



**Murage & another v Republic (Criminal Appeal 9 of 2022)
[2023] KECA 1434 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1434 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 9 OF 2022
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
NOVEMBER 24, 2023**

BETWEEN

STANLEY MURAGE 1ST APPELLANT

JOEL MWANGI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya (Hon. Justice R. Nyakundi) dated 15th September, 2021 at Garsen in Cr. Case No. 11 of 2016)

JUDGMENT

1. The Appellants herein were jointly charged before the High Court in Garsen in Murder Case No 11 of 2016 for the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on the 14th day of March, 2016 at Chakamba market, Kipini Division in Tana Delta Sub County within Tana River County, they murdered Peter Muiruri alias Bara.
2. After hearing, the learned Judge (Nyakundi, J) found the Appellants guilty of a lesser charge of manslaughter under Section 202 as read with Section 205 of the *Penal Code* and sentenced them to twenty years imprisonment. Aggrieved by that decision, the Appellants lodged the present appeal, basing the same on the grounds that the learned Judge failed to consider that the evidential burden of the offence of murder was on the prosecution and that prosecution failed to prove malice aforethought beyond reasonable doubt; that the learned Judge failed to consider the fact that the evidence did not connect the Appellants with the offence of murder; that the learned Judge failed to adequately consider the Appellants' defence; and that the sentence meted was harsh and excessive.
3. In support of its case, the prosecution marshalled 6 witnesses. According to the evidence, on 29th February, 2016, at 3pm, PW1, Moses Mbatia Kimani, saw the deceased, who was known to him, being



- carried into a motor vehicle which he had boarded at Witu on his way to Mpeketoni. The deceased who was accompanied by his wife disclosed to him that he had been assaulted by Murage and his wife and other people. At Mpeketoni, PW1 assisted them to alight from the bus and the deceased boarded a tuktuk to the Hospital. Later, PW1, followed them and found that the deceased had been given first aid and though the doctor recommended that x-ray be taken, the deceased's wife had no money. After PW1 returned to Witu in the evening he sought financial assistance and the following morning handed over the money to the deceased's wife and it was decided that the deceased be taken to Kenyatta National Hospital. Later, he learnt that the deceased passed away.
4. PW2, Hiribae Hussein, a farmer at Chakamba village and the chairman of Peace at Kilengwani location, testified that on 23rd February, 2016 while on a motor cycle he stopped near the 1st Appellant's garage for his passenger to buy cigarettes and saw the deceased lying down. When he tried to assist him to stand, the deceased fell down. He saw the Appellants working but did not talk to them. He then called Administration Police officers from Chakamba who arrived after 20 minutes and left them to do their work. In cross-examination, he however said that he did not go near the deceased and did not talk to him.
 5. PW3, Isaac Gakenga Nderitu a resident of Witu stated that on 23rd February, 2016 at about 12pm, he was travelling from his place of work to Chakamba riding a motor cycle when he saw the Appellants assaulting the deceased with a stick. In his evidence, the fight lasted for 5 minutes. By then he was 20 metres away. According to him, the 1st Appellant called the police and informed them that the deceased was a thief who had stolen his radio and that the deceased, who was drunk had fallen down. The 1st Appellant, according to him got some cold water which he poured on the deceased. After removing the deceased from the sun, he went away to look for help. The following day, having not seen the deceased who used to supply water, he went to the deceased's home and was informed by the deceased's wife that the deceased had not been seen since the previous day.
 6. They later found the deceased at the back of the house and they relayed the information to the police. On arrival, the police were informed by the deceased's wife that the deceased had come home drunk. The deceased was then taken to the Hospital. However, since his condition was not improving, it was decided that the deceased be taken to Nairobi. Later, after three days he learnt that the deceased had passed away. In company of other people, he lodged a complaint with the police why the Appellants had not been arrested. It was his evidence that when the police went to the scene he did not inform them that he witnessed the assault on the deceased. Neither did he relay this information to the deceased's wife. He admitted that the Appellants were arrested following demonstrations by the people.
 7. PW4, Sgt. Salimu Shambi, an administration police officer testified that on 23rd February, 2016, he received a report of an assault on the deceased in front of the 1st Appellant's garage and in the company of his two other police officers proceeded to the scene. On arrival, he found the Appellants and the deceased person and the Appellants alleged that the deceased had stolen their property and upon being interrogated, the deceased fell down as he was drunk. He confirmed that the deceased was injured and was in bad condition since he was unable to stand. He then advised the Appellants to take the deceased to the Hospital and returned to the camp. He later learnt that the deceased passed away after being taken to the Hospital. By then no report had been made with them. However, on 16th March, 2016, there was a demonstration by some young people complaining that the culprits of the murder of the deceased were free. Realising that the Appellants were in danger, PW4 sent his officers who picked up the 1st Appellant while the 2nd Appellant was arrested by the members of the public.
 8. PW5, APC. Elias Abdubi, confirmed that on 16th March, 2016, while he was in the AP Camp at 3pm, some elders from Chakamba went to the camp and informed them that there was a public demand that



the Appellants be arrested on the allegation that they were involved in the death of the deceased. Based on their report, he proceeded to arrest the Appellants whom they handed over to Kipini Police Station

9. PW6, Dr Kahindi Erastus, produced the post mortem report that was prepared by his colleague, Dr Muthama, with whom he had worked and whose handwriting he was familiar with. In the opinion of the doctor, the cause of death was general sepsis infection consistent with blunt head injury. There was also evidence of pneumonia. In his evidence:

“It is possible to get sepsis from anything.”

10. At the close of the prosecution case, the Appellants were placed on their defence. In his sworn evidence, the 1st Appellant denied killing the deceased. He stated that on 23rd February, 2016 the deceased went to their house and called them. When he went out, he found the deceased on the ground on the road complaining about hunger. He then called the 2nd Appellant and requested him to assist them with some food. The deceased stayed there till 4pm complaining about his chest and spent the night at their home. In the morning, the 1st Appellant reported the matter to the police who went to his house and informed him to take the deceased to the Hospital where the deceased was admitted. When he went to check on him later, he found that he had been transferred to Mpeketoni Hospital and that he died while undergoing treatment. According to him, he was only assisting the deceased whom they picked outside the house. The 2nd Appellant testified that on 23rd February, 2016, he saw the deceased lying on the ground and they took him into the 1st Appellant’s house.
11. According to the 2nd Appellant, he left the deceased at the compound of the 1st Appellant only later to be jointly charged with the 1st Appellant for the murder. DW3, Simon Katana, the chairman of the area residents stated that he was made aware of the death of the deceased by 1st Appellant. He testified that the 1st Appellant who was his neighbour went to him and informed him that he had found the deceased lying at the back of his house and requested DW3 to accompany him to the scene. At the scene they found the deceased who was a drunkard. He then told the 1st Appellant that they should inform the police of the incident since the deceased complained of injuries to the stomach. The police suggested that the 1st Appellant gives the deceased accommodation and was later escorted to the Hospital for treatment where he later died. DW4 John Anyona also a resident of Chakamba told the Court that he was informed of the presence of the deceased at the home of the 1st Appellant. He observed that the deceased was intoxicated with liquor and was unconscious. That on further consultation, they all agreed that he be given some food and also be escorted to hospital for treatment.
12. In his judgment, Nyakundi, J held that PW1, PW2 and PW3 failed to satisfy the threshold on what constitutes malice aforethought as stipulated under Section 206 of the *Penal Code* but opined that it was proved that the Appellants inflicted injuries which caused the death. The Learned Judge was satisfied that the prosecution had put forward strong, direct and circumstantial evidence which constitutionally proved that the Appellants committed manslaughter contrary to Section 202 as read with 205 of the *Penal Code*. He sentenced the Appellants to 20 years imprisonment.
13. We heard the appeal vide the Court’s virtual platform on 25th July, 2023 when the Appellants appeared from Malindi prison. They were represented by learned counsel, Mr Were while Mr Mwangi Kamanu, appeared for the respondent. While Mr Were relied on his written submissions which he briefly highlighted. Mr Kamanu who had not filed his submissions due to the short notice of service on him of the Appellants’ submissions addressed us orally.
14. The Appellant has appealed before us on grounds that the Trial Court judgment was not fairly done by the Learned Trial Magistrate since she failed to distinguish between the truth and lies and went to



ignore his defence; he was arrested on 15th February, 2019 and arraigned in court on 7th March, 2019 which is contrary to Article 49(1)(j) of the *Constitution*; failure to scrutinize the credibility of each prosecution witness; failure to consider the medical report hence no any legal proof that he committed the offence; failure to consider that his defence was reasonable; and he did not know what transpired during the hearing.

15. The Appellants submitted that key witnesses including Githinji who is alleged to have been selling tomatoes at the scene and was mentioned by PW3 as well as the deceased's wife and a Mr Njoroge who is said to have contributed money to take the deceased to Kenyatta Hospital were all not called to testify.
16. Regarding reliance on circumstantial evidence, the Appellant submitted that the only evidence linking the Appellants to the crime was that of PW3, Isaac Gakenga Nderitu, who testified to have seen the Appellants beat the deceased on his back and hands; that the circumstantial evidence was weak; that the Appellants PW3 evidence ought to have corresponded with the doctor's report which it did not; that the trial court failed to establish the reason and motive that would have led to the Appellants assaulting the deceased; and that the cause of death was pneumonia, sepsis infection, ulcers while an addition of blunt head injury was recorded by a different person and not the one who prepared the original post mortem report.
17. According to the Appellants, PW1 stated that he met the deceased wife taking the deceased to hospital but PW2 did not mention anyone. While PW3 stated that they called deceased's brother, in cross-examination he stated that the deceased was taken to hospital by the police officers. On the other hand, PW4 stated that the deceased was taken to hospital by the Appellants. The Appellants therefore submitted that these contradictions and uncorroborated evidence can only be as a result of fabrication. According to the Appellants, the post mortem was fabricated since it is recorded to have been done on 23rd March, 2016 yet it is recorded that people demonstrated for the arrest of the Appellants on 16th March, 2016 leading to their arrest and the incident was reported on 23rd February, 2016. According to the Appellants, the burden of proof was shifted to them since the evidence by the prosecution witnesses was fabricated.
18. It was further submitted that the case was heard in two courts by three different judges but the Appellants were not informed neither were they requested if they wanted the matter to continue from where the matter had reached which is a fatal omission in law that leads to miscarriage of justice. The Appellants urged the court to quash the conviction and set aside the sentence.
19. In his submissions, Mr Kamanu the Appellants took the law into their hands; that the weapon used to assault the deceased was produced in court; that that the cause of death was established as sepsis from head injury; that the deceased died after three weeks; that that the defence did not dislodge the evidence of PW3; and that the act of assisting the deceased by the Appellants was a cover-up; that there was sufficient evidence to support the offence of manslaughter. He urged us to dismiss the appeal.

Analysis and Determination

20. We have considered the evidence and the submissions made before us. This being a first appeal, we are enjoined to analyse and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno v Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

“ An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* (1957) EA.



(336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] E.A 424."

21. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows:-

"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the Appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

22. In this case the only evidence linking the Appellants with the deceased's death was that of PW3 who alleged that he saw the Appellants assaulting the deceased who was drunk. It was his evidence that the 1st Appellant called the police and informed them that the deceased had stolen his radio. PW2, on his part testified that when he saw the deceased, he was lying on the ground while the Appellants were working nearby. It was his evidence that he was the one who called the police. It is however curious that PW3 did not disclose the information that he saw the Appellants' assault the deceased to the police or even to the deceased's wife when, the next day, he went to the deceased's house. That silence, even after the deceased had passed away raises questions as to whether he was a truthful witness. As was stated in *Ndung'u Kimanyi v Republic* [1979] KLR 282:

"A witness in Criminal Case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

See also *Alicandioci Mwangi Wainaina v Republic* Criminal Appeal No 628 of 2004 and *David Kariuki Wachira v Republic* [2006] eKLR.

23. The fact that PW3 did not report the incident to the police and to the deceased's wife raises doubt as to whether he witnessed the incident and if he did whether he was certain that it was the Appellants whom he saw assaulting the deceased. In our view, whether a witness reports to another person or to the police that he could identify the victim's assailants are matters of importance whether in case of a



- stranger or a person known to him before the offence. In inquiring on the evidence of a single witness on identification, it ought to be ascertained whether the witness informed the police or those who he was reasonably expected to have informed of his ability to identify the culprits. See *Moses Odongo Odinga v Republic* [2011] eKLR.
24. As was appreciated in *Tekerali s/o Korongozi & 4 others v Rep* (1952) 19 EACA 259:
- “Their [statement] importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [come] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.”
25. On the testimony of a single eye witness, this Court in *Titus Ngamau Musila Katitu v Republic* [2020] eKLR expressed itself as hereunder:
- “As the Court warned in *Abdalabin Wendo & another v R.* (1953) 20 EACA 166, *Cleophas Otieno Wamunga v R* (1989) eKLR and *Paul Etole & Reuben Ombima v R*, (2001) eKLR, and a host of others, the testimony of a single witness respecting visual identification or recognition must be received with the greatest care, especially when the conditions favouring a correct identification are difficult. In such circumstances the court ought to examine closely the circumstances in which the identification by the witness came to be made. In addition, and of significance, the court must look for some other corroborating evidence, pointing to the guilt of the accused person, so as to minimize the error in the identification by a single person. Those authorities also warn that, although recognition may be more reliable than the identification of a stranger, mistakes are sometimes made in recognition of even close relatives and friends. They emphasize that when the quality of the identification evidence is good the danger of mistaken identification is lessened.”
26. It is our view and we find that failure by PW3 to name the Appellants either to the police or to the deceased’s wife, raises the possibility of error as was observed in *Joseph Ngumbao Nzaro v Republic* [1991] 2 KAR 212 (Hancox CJ, Gachuhi and Cockar JJA). In that case, this Court held:
- “1) Before accepting visual identification as a basis for conviction the court had a duty to warn itself of the inherent dangers of such evidence.
- 2) A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, was essential.”
27. We have considered the evidence on record and we are not satisfied that the learned Judge exercised the necessary caution and care before convicting the Appellants on the discredited single eye witness evidence of PW3 in the absence of which the evidence on record could not meet the threshold of proof beyond reasonable doubt, even for the offence of manslaughter. The credibility and reliability of this witness is critical in order to sustain a conviction, and the court must be particularly alive to the dangers of poor observation, faulty recollection, reconstruction of evidence after the event, bias and any other risk that the circumstances of the case suggest.
28. In this case, it would seem that even the police did not find any incriminating evidence against the Appellants who were only arrested after agitation by the public. In fact, according to the police, they



only arrested the Appellants for the sake of their safety and not on the basis that there was any credible evidence against them. From the record, one cannot even tell whether investigations were conducted before the Appellants were arraigned in court since there was no testimony from or even a mention of the investigations officer. While we appreciate that the prosecution's case is not necessarily fatal for the failure to call the investigations officer as a witness, Sir Udo Udoma, the then Chief Justice of Uganda, had this to say on that point in the case of *Bwaneka v Uganda* [1967] EA 768 at page 771 Letters H to C at page 772.

“The prevailing practice of not calling police officers during trials in magistrate's courts to testify as to the part they played in deciding ultimately to arrest and charge an accused person is most unsatisfactory. It gives the impression that the police do not seem to realize that it is their duty to control and conduct all prosecutions in the magistrates' courts in criminal cases. Generally speaking criminal prosecutions are matters of great concern to the state and such trials must be completely within the control of the police and the Director of Public Prosecutions. It is the duty of the prosecutors to make certain that police officers, who had investigated and charged an accused person do appear in court as witnesses to testify as to the part they played and the circumstances under which they had decided to arrest and charge an accused person. Criminal prosecutions should not be treated as if they were contests between two private individuals. In the instant case the evidence was that after the Appellant had been arrested by local government police, he was taken and handed over to the central government police station at Mbarara. There was no evidence as to which police officer had taken charge of the case and what steps, if any, he had taken when he had decided to arrest and charge the Appellant. The absence of such evidence necessarily creates a lacuna in the case of the prosecution because it gives the erroneous impression that the central government police officers had nothing to do with the case and had taken no part whatsoever in investigating and deciding on the charge to be preferred against the Appellant. It is to be hoped that in future this practice would be discontinued, because without the evidence of an accused person having been arrested and charged by the police, the proceedings of the trial with respect to the prosecution case appear to be incomplete”.

29. The Appellants also complained that their defences were never considered. According to the Appellants, the deceased was found drunk near the 1st Appellant's garage. When he complained of hunger the Appellants sourced for food for him and when the police arrived upon being called by the 1st Appellant, they requested the 1st Appellant to accommodate him for the night which the 1st Appellant did. The next day, the Appellants escorted him to the hospital. In his judgement, the learned Judge appreciated that:

“the accused conduct was that of sympathy to what had befallen the deceased. They became involved in making arrangements for hospitalization and initial accommodation accompanied with meeting the deceased's basic needs.”

30. The conduct of the 1st Appellant, in our view was clearly incompatible with that of a person who caused fatal injuries to the deceased. In the words of this Court, *David Merita Gichuhi v Republic* Nairobi Criminal Appeal No 158 of 2003:

“It is incredible that the Appellant could have given his correct name to the members of the vigilante group near the home of the deceased when he was proceeding to her home to commit a crime. The fact that the Appellant gave his correct name near the home of the deceased is a co-existing circumstance which destroys the inference that he was going to



the home of the deceased on the night on 18th April, 1999 when Bakari met him...Lastly, Njambi (PW10) testified that she is the one who told the Appellant about the death of Elizabeth Naymbura on 21/4/99 and that the Appellant decided to remain at the home of the deceased and even slept there. The learned Judge concluded that the Appellant went to the home of the deceased as a cover up. There was no evidence to support this finding. If the Appellant had indeed committed the crime charged and had in fact been seen by Bakari and the members of the vigilante group near the home of the deceased on the night of 18th April, 1999, the natural reaction would have been to go into hiding. The fact that he went to the home of the deceased after her death to console the family and even slept there is another co-existing circumstance which destroys any inference that he was the one who committed the offence.”

31. The Appellants’ other complaint was that the trial process did not comply with Section 200 of the Criminal Procedure Code. That section provides as follows:
- 1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—
 - a. deliver a judgment that has been written and signed but not delivered by his predecessor; or
 - b. where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.
 - 2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.
 - 3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.
 - 4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.
32. Section 201(2) of the Criminal Procedure Code provides that section 200 of this Act shall apply *mutatis mutandis* to trials held in the High Court. A perusal of the proceedings reveals that the hearing of the case commenced on 23rd November, 2016 before Onger, J On 27th June, 2018, directions were given by R. Lagat Korir, J that the hearing would proceed from where Onger, J, who was on transfer to Nakuru had reached. On 25th February, 2020, the part heard matter proceeded before R. Lagat Korir, J From the record, it would seem that the said Judge was similarly unable to complete the trial which was taken over by Nyakundi, J who on 10th June, 2021 took the evidence for the defence. However, the record does not show that at this point section 200 of the Criminal Procedure Code was complied with.
33. It is evident from the various decisions of this Court that compliance with section 200 and particularly section 200(3) of the Criminal Procedure Code is mandatory, as its purpose is to protect the rights of an accused person to a fair trial as guaranteed by the Constitution under Article 50(2). The only discretion which the trial Court has is as regards the choice of the course of action to take after complying with



the provisions of section 200(3), as between the choice of proceeding with the trial from where it has reached, or starting the hearing *de novo*. This position was explained by this Court in the case of *Abdi Adan Mohamed v Republic* [2017] eKLR where the Court explained that as much as it is practically possible, it is desirable that the trial magistrate or judge must hear the case to conclusion and ultimately render judgment as it is important for the final arbiter to be in a position to weigh the evidence taken together with his or her observation of the demeanour of witnesses.

34. The Court went ahead to advise that even where the trial magistrate or Judge has been transferred, arrangements ought to be made for him or her to return to the former station to complete the trial, unless in cases where only a few witnesses had testified, in which cases the succeeding magistrate may continue with the trial from the stage it had reached, or where the evidence already recorded is more or less formal or largely uncontroverted. Further, that the purpose particularly of section 200(3) of re-summoning of witnesses and re-hearing of the case is intended to ensure that the succeeding magistrate or judge is able to assess personally and independently the demeanour and credibility of the particular witness or witnesses and to weigh their evidence accordingly.

35. As to whether it is mandatory to comply with the provisions of section 200(3), the Court in *Abdi Adan Mohamed v Republic* [*supra*] expressed itself as hereunder:

“Because of the importance of having a trial conducted from commencement to conclusion by the same magistrate or judge Section 200(4) provides that;

“Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”

Section 200 therefore entrenches the accused person’s rights to a fair trial as provided for today under Article 50(1) of the *Constitution*.”

36. The Court went on to emphasise and reiterate that “the Court said in *Ndegwa v R. (supra)* that the most sacrosanct individual in the system of our legal administration is the accused person. By reviewing his order without first hearing the Appellant the magistrate erred and the Appellant was thereby prejudiced”, and found in that appeal that there was a mistrial when the trial magistrate reviewed his earlier order of a fresh hearing and directed that he would rely on the previously recorded evidence without giving the Appellant an opportunity to comment.

37. We have said enough to show that this appeal is merited.

Accordingly, we allow it, set aside the conviction and quash the sentence. We set the Appellants at liberty forthwith unless otherwise lawfully held.

38. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER, 2023.

R. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

J LESIIT

.....



JUDGE OF APPEAL

G.v ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR

