB**. Section 8(1) of the sexual offences Act provides for the offence of defilement, that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

In PW1's testimony she stated that the accused had sex with her at his house while standing and he inserted his penis in her vagina. PW2 corroborated PW1's testimony that she was indeed in the accused person's house. PW4 the medical examiner adduced evidence that pw1's hymen was broken, vaginal penetration occurred and the probable weapon was a penis. On cross examination by the accused he stated that you could have vaginal penetration without ejaculation. In the accused defence he denied having sex with Pw1 he asserted that pw1 came to his house after she was beaten. He further stated that he was in his house with his brother whom he failed to call as a defence witness.

In my analysis, the hymen was broken due to penetrative sex as alluded by Pw4, the medical examiner and no other probable cause. The fact that the hymen was broken and there was absence of spermatozoa does not negate the complainant's assertion that that the appellant inserted his penis into her vagina. Penetration is defined under section 2 of the Sexual Offences Act as the partial or complete insertion of one's genitalia organ into the genital organs of another person. In the case of **GDB VS. R (2017) EKLR Criminal 32 of 2016** the Court of Appeal held that there is no legal requirement that a victim of sexual offence must suffer lacerations, cuts and bruises or any other injury on the genital organs. In the case of **T VS. U the Ugandan Court of Appeal** expressed the view as follows: *"In sexual offences, the slightest penetration of a female sex organ by a male organ is sufficient to constitute the offence."*

One of the main ingredients in defilement cases is proof that there was penetrative sexual intercourse of a female. In my opinion, the prosecutor succeeded in proving that Pw1 was sexually defiled by the appellant.

4. Whether the prosecution proved its case beyond reasonable doubt

The appellant elucidates in his petition of appeal on ground 5 where he states that the trial magistrate erred in fact and law in holding that the prosecution had proved its case beyond reasonable doubt.

In a criminal trial the standard of proof is beyond reasonable doubt. Burden of proof is on the prosecution. According to section 8(1) of the Sexual Offences Act No. 3 of 2006; the prosecution has to prove the following in order to sustain a charge of defilement, these are;

- 1) There was penetrative sexual intercourse of a female;
- 2) That the female was a minor whose age must be established; and
- 3) That it was the accused /appellant who had sexual intercourse with the minor.

The critical ingredients in defilement are: penetration, age of the victim and identity of the defiler. In this case the age of the victim and identity of the defiler are undisputed. The age of the defiler as seen in her birth certificate which was produced as exhibit was 17 years of age at the time of the assault. The victim identified the defiler in her testimony as her school teacher, who came to their school in 2017 when she was in class six and he taught her Maths and English. The matter in dispute was whether there was penetration to the victim's genitalia.

The prosecution has the task of proving its case beyond reasonable doubt and it is a burden the prosecution must discharge in relation to each and every particulars of the offence charged. The most important ingredient to be proved of the offence of defilement in this instant case is penetration. The prosecution proved this by calling PW4 to ascertain the truth by way of proving penetration, PW4 corroborated Pw1's testimony by testifying that there was indeed penetration from the accused in addition, he tendered exhibits such as treatment forms, P3 form, lab tests, and post rape care form as evidence and this was enough proof of sexual defilement. I am satisfied that the prosecution proved their case beyond reasonable doubt.

In the circumstances of this appeal I am satisfied that there are no grounds to impeach the trial court in respect of the prosecution evidence on the appellant version on the commission of the offence. The onus that rests on the state to prove the guilt of the applicant beyond reasonable doubt was discharged in the court below.

From the above analysis I find no misdirection on both facts and law by the trial court that could reasonably infer that the appellant guilty was not proved by the state. Consequently, the judgement of the trial court on verdict of guilty, conviction and sentence remain in place. Accordingly, the appeal is dismissed on all grounds with no order as to costs.

Dated, Signed and Delivered at Kajiado this 22nd day of November 2018

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R. NYAKUNDI

JUDGE

Representation

Mr. Githuka for the applicant

Appellant – present

Mr. Meroka for the Director of Public Prosecutions - present