REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.19 & 21 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. E. Micheka - PM delivered on 3rd December 2015 in Kikuyu PM. CR. Case No.501 of 2015)

PETER KUBAI GITHINJI……...…...……..1ST APPELLANT

JAMES WAITARA MUTHONI……..…2NDAPPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellants Peter Kubai Githinji, hereinafter referred to as the 1st Appellant, and James Waitara Muthoni, the 2nd Appellant were the 2nd and 1st accused respectively in the trial before the magistrate's court. Their appeals have been consolidated as they arise from the same trial. The Appellants were charged with the offence of **rape** contrary to **Section 3 (1)(a) (b) (3)** of the **Sexual Offences Act**. The particulars of the offence were that on the night of 11th January 2015 at Muku Village, in Kiambu County, the Appellants jointly and at diverse times intentionally and unlawfully caused their respective penises to penetrate the vagina of M T M without her consent. They were alternatively charged with **committing an indecent act with an adult** contrary to **Section 11(a)** of the **Act**. The particulars of the offence were that on the same night and in the same place, the Appellants jointly and at diverse times intentionally and unlawfully touched the vagina of M T M with their penis against her will. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, they were both convicted as charged on the main count of **rape** and were each sentenced to serve twenty (20) years imprisonment. The Appellants are aggrieved by their conviction and sentence and have filed their separate appeals to this court.

In their respective petitions of appeal, the 1st and 2nd Appellants raised several grounds of appeal challenging their conviction and sentence. The 1st Appellant was aggrieved that the trial court relied on weak evidence of identification to convict him. He faulted the trial court for failing to find that the circumstances favouring a positive identification were absent. He was aggrieved that his conviction was based on uncorroborated evidence of the complainant. The 1st Appellant was also aggrieved that the prosecution's evidence, taken as a whole, did not prove the case against him to the required standard of proof beyond any reasonable doubt. He complained that the trial court ignored his defence. Finally, the 1st Appellant faulted the trial court for failing to deal with his evidence and that of the 2nd Appellant separately before reaching the decision to convict him. The grounds of appeal advanced by the 2nd

Appellant were that the charge sheet was defective in that it failed to comply with the provisions of **Section 134** of the **Criminal Procedure Code**; that the trial court failed to comply with the provisions of **Section 151** of the **Criminal Procedure Code** and that his right to a fair trial in terms of **Article 50(2)(c) (j)** of the **Constitution** had been infringed when he was not supplied with witness statements made by the prosecution witnesses before trial. The 2nd Appellant further took issue with the fact that he was convicted yet the prosecution had not established its case to the required standard of proof beyond any reasonable doubt. He faulted the trial court for failing to find that there were material contradictions in the evidence of the prosecution witnesses, that the evidence of identification was not watertight and that there was no medical evidence linking him to the crime. He was also aggrieved that the trial court failed to find that the charges against him were inspired by a personal grudge that the complainant held against him and that no proper investigations were undertaken. He also complained that the trial court misconstrued the prosecution witnesses' evidence to arrive at the decision to convict him. Finally, the 2nd Appellant complained that the trial court rejected his defence. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

Prior to the hearing of the appeal, the Appellants filed their respective written submission in support of their appeals. A response to the Appellants' submissions was made by the Learned State Counsel, Ms. Akunja. The 1st Appellant submitted that since the prosecution's case against him rested on the sole evidence of the complainant, the trial court erred by not properly applying its mind to the cautionary rules applicable to the evidence of single witnesses. He argued that in so far as the complainant's alleged recognition of him is concerned, the trial court failed to apply its mind to the prevailing circumstances under which the complainant identified him as having raped her. He submitted that the fact that the incident was said to have occurred between midnight and 4.00 a.m. in a bush implied that the conditions favouring a positive identification were absent, more so given that no evidence was led on the condition of lighting at the scene. He further argued that there was also a possibility of a mistaken identification. To put into perspective the law in so far as dealing with the identification evidence of a single witness is concerned, the 1st Appellant cited the cases of **Republic -Vs- Turnbull & Others [1976] 3 ALLER 549, Njihia -Vs- Republic [1996] KLR 422, Obwana &Others -Vs- Uganda [2009] 2 EA 333, Etudebo & Others -Vs- Uganda [2009] 1 EA 132, Charles O. Maitanyi -Vs- Republic [1986] KLR 198 and Murumbe & Another -V- Republic [1980] KLR 356**

He further argued that the trial court erred in acting on the single uncorroborated evidence of the complainant to convict him and cited the case of **Odhiambo -Vs- Republic [2005] 1 KLR 564** in support of his submission. He contended that although **Section 124** of the **Evidence Act** provides that an accused may be convicted of a sexual offence on the single evidence of the victim of the offence, the conviction ought to be invoked when the court is satisfied that the witness is truthful. In this regard, the 1st Appellant criticized the trial court for failing to test the credibility and reliability of the complainant's evidence to be satisfied that she was a truthful witness. According to him, the fact that the complainant in her evidence in chief denied knowing the 2nd Appellant prior to the incident contrary to the evidence of PW2, PW4 and PW6 was an indication that she was not an honest witness. On the question of whether the prosecution proved his guilt to the required standard of proof beyond any reasonable doubt, the 1st Appellant reiterated that the trial court relied on a weak prosecution's case against him to convict him based on the sole evidence of the complainant. He further submitted that the trial court misconstrued the evidence of the complainant and came to an inaccurate conclusion to convict him. He was of the view that the trial court did not properly distinguish the complainant's evidence against him and the evidence against the 2nd Appellant. To support his submission, the 1st Appellant placed reliance on the case of **Munyole -Vs- Republic [1985] KLR 662.** Finally, the 1st Appellant submitted that the trial court erred in disregarding his alibi defence without giving reasons for rejecting it. To this end, the 1st Appellant relied on the case of **Stephen Mungai Machari -Vs- Republic Criminal Appeal No.1 of 1994** to support this submission. He therefore urged the court to allow his appeal.

On his part, the 2nd Appellant submitted that he was prejudiced having been convicted on the basis of a defective charge sheet that was not amended. According to him, the evidence on record established the commission of the offence of **gang rape** in terms of **Section 10** of the **Sexual Offences Act**. He

contended that the defect in the charge sheet should have been remedied by an amendment to the charge sheet to bring it into line with the proven offence. To support his submission, he relied on this court's decision in the case of **Jason Akumu Yongo -Vs- Republic [1983-88] 1 KAR**. With respect to the alleged violation of **Article 50(2)(c)** of the **Constitution,** the 2nd Appellant submitted that his right to have adequate time and facilities to prepare a defence was infringed when he was denied the prosecution witness statements. He cited the cases of **Thomas Patrick Gilbert Cholmondeley -V- Republic [2008] eKLR, George Ngodhe Juma & Others -Vs- The Attorney General [2003] eKLR and Republic -Vs- Daniel Chege Magotho [2014] eKLR** in support of his submission. As to the trial court's non-compliance with the provisions of **Section 151** of the **Criminal Procedure Code,** the 2nd Appellant's submitted that because the evidence of all prosecution witnesses was not given under oath, it followed that there was no admissible evidence against him hence his conviction and sentence should be set aside. He further submitted that the prosecution's case was not proved to the required standard of proof beyond any reasonable doubt for reason that there was no medical evidence linking him to the offence. Finally, the 2nd Appellant took issue with the trial court's reliance on the evidence of the complainant whom he considered not to be a reliable and credible witness having given a false account of the events of the material night. To this end, the 2nd Appellant relied on the holding of this court in the case of **Ndungu Kimani -Vs- Republic [1979] KLR 282**.

Ms. Akunja for the State opposed the Appellants' appeals. She submitted that the prosecution proved its case against the 1st and 2nd Appellants to the required standard of proof beyond any reasonable doubt. According to her, all the essential elements requiring proof beyond reasonable doubt in the offence were proved. It was her submission that the prosecution led evidence during trial showing that the Appellants had carnal knowledge of the complainant without her consent. She further submitted that the medical examination carried on the complainant found that her genitalia was bruised and was covered with soil. As far as the identification of the Appellants is concerned, the Learned State Counsel submitted that aside from the evidence of the complainant, the 2nd Appellant was positively identified by PW2, PW4 and PW5 who were eye witnesses. She submitted that the complainant also positively identified the 1st Appellant as she knew him very well as a matatu driver and referred to him by his name Kubai. She further submitted that the trial court considered the Appellants' defence before reaching the decision to convict them. She contended that prosecution witnesses adduced cogent, credible and consistent evidence linking the Appellants to the offence. She therefore urged the court to disallow the Appellants' appeal.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (See **Njoroge –vs- Repubic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellants of **rape** to the required standard of proof beyond any reasonable doubt.

The facts leading to the charge against the Appellants as presented by the prosecution witnesses are as follows. The complainant in this case is M T M. She testified that on the material night of 11th January 2015, she left work at about midnight and boarded a motorcycle at Gikuni belonging to PW4 Peter Karanja to take her to her house. She testified that before they left, the 2nd Appellant arrived and asked for a ride to Mukui. He also boarded the motorcycle and sat behind her before they began their journey to Mukui. She testified that when they reached the PCEA Church, the 2nd Appellant grabbed her neck and asked PW4 to stop the motorcycle and he complied. They alighted from the motorcycle. The 2nd Appellant then began to forcibly undress her and she called out for help. She tried to push him away but he overpowered her and pinned her down. Her screams attracted the attention of several people who arrived at the scene. By this time the 2nd Appellant had managed to fully undress her. She testified that the 2nd Appellant picked up a stone to scare away the onlookers who then moved away. The 2nd Appellant then lay on top of her and had sexual intercourse with her. When he finished, he asked the 1st Appellant who was amongst the people who arrived at the scene to escort her home. The complainant testified that there was lighting at the scene and she was able to identify the 1st Appellant as Kubai, a

matatu driver. She testified that the 1st Appellant escorted her from the scene while she was still naked. The 2nd Appellant followed them behind carrying her clothes and caught up with them near a roundabout that was ahead. He again got hold of her and dragged her to a nearby bush where again he had sexual intercourse with her a second time as the 1st Appellant watched. She testified that when he finished, the 1st Appellant told her that he also wanted to have sexual intercourse with her which he did without her consent and when he finished, he was chased away by the 2nd Appellant. The 2nd Appellant then continued to sexually assault her until 4.00 a.m. when he left. She dressed herself up and proceeded to Kibiku Police Post where she reported the incident.

PW4's account of the events of the material night was that the complainant boarded his motorcycle together with the 2nd Appellant and asked to be taken to the 2nd Appellant's house. He testified that on the way there, the complainant and the 2nd Appellant began to argue and he stopped his motorcycle at PCEA Church. He testified that the 2nd Appellant tried to pull the complainant towards a bush nearby but she resisted. By this time several people had arrived at the scene including PW2 David Njoroge, a guard who was manning the church and the 1st Appellant. PW4 testified that he had been paid his money and so he left. On his part, PW2 testified that he was at the church premises when he heard the commotion outside the church. He testified that he proceeded to the scene to find the 2nd Appellant physically assaulting the complainant who was naked. He testified that the 2nd Appellant was saying that the complainant had spent his money. PW2 testified that the 2nd Appellant told him not to interfere with his business. He moved behind. He testified that he saw the 2nd Appellant push the complainant to the ground and lay on top of her. His evidence was that the complainant kept telling the 2nd Appellant to stop and that she called him by his name Waitara. He also testified that he saw the 1st Appellant arrive at the scene a while later.

PW5 Alfred Olibwa's house was by the roadside near the church. His evidence was that on the night in question, he heard a lady screaming outside his house. He went to investigate and found the complainant being slapped by the 2nd Appellant. He testified that he found PW2 and PW4 at the scene while the 1st Appellant arrived later. The evidence of PW5 was that he saw the 2nd Appellant undress the complainant before he also removed his trouser and lay on top of her. He testified that he asked the 2nd Appellant what he was up to and he told him that he was handling his business. PW5 testified once the 2nd Appellant had finished he wore his trousers as the complainant also wore her clothes. PW5 testified that the 1st Appellant then escorted the complainant from the scene.

PW6 PC Wycliffe Makari testified that he was at Kibiko Police Post when the complainant arrived looking distressed. He testified that she reported that she had been sexually assaulted by two men whom she knew and gave the names of the 1st and 2nd Appellants as her assailants. She also reported that several people had witnessed the incident. PW6 referred the complainant to Nairobi Women's Hospital for medical attention. At the hospital, the complainant was seen by PW7 Dr. Edward Kinuthia on 11th January 2015. He testified that the complainant came to the hospital with a history of having been sexually assaulted by two people. He examined her and found that she had soiled clothes with mud stains. He examined her genitalia and found that her vagina was bruised and was covered with soil. Her vulva was also swollen. She also had bruises on her stomach and wrist. PW7 found that the injuries sustained by the complainant were consistent with sexual assault. He therefore filled his findings on a P3 form which he produced into evidence as ***Prosecution's Exhibit No. 4***. The complainant was also examined by PW3 Dr. James Kamenwa at Wangige clinic on 11th January 2015. PW3 testified that the complainant came to the hospital with a history of having been sexually assaulted. He examined her and observed that she had bruises on her stomach, chest and right hand. He also examined her genitals and observed that they were swollen and covered with soil. He observed that the injuries were consistent with the sexual assault reported by the complainant. He filled his findings on a Post Rape Care Form which he produced into evidence as ***Prosecution's Exhibit No.5***.

The 1st and 2nd Appellants were subsequently arrested and charged with the present offence. When the

Appellants were put on their defence, they denied committing the offence. In his defence, the 2nd Appellant testified that he met the complainant in a bar on the material night. They had drinks together. He testified that he gave the complainant Kshs.500 in exchange for her spending the night in his house but she refused. He testified that he therefore took the complainant back to her house and they parted ways. On his part, other than explaining the circumstances of his arrest, the 1st Appellant did not at all touch on the evidence that was adduced against him by the prosecution witnesses.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the grounds of appeal presented by the 1st and 2nd Appellants and the submissions made by the Appellants and the State. The Appellants were charged with the offence of **rape** contrary to **Section 3(1)(a) (b) (3**) of the **Sexual Offences Act**. For the prosecution to establish its case, there are three elements of the charge the prosecution is required to establish. Under **Section 3** of the **Sexual Offences Act**, a person is said to have committed the offence of rape if ***"he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; the other person does not consent to the penetration; or the consent is obtained by force or by means of threats or intimidation of any kind."*** Under **Section 3(1)** of the **Sexual Offences Act**, the prosecution was required to first establish that there was penetration. **Section 2(1)** of the Act defines penetration as ***"the partial or complete insertion of the genital organs of one person into the genital organs of another person".*** In the present case, the prosecution established that indeed the complainant, the victim of the sexual assault was penetrated. The medical evidence produced by PW3 and PW7 established to the required standard of proof that the complainant was penetrated. The complainant's genitalia was found to be bruised, swollen and was covered with soil. This was consistent with the prosecution's evidence that the complainant was sexually assaulted on the ground in an open space. The prosecution therefore proved the first element of penetration to the required standard of proof beyond any reasonable doubt.

The second element that the prosecution is required to prove is the identity of the perpetrator. The Appellants were convicted primarily on the basis of the evidence made by the complainant and the eye witness evidence of PW2, PW4 and PW5. The evidence of the complainant was that on the material night she left work at about midnight and boarded a motorcycle at Gikuni belonging to PW4. She boarded the same to take her to her house. She testified that at about the same time the 2nd Appellant approached PW2 asking to be taken to Mukui. They all then proceeded to Mukui together with the 2nd Appellant sitting behind her on the motorcycle. The complainant testified that when they reached the PCEA church, the 2nd Appellant grabbed her neck and asked PW2 to stop the motorcycle for them to alight. She testified that the Appellant began physically assaulting her. She cried out for help. He forcefully undressed her and wrestled her to the ground. By this time, several people had gathered at the scene. The complainant testified that the 2nd Appellant managed to pin her down and lay on top of her before he forcibly had sexual intercourse with her. When he finished, he asked the 1st Appellant to escort her home. She testified that she was able to identify the 1st Appellant as there was light at the scene. She knew him very well as a matatu driver by the name Kubai. The complainant testified that she was escorted from the scene by the 1st Appellant while she was still naked. The 2nd Appellant followed them behind carrying her clothes and he caught up with them at a nearby roundabout. He again got hold of her and dragged her to a nearby bush where he had sexual intercourse with her a second time as the 1st Appellant watched. She testified that when he finished, the 1st Appellant told her that he also wanted to have sexual intercourse with her. He proceeded to have sex without her consent. When he finished, he was chased away by the 2nd Appellant. The 2nd Appellant then continued to sexually assault her until 4.00 a.m when he left.

The evidence PW4 was that on the material night, the complainant boarded his motorcycle together with the 2nd Appellant to go to the 2nd Appellant's house. He testified on the way, the complainant and the 2nd Appellant began to argue and he stopped the motorcycle at PCEA church. The commotion attracted the attention of several people at the scene amongst them, PW2 and the 1st Appellant. He saw the 2nd Appellant pulling the complainant towards a bush nearby but she resisted. PW4 testified since he had already been paid his money, he left the scene. The evidence of PW2 was that that he arrived at the scene to find the 2nd Appellant physically assaulting the complainant who was naked. He testified that the 2nd

Appellant was saying that the complainant had spent his money. The evidence of PW2 was that he saw the 2nd Appellant shove the complainant to the ground and lay on top of her. He testified that the complainant asked the 2nd Appellant to stop and that she called him by his name, Waitara. PW2 also testified that he also saw the 1st Appellant arrive at the scene a while later.

The evidence of PW5 Alfred Olibwa was that he arrived at the scene and found 2nd Appellant physically assaulting the complainant. He testified that he found PW2, PW4 at the scene while the 1st Appellant arrived later. PW5 saw the 2nd Appellant undress the complainant and mount himself on her. He testified that he saw the 1st Appellant escorting the complainant from the scene after the 2nd Appellant finished what he was doing to her. On his part PW6 testified that the complainant reported that she had been sexually assaulted by two people known to her. She identified the 1st and 2nd Appellants as her assailants in her first report made at the police post. The Appellants denied any involvement in the offence.

In convicting the Appellants, the trial court had this to say;

> ***"From the evidence adduced by the prosecution witnesses namely PW1, PW2 and PW5, the accused persons are placed at the scene of the crime at the material date and time. PW1 stated that she recognized accused 2 and knew him as Kubai. It was at night time but there was lighting from the church and besides she knew him. She stated that she met the 1st accused on the material day. She stated that she was raped repeatedly by the 1st accused which fact is confirmed by the eye witnesses. She also stated that the 2nd accused also raped her repeatedly up to about 4.00 a.m.***
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> ***She is positively sure that it was the accused persons who raped her. This is corroborated by witnesses and further by the fact that she spent considerable time with the said persons, the act in itself calls for close proximity and touching which happened, there was proper lighting and the 2nd accused was known to her.***
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> ***Both accused persons denied committing the offence. Accused 1 stated that he took the complainant to her house and denied raping her. Accused 2 stated that he was at his home at the time and was surprised when he heard that the police were looking for him for alleged rape. Their testimonies were not corroborated and did not rebut the prosecution's witnesses' consistent and corroborated evidence that placed the two of them at the scene and which implicates them."***

From the foregoing excerpts, it is clear that the trial court failed to consider the evidence implicating each Appellant separately in accordance with the guidance of court in the case of **Joseph Mbebi s/o Mati & Others -Vs- Republic [1957] E.A 426.** From the evidence adduced by the prosecution witnesses, it would appear that the complainant's case against the 1st Appellant is that he sexually assaulted her at a bush near the roundabout while her case against the 2nd Appellant is that he sexually assaulted her severally both outside the PCEA Church and at the said bush near the roundabout. From the evidence on record the 2nd Appellant's sexual assault on the complainant was witnessed by both PW2 and PW5. They both saw the 2nd Appellant physically assault the complainant before he pinned her down on the ground and sexually assault her. The evidence of PW5 was that he saw the 2nd Appellant undress the complainant before he also undressed himself and mounted himself on top of the complainant. He testified that he asked him what he was doing to her and he answered that he was handling his business. The complainant testified that there was light at the scene therefore the 2nd Appellant's identification was proper. He was further placed at the scene by PW4 who testified that he was the one who picked him and the complainant at Gikuni and dropped them outside the PCEA Church. This court is therefore satisfied as to the identity of the 2nd Appellant as the perpetrator of the offence. The fact that the appellant physically assaulted the complainant before having sexual intercourse with her is clear proof that the sexual intercourse was not consensual.

As to the complainant's case against the 1st Appellant, the complainant testified that the 1st Appellant had sexual intercourse with her at the bush near the roundabout. From the evidence on record, none of the prosecution witnesses saw the 1st Appellant sexually assaulting the complainant. The trial court based its findings on the sole evidence of the complainant. It has been severally held that evidence of a single witness in sexual offences must be treated with caution.

Section 124 of the Evidence Act provides as follows:

> ***"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:***
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> ***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."****(underlining ours)*

The court can only accept the evidence of a single witness if it is satisfied that that it is truthful. In the present appeal, it was clear to the court that the complainant was telling the truth when she testified that the 1st Appellant had sexually assaulted her on the material night. She gave a blow by blow account on how the 1st Appellant took advantage of the situation and had sexual intercourse with her without her consent. Instead of assisting her, the 1st Appellant proceeded to forcefully have sexual intercourse with her at her most vulnerable moment. When she reported the incident to the police, she told the police that she had been sexually assaulted by two men. She identified both Appellants by name. From the evidence adduced, it was apparent that there was no cogent reason why the complainant would implicate the 1st Appellant in the sexual assault if indeed the 1st Appellant was not the perpetrator. This court is satisfied to the required standard of proof that the complainant properly identified the 1st Appellant as her assailant in the sexual assault. The 1st Appellant was seen at the scene of the first sexual assault by the 2nd Appellant by witnesses. The 1st Appellant was therefore placed at the scene by the prosecution witnesses when the sexual assault took place. In the premises therefore, this court reaches the conclusion, as was reached by the trial court, that the evidence adduced by the prosecution against both Appellants was consistent, credible and supported the charge of **rape** contrary to **Section 3(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt. The Appellants' appeal on conviction therefore lacks merit and is hereby dismissed.

On sentence, the Appellants are on firmer ground. **Section 3(3)** of the **Sexual Offences Act** provides that if any person is convicted of rape, he shall be liable to be convicted to a term of imprisonment of not less than ten (10) years. In the present appeal, it was clear to this court that there existed no aggravating circumstances to warrant the sentence of twenty years imprisonment that was imposed by the trial court. The Appellants were first offenders. They were remorseful and appeared to have learnt from the trial that what they did was not only unlawful but inhuman and damaged the complainant's dignity as a human being. In the premises therefore, this court sets aside the sentence of twenty (20) years imprisonment that was imposed by the trial court and substitutes it with a sentence of ten (10) years imprisonment to be served by each Appellant. The sentence shall take effect from 3rd December 2015 when the Appellants were convicted by the trial court. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF MARCH 2017

L. KIMARU

JUDGE