IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 8 OF 2019

BETWEEN

PETER GITAU MACHUGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at

***Kiambu, (Joel Ngugi, J) dated 21st June 2017* in HC.CRA. 142 OF 2016)**

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JUDGMENT OF THE COURT

This is a second appeal arising from the judgment of the High Court of Kenya at Kiambu in Criminal Appeal No. 142 of 2016 (**Joel Ngugi, J**) dated 21st June 2017.

The background to the appeal is that the appellant was arraigned before the Senior Resident Magistrate's Court at Thika charged with the offence of defilement of a girl contrary to **section 8(1**) as read with **section 8(2)** of the Sexual Offences Act No. 3 of 2006 (SOA). The particulars of the offence were that on diverse dates between 1st October 2011 and 29th October 2011 at **[Particulars withheld]** area within Kiambu County, he intentionally caused his penis to penetrate the vagina of "**TNW"** a child aged 13 years. The appellant also faced an alternative count of the offence of committing an indecent act with a child contrary to **section 11(1)** of the Sexual Offences Act No. 3 of 2006 [SOA]. The particulars were that on the same diverse dates he touched the vagina and breast of the child **"TNW"**, aged 13 years with his hands and penis.

The appellant denied both offences prompting a trial in which the prosecution called four (4) witnesses to prove the charges, while the appellant gave sworn testimony and also called two witnesses in support of his defence. The brief facts are that **"TNW"** (PW1) then a minor aged 13 years, lived with her alcoholic mother and three sisters in a room rented from the appellant's mother. It was **"TNW's"** testimony that on the first material date of the offence her alcoholic mother came home while drunk and picked her up from the bed she shared with her sisters and took her to the appellant's house located in the same compound. He welcomed them into his bed, had sex with her mother before turning to her. She tried to resist but he overpowered her, removed her panty and inserted his penis into her vagina, and had sex with her. The following morning the appellant gave her mother Kshs. 1,000. They both left for their house. Her mother warned her not to disclose to anybody what had happened to her. The mother washed her blood-stained clothes. The offences were committed severally thereafter. She resisted when she could no longer put up with it.

The facts leading to disclosure are that the mother locked the children in their rented room. PW1 opened the window and assisted her sisters to escape.

They then reported the incident to their grandmother. The mother assaulted her using a panga occasioning physical injuries on realizing what she had done to facilitate her sisters' escape and for resisting her mother's attempt to take her to the appellant. She screamed. Neighbours intervened and instructed her mother to take her to hospital but she never did so. It is her maternal grandmother, **TNN** (PW3) who came the following day and took her to **Thika** Level 5 Hospital, where she was examined and, treated. A P3 form was subsequently filled on her behalf by **Dr. Mwachua.** It tendered in evidence by **Dr. Alawira** (PW2) on behalf of **Dr. Mwachua** who had left the hospital. **Dr. Alawira** testified that he was familiar with both the handwriting and signature of **Dr. Mwachua** as they had worked together at the hospital, hence his competence to produce the P3 on her behalf. The findings therein were that "**TNW"** had swelling and tenderness on the right distal forearm, a tear in her vagina, and a bruised hymen. The doctor concluded that "**TNW"** had both been assaulted and defiled. When cross-examined,

PW2 stated that he had worked with **Dr. Mwachua** for one year and was conversant with both her signature and handwriting. He was not privy to the circumstances under which "**TNW"** sustained injuries noted in the P3 form save what was noted in the P3 form that "**TNW"** was assaulted by the mother who was also privy to the defilement committed against "**TNW"** by a person known to her.

The testimony of PW3 was that on 9th November 2011 at around 1.00 am two of her granddaughters arrived at her house and narrated to her what their mother had done to "**TNW"**. The following morning, she left for the scene. On arrival, she found "**TNW"** injured and took her to **Thika District Hospital** where she was treated. They were thereafter referred to **Makongeni Police Station** where she filed the report of assault and defilement. A P3 was issued to her subsequently filled by the doctor. Investigations into the offences were carried out by **CPL Diana Mbira** (PW4); upon receiving a report from **"TNW"** and her grandmother. PW4 recorded statements from witnesses, arrested the appellant and caused him to be arraigned before court with the offences he faced at the trial.

Put to his defence, the appellant denied both offences alleging fabrication by PW3 with a view to settling grudges between him and PW3 and that he was incapable of having sex. He called his mother **Teresa Wanjiru Machogu**, DW2 as a witness. She confirmed she owned rental houses where the mother of **"TNW"** was one of her tenants. She recalled seeing **"TNW"** and her children in the compound. She confirmed the appellant was her son who lived elsewhere and only visited her occasionally and that whenever he visited her, he slept in the kitchen the only spare room in the compound with no bed. She confirmed the appellant's assertion that there was a case involving her family and PW3 over a cow which was settled by the area Chief. DW3, **Mercy Njeri Gitau, the** appellant's wife confirmed that appellant is son to DW2. They live in **Kamahuha** location but was aware that appellant occasionally visited his mother DW2. She was also aware of the offence appellant faced and stated that as far as she was concerned he was incapable of having sex since 1999.

At the conclusion of the trial, the learned trial magistrate **Hon. A. Lorot H.R**, SPM assessed the record and then rendered himself as follows:

> ***"The child gave her testimony. She explained how she was captive to poor parenting and a man who paid her own mother to have sex with her. She had nowhere to run to. Surely, such a script cannot be expected from a child who exuded details of traumatic experience and withstood the veracity of strong cross-examination. From the testimony on record, the child must have been on the stand for a period longer than half an hour, and was put through the rigours of cross-examination. Her account is believable, and more importantly, is corroborated by the medical evidence and that of her grandmother. To discount this testimony one would have to imagine that the child is an actor playing the starring role in a complex drama. Sadly, the medical evidence demonstrates otherwise. The child was defiled. She has directed the court's attention to the culprit, the accused. She has even joined in her own mother as an accessory.***
>
> ***The evidence is watertight against the accused. The threshold has been attained. The accused was linked, and evidence demonstrated to show he is the one responsible. I am satisfied with the evidence and proceed to convict the accused person of the main count of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No. 3 of 2006. As this is my finding I will make no orders on the alternative count."***

The appellant was sentenced to serve twenty years' imprisonment. He was aggrieved and appealed to the High Court raising various grounds. The learned judge re-evaluated the record, reminded himself of his role as a first appellate court judge, identified issues for determination and considering these in light of the rival submissions before him proceeded to make findings thereon. In summary, it was the learned judge's finding that there was sufficient evidence to support the conclusions reached by the learned trial magistrate; that the prosecution evidence, on the whole, was consistent; that the trial magistrate who had an opportunity to observe and listen to the testimony of the witnesses concluded that **"TNW"** and her grandmother were credible witnesses, while the appellant was not. On that account, the learned judge found no reason to depart from the findings of the trial magistrate.

On the elements for proof of the offence of defilement, the learned judge identified these as proof of age, penetration and identification of the perpetrator. The judge found no basis to doubt the trial magistrate's findings that PW1's age was proved by the testimony of **"TNW"** herself and her grandmother, which the trial court found truthful, that PW1 was thirteen (13) years as at the time the offence was committed against her. The judge found penetration proved by the evidence of **"TNW"** as corroborated by medical evidence while identification of the appellant as the perpetrator was proved by the testimony of **"TNW",** who the trial court found truthful, that appellant was the person who penetrated her and disbelieved that of the appellant. The learned judge therefore found no basis for impugning the same, especially when in the judge's opinion the evidence was consistent and mutually corroborative.

On non-compliance with **section 200(3)** of the Criminal Procedure Code (CPC); the Judge reviewed the record in light of the appellant's grounds of appeal and case law relied upon by the appellant in support of his argument on non-compliance. The learned judge appreciated that the position in law is that it is incumbent upon a succeeding judicial officer to inform the accused person of the right to recall any witnesses; that it was not in dispute that the succeeding magistrate, **Hon. Lorot** took over the trial from the outgoing magistrate **Hon. Martha Mutuku**; that on 14th July 2015 when the matter was placed before **Hon. Lorot** for hearing, counsel on record for the appellant informed the court that they were ready with the defence in terms of section 200 Criminal Procedure Code. The judge could not therefore understand how counsel for the appellant could turn round and claim that the right under **section 200(3)** belongs to an accused person and that failure of the incoming judicial officer to personally address the appellant in that regard amounted to a violation of the appellant's right under the said provision. The judge agreed with the appellant's submissions that the right under **section 200(3)** belongs to an accused person but disagreed with the submission that the appellant was not aware of that right as at the time he was put on his defence. In the judge's opinion, the advocate represented the interests of the appellant and on that reasoning expressed himself as follows: -

> ***"When an advocate specifically addresses the presiding magistrate on a matter of rights that the accused person has and authoritatively informs the trial magistrate on behalf of the accused person that they have considered the rights and options offered by the law and that the defence has elected a particular cause of action, it would be absurd to insist that the trial magistrate is required even in the face of such definitive pronouncement by the defence counsel, to still insist that the accused person has to personally respond on the elections he had made. In my view therefore, the complaint by Mr. Kinuthia pivoted on section 200(3) of the Criminal Procedure Code fails."***

Appellant's complaint on variance of **"TNW"** evidence and particulars in the charge sheet arising from **"TNW"** talking of events that occurred in 2014 when the particulars of the charge spoke of events that had occurred in 2011 as the date of the offence was rejected by the judge because in the same testimony of **"TNW"** she had first referred to events which took place in 2011 before switching to 2014. All the other witnesses referred to events which took place in 2011. The mention of 2014 in the judge's opinion was a typographical error which did not go to the root of the prosecution's case and on that account declined to vitiate the conviction.

On the appellant's complaint that the burden of proof was shifted on him to prove his conviction, the judge reviewed the case of **Bukenya & Others vs. Uganda [1972] EA 549** for the holding *inter alia* that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; and second that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case; and made observation that the complaint related to the prosecution's failure to call the mother of **"TNW"** as a prosecution witness; and upon reviewing the decision in the case of **Keter vs. Republic [2007] 1EA 135**, for the holding that the prosecution is not bound to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt, the judge ruled that no adverse inference could be drawn against the prosecution's failure to call the mother of **"TNW"** to testify as uncontroverted evidence on the record indicated clearly that she was an accomplice. Her evidence would have been of no probative value to the prosecution.

On the complaint that the appellant was incapable of committing the offence for lack of sex drive, the judge reviewed **"TNW's"** evidence in light of the appellant's complaint, and made observation that apart from the trial magistrate's unfortunate remarks "**that it was incumbent upon the appellant to 'prove' that he was impotent"**, the rest of the trial magistrate's analysis was spot on, notwithstanding that the appellant had no obligation to prove he was impotent. Upon reviewing the case of **S. vs. Shackell (4) SA 1 (SCAJ)** the judge concluded as follows:

> ***"42. However, here, even after using the very high threshold required in criminal trials, the learned trial magistrate was correct in believing "TNW" and disbelieving the appellant and concluding that the theory of the defence was so improbable that it cannot reasonably possibly be true."***

On the totality of the above assessment and reasoning, the learned judge dismissed the appeal and affirmed both the conviction and sentence handed down against the appellant by the trial court.

The appellant was aggrieved and is now before us on a second appeal raising three homegrown grounds of appeal which may be paraphrased that the learned judge of the High Court erred in law when he:

> **(1) Failed in his duty as a first appellate court judge when he affirmed conviction and sentence handed down against the appellant by the trial court.**
>
> **(2) Misdirected himself by holding that the appellant's rights under section 200(3) of the Criminal Procedure Code had not been infringed.**
>
> **(3) Failed to appreciate and reconcile in favour of the appellant the issue of variance of evidence and the particulars of the charge sheet in violation of section 214(1) of the Criminal Procedure Code.**

The appeal was canvassed by written submissions orally highlighted by the appellant who appeared in person and the learned Senior Assistant Director of Public Prosecution, (SADPP) **Mr. O'mirera**. Those for the appellant are dated 20th November 2019, and filed on 25th November 2019. Those for the state although they are on record they are neither signed, dated or date stamped with the filing date. The above irregularity notwithstanding, **Mr. O'mirera** was allowed to highlight the same in opposition to the appeal.

Supporting the appeal, the appellant submitted that the prosecution was obligated to prove the three elements or ingredients for the proof of the offence of defilement namely age, penetration and identity of the perpetrator. On proof of age, the appellant contended this was not proved neither were the contradictions surrounding the proof of age of the complainant reconciled by either the trial or the first appellate court. It is his submission that PW1 in her own testimony stated that she was 15 years old, **Dr. Mawia** from **Thika** Level 5 Hospital stated that the minor was aged 14 years old, the P3 form stated PW1 was 11 years old, the subordinate court judgment states she was 13 years, the charge sheet indicted she was 13 years, while in the clinic outpatient card serial number 20066 O.P No. 116925 – No. 78737 dated 25th November 2011 issued on 10th November 2011 indicated PW1 was 11 years old; that whereas PW2 and 3 did not indicate the age of the victim, PW4 the investigating officer gave the age of the victim as 11 years.

Relying on the case of **Burungi & Another vs. Uganda [1968] E.A 123, C.A** and **Thomas Kwanza Drombo vs. Republic [2009] HCCRA No. 167 of 2009**, the appellant submitted that the above highlighted discrepancies, inconsistencies and contradictions on the age of PW1 created a doubt in the prosecution case which should have been reconciled in his favour.

On penetration, the appellant contended that PW1's account of what transpired on the alleged day of the incident was not truthful and should not have been relied upon as basis for convicting him. Medical evidence was not helpful either as the doctor's evidence that there was a tear on the vagina caused by a sharp object was not corroborated by the evidence of PW1, that she felt any pain during the alleged penetration. Neither was there any proof of bleeding. All that PW1 said was that her mother took the clothes she wore and cleaned them without mentioning any presence of bloodstain on the said clothes. Those clothes were also never tendered in court as exhibits. Lastly, that no medical examination was carried out on him to link him to the commission of the offence.

The appellant also contended medical evidence was of no evidential value to the prosecution case on account of discrepancies on the age of PW1 already highlighted above for indication of the offence committed as **"rape"** instead of defilement he faced at the trial. The approximate age of the victim's injury in the P3 contradicted the evidence adduced at the trial. The weapon causing injury indicated as sharp does not correspond with **"a penis"**.

On the identification of the appellant as the perpetrator of the offence, the two courts below were faulted for the failure to determine whether there was light in his house, its type, intensity and distance between him and PW1 as all that PW1 said was that they arrived at the house at midnight, slept and woke up the next day at around 9.00 a.m. and left which, in the appellant's opinion, was not sufficient proof of his identification as the perpetrator of the offence; that non-production of exhibits, was fatal to the prosecution case.

Relying on the case of **Okeno vs. Republic [1972] EA 32**; **Mohamed Rama Alfani & 2 Others vs. Republic CRA. No. 223 of 2013** and **David Njuguna Wairimu vs. Republic [2010] eKLR**, the appellant faulted the first appellate court for the failure to re-analyze and re-evaluate the record and come to its own conclusion as all that the first appellate court did according to him was simply to affirm the findings of the trial magistrate. The appellant also relied on the case of **Bater vs. Bayar [1950]** and **[1952] ALL E.R 458**; **Samuel Warui Karimi vs. Republic [2016] eKLR** and **Cliff Odhiambo Oburu vs. Republic [2017] eKLR** and submitted that the prosecution case did not meet the threshold of proof beyond reasonable doubt and on that account prayed for the appeal to be allowed, conviction quashed, sentence set aside and he be set at liberty.

Opposing the appeal **Mr. O'mirera** relied on the case of **Karani vs. Republic [2010]eKLR**, and submitted that both courts below made concurrent findings on issues of fact regarding the credibility of the prosecution witnesses which this court has no mandate to interfere with unless there is clear evidence of gross misdirection which, in counsel's view is absent; that both courts below relied on both direct and circumstantial evidence as basis for conviction; that there was no contradiction in the medical evidence relied upon to prove both the age and penetration of the complainant; that the two courts below did not find it prudent to address the issue of identification as the appellant's case was one of recognition and not identification; that re-evaluation of the entire record by the first appellate judge is evident from the judgment.

Counsel submitted that it is evident from the record that both the courts below evaluated and re-evaluated the evidence on record and found the prosecution case truthful and rejected the appellant's defence, and gave well-founded reason both on the facts and the law and it is therefore unassailable. Counsel relied on the case of **Keter vs. Republic [2007] 1 E.A 135, David**

Njuguna Wairimu vs, Republic [2010]eKLR; Odongo & Another vs. Bonge Civil Appeal No. 10 of 1987 (UR) Odoki JSC and **Gabriel Njoroge vs, Republic [1988-1985] 1 KAR 1134** on the role of a first appellate court and submitted that the first appellate court judge re-evaluated the record and gave well-founded reasons as to why the judge rejected the appellant's complaint that **section 200(3**) of the Criminal Procedure Code had not been complied with and why in the judge's view the burden of proof had not been shifted as the appellant's contention was based on the prosecution's failure to call the mother of PW1 as a witness whom the court ruled was an accomplice and her evidence would not have been of any probative value to the prosecution case.

Counsel stated that the only discrepancy pointed out by the appellant is that which related to the date of the offence which PW1 inadvertently gave as 2014, while the rest of the witnesses talked of events that had occurred in 2011; that the judge properly appreciated the existence of the said discrepancy, took note of the trial court's failure to reconcile the said discrepancy, reconciled it himself and found the same inconsequential to the otherwise proven prosecution case, and rejected that complaint.

Counsel appreciated evidence on the exact age of PW1 was contradictory as correctly highlighted by the appellant in his submission. It was, however, counsel's submission that the alleged contradictions were cured by the details in the immunization card tendered in evidence as an exhibit which indicated clearly that PW1 was born in March 1998, corroborated by PW1's own evidence on her age which fell into the age bracket for the offence the appellant faced at the trial. Counsel therefore submitted that the failure to reconcile the discrepancies in PW1's age did not therefore occasion any miscarriage of justice to the appellant. Neither did it operate to vitiate the prosecution's case.

Counsel also relied on the case of **Njogu Gichiri vs. Republic [2010] eKLR** and submitted that the judge considered appellant's defence and gave reasons why he affirmed the trial court's rejection of that defence which in counsel's view were well founded both on the facts and law.

This is a second appeal and by dint of the provision of **Section 361** of the **Criminal Procedure Code**, only points of law fall for our consideration. In **Karingo vs. Republic [1982] KLR 213**, the court stated as follows; -

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari s/o Karanja versus (1956) 17 EACA 146)."**

We have considered the record in light of the rival submissions and principles of law relied upon by the respective parties in support of their respective opposing positions. Issues that fall for our determination are the same as those raised by the appellant in his homemade grounds of appeal as paraphrased above.

On the first issue, **section 200(3**) of the Criminal Procedure Code stipulates *inter alia* as follows;

> **"200.(1) Subject to sub-section (3), where a magistrate, after <u>having heard</u> <u>and recorded the whole or part of the evidence</u> (emphasis ours) 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) .....**
>
> **(b)** .....
>
> **(2) ….....**

(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 re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right. (emphasis ours)

(4) …..”

This court in the case of **John Bell Kinengeni vs. Republic [2015] eKLR** expressed itself as follows on this issue:

> **“In Richard Charo Mote NRB Criminal Case No. 135 of 2004 this court approved the principles set in Ndegwa vs. Republic [1985] KLR 534 and stressed that the duty is reposed on the court and there is requirement that an application be made by the accused person for such compliance, and that failure to comply with that requirement would in an appropriate case render the trial a nullity as section 200 (3) requires in a mandatory tone that the succeeding magistrate (read judge) shall inform the accused person of the right to demand a recall of any of the witnesses to be reheard by the succeeding magistrate.”**

The keywords for our consideration in the above guiding principle are

“…and that failure to comply with that requirement would in an appropriate case render the trial a nullity…”. It is not disputed that the evidence of PW1 was recorded by **Hon. M. Mutuku,** while the judgment was written by **Hon. A. Lorot**. **Hon. A. Lorot** did not have an opportunity to observe the prosecution witnesses testify and was not therefore in a position to assess the personal credibility and demeanour of all the prosecution witnesses in the case. The record is explicit that the appellant’s conviction was based on the evidence of PW1 as corroborated by the medical evidence and PW3, her grandmother. The previous magistrate did not make any note on the record on the credibility of the prosecution witnesses who testified before the court. In the case of **Ndegwa vs Republic, Criminal Appeal No. 125 of 1984 [1985] KLR 534**, the court observed as follows;

> **“It could be also argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in the other cases that will follow.**
>
> **In this case, how8ever, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully “observed” the evidence given by the prosecution witnesses. He, therefore, was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case, in our opinion. The succeeding magistrate was as helpful as he could possibly make himself. He acted in an attempt to dispatch justice speedily. We appreciate his motive very much. The sweetness of justice lies in the swift conclusion of litigation”**

We adopt the above position as the correct position in law. Since the credibility of the prosecution witnesses namely PW1 and 3 was the major basis for the appellant’s conviction, we find justification in the appellant’s complaint that this was a fitting case in which he should have been addressed specifically by the incoming trial magistrate to make an election as to whether to recall the key witnesses for cross-examination or otherwise before the incoming magistrate could take over and proceed to conclude the trial. We, therefore, find that the failure of the incoming magistrate to observe the above procedure in the peculiar circumstances of this appeal vitiates the trial as it amounted to a failure of justice. The conviction handed down by the trial magistrate and affirmed by the High Court is therefore not safe and is accordingly quashed and the sentence set aside.

We have anxiously considered whether this is a matter that is suitable for a retrial. In the case of **Ahmed Sumar vs. Republic (1964) EALR 483** the court expressed itself inter alia as follows:

> ***“...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; .....”***

This Court likewise had the following to say in the case of **Samuel Wahini Ngugi vs. Republic (2012) eKLR**: -

> ***“The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:***
>
> ***‘It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered…”***

The above position and which we fully adopt was reiterated by the Court in the case of **Bernard Lolimo Ekimat vs. Republic [2005] eKLR,** in which the Court stated as follows:

> ***“…the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of each case that an order for the retrial should only be made where interests of justice require it.”***

Applying the above threshold to this appeal and considering the nature of the evidence on record and the charge appellant faced at the trial which in our view was a serious offence committed against a minor, it is our considered opinion that this is a fit matter for a retrial. Our reason for holding this opinion is because we note from the record that the appellant, the complainant and the complainant's grandmother come from the same locality. Availability of witnesses may not therefore be an issue. It is therefore our opinion that ends of justice in this appeal demands that a retrial be conducted and we so order.

The appeal is therefore allowed. We quash the conviction and set aside the sentence of 20 years' imprisonment and order a re-trial before a magistrate other than **Hon. M. Mutuku** and **Hon. A. Lorot**.

We direct that the file be remitted to be mentioned before Chief Magistrate's Court at Thika within **fourteen (14) days** in order for a new trial to start on expedited basis.

Dated and Delivered at Nairobi this 25th day of September, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. ole Kantai

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR