Ogola v Republic (Criminal Appeal 135 of 2017)
[2023] KECA 39 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 39 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 135 OF 2017

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

FEBRUARY 3, 2023

BETWEEN

TOBIAS ONYANGO OGOLA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kisii (R.N. Sitati, J.) dated and delivered on 18th December, 2010 in High Court Criminal Appeal No. 38 of 2011)

Effect of failure to conduct a voir dire (an oral examination) in a trial where a minor was a complainant

It was not sufficient to ascertain that the child had enough intelligence to justify the reception of the evidence, but also that the child understood the difference between the truth and falsehood.

Reported by Moses Rotich

Evidence Law *– oral evidence – oral evidence by a minor in oral examination – oral evidence by a minor who was a complainant – what was the scope of an a voir dire (an oral examination).*

Jurisdiction *- Court of Appeal - appellate jurisdiction in criminal proceedings - what was the extent of the Court of Appeal's appellate jurisdiction in a second appeal - Criminal Procedure Code, cap 75, section 361(1).*

Brief facts

The appellant was arraigned and charged with the offence of defilement of a girl contrary to section 8(1) and (2) of the Sexual Offences Act, cap 63A for willfully and intentionally caused an act of penetration to the genital organ of MA, a 7 years old girl. The appellant also was faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, cap 63A. He was tried and convicted. He was then sentenced to life imprisonment as provided under section 8(2) of the Sexual Offences Act. Aggrieved, the appellant unsuccessfully appealed to the High Court, hence the instant second appeal.

Issues

i. What was the extent of the Court of Appeal's jurisdiction in a second appeal?

ii. What was the scope of a *voir dire* (an oral examination) in criminal proceedings?
iii. What was the effect of failure to conduct oral examination in a trial where the complainant was a minor?

Held

1. In a second appeal, the court's jurisdiction was limited to a consideration of matters of law only by dint of section 361(1) of the Criminal Procedure Code. It was only on rare occasions that the court interfered with concurrent findings of fact by the two courts below. A court would not normally interfere with concurrent findings of fact by the two courts below unless such findings were based on no evidence, or were based on a misapprehension of the evidence, or the courts below were shown demonstrably to have acted on wrong principles in making the findings.
2. Where, in any proceedings before any court, a child of tender years was called as a witness, the court was required to form an opinion, on a *voir dire* examination whether the child understood the nature of an oath in which even his sworn evidence could be received. If the court was not so satisfied, his unsworn evidence could be received if in the opinion of the court he was possessed of sufficient intelligence and understood the duty of speaking the truth. In the latter event an accused person would not be liable to be convicted on such evidence unless it was collaborated by material evidence in support thereof implicating him.
3. It was important to set out questions and answers when deciding whether a child of tender years understood the nature of oath so that the appellate court was able to decide whether the important matter was rightly decided, and not be forced to make assumptions.
4. Dealing with the question of the girl taking oath, it should be borne in mind that where there was an inquiry as to the understanding of a child witness of nature of solemnity of an oath, the questions put to a child had to appear on the shorthand note so that the course the procedure took in the court below could be seen.
5. When a court had to decide whether a child should properly be sworn, was whether the child had sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which was involved in an oath, over and above the duty to tell the truth which was an ordinary duty of normal social conduct. There were therefore two aspects when considering whether a child should be sworn;
    a. the child had sufficient appreciation of the particular nature of the case; and,
    b. a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day to day life.
6. Even in the absence of express statutory provision it was always the duty of the court to ascertain the competence of a child to give evidence; it was not sufficient to ascertain that the child had enough intelligence to justify the reception of the evidence, but also that the child understood the difference between the truth and falsehood.
7. Failure to conduct a *voir dire* rendered the entire evidence of the complainant of no use to the court. In cases where there was no other evidence sufficient to sustain a conviction, the failure to conduct *voir dire* properly was fatal. What transpired during the trial court's examination of the minor was not the epitome of the ideal thorough-going *voir dire* of minors but that, in itself, would have been insufficient to render the conviction unsafe.
8. A 6 or 7-year old girl would not use the word "defile" in court proceedings. Such a girl would have had a more metaphorical or euphemistic expression to explain what happened to her. Thus, the trial court's reproduction of the proceedings was not faithful to what actually happened in court. It was highly unlikely that the complainant used those words.
9. The concerns raised in the instant appeal rose to the level of attaining categorization as questions of law appropriate for review at the second level of appeal. Therefore, the conviction was unsafe and ought to be reversed. If the reversible errors were merely the procedural infirmities (reflected in the issues of recording of proceedings in a language that appears plain and failure to accord the appellant adequate

facilities for his defence), the High Court judgment would have been reversed; set aside the judgment of the lower court, and then carry out an analysis whether to order for a retrial.

10. The procedural infirmities were compounded by substantive evidential infirmities (reflected in the failure to call crucial witnesses). That confluence of procedural and substantive infirmities ineluctably led to the outcome that the conviction ought to be quashed and the sentence set aside.

Appeal allowed.

Orders

The judgment of the High Court was reversed and substituted with a judgment acquitting the appellant. Appellant to be released from custody forthwith unless he was otherwise lawfully held.

Citations

Cases

Kenya

1. *Cardonwagner, John & others v Republic* Criminal Appeal 405 & 406 of 2009; [2011] KEHC 3272 (KLR) - (Mentioned)
2. *Chemagong, Richard Kaitany v Republic* Criminal Appeal 150 of 1983; [1984] KECA 64 (KLR) - (Mentioned)
3. *CWK v Republic* Criminal Appeal 72 of 2013; [2015] KEHC 7553 (KLR) - (Followed)
4. *Karimi, Samuel Warui v Republic* Criminal Appeal 16 of 2014; [2016] KECA 812 (KLR) - (Explained)
5. *Kebiba, Bernard v Republic* Criminal Appeal 104 of 2000; [2000] KECA 158 (KLR) - (Mentioned)
6. *Kiare v Republic* Criminal Appeal 93 of 1983; [1984] KLR 739 - (Mentioned)
7. *Maingi & 5 others v Director of Public Prosecutions & another* Petition E017 of 2021; [2022] KEHC 13118 (KLR) - (Mentioned)
8. *Mboloi, Kivevelo v Republic* Criminal Appeal 34 of 2013; [2013] KEHC 484 (KLR) - (Followed)
9. *Muiruri, Johnson Nyoike v Republic* Criminal Case 44 of 1982; [1983] KECA 1 (KLR) - (Overruled)
10. *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* Petition 15 & 16 of 2015; [2021] KESC 31 (KLR) - (Mentioned)
11. *Mwangi v Republic* Criminal Appeal 84 of 2015; [2022] KECA 1106 (KLR) - (Mentioned)
12. *Mwasya, Musyoka v Republic* Criminal Appeal 50 of 2013; [2013] KEHC 464 (KLR) - (Followed)
13. *Nyagah, John Muriithi v Republic* Criminal Appeal 201 of 2007; [2014] KECA 506 (KLR) - (Mentioned)
14. *Okello, Alfayo Gombe v Republic* Criminal Appeal 203 of 2009; [2010] KECA 319 (KLR) - (Mentioned)

Uganda

Bukenya & others v Uganda [2021] UGCA 20 - (Explained)

United KIngdom

Regina v Campell [1987] 84 Cr App R 255 - (Mentioned)

Regional Court

Nyasani s/o Bichana v Republic [1958] EA 190 - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 27(1);50(2)(c); 55 - (Interpreted)
2. Criminal Procedure Code (cap 75) section 361(1) - (Interpreted)
3. Evidence Act (cap 80) section 124 - (Interpreted)
4. Oaths and Statutory Declarations Act (cap 15) section 19 - (Interpreted)
5. Sexual Offences Act (cap 63A) sections 8(1)(2); 8(2); 11(1) - (Interpreted)

Advocates

Mr Okango for the respondent

JUDGMENT

1. The appellant, Tobias Onyango Ogola, was arraigned before the Senior Resident Magistrate's Court in Rongo in Criminal Case No 991 of 2009. He was charged with the offence of defilement of a girl contrary to section 8(1)(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that the appellant, on the 15th day of December, 2009, at [Particulars Withheld] village in Uriri District of Nyanza Province, willfully and intentionally caused an act of penetration to the genital organ of MA, a girl of the age of seven (7) years. The appellant was also faced with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that of the main charge.

2. The appellant pleaded not guilty and a fully-fledged hearing ensued. The Prosecution called four (4) witnesses before closing its case. The appellant was put on his defence. He gave unsworn testimony. The record shows that the appellant informed the Court that he wished to call two (2) witnesses but that was never to be since thereafter when the case came up for hearing, he closed his case. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to life imprisonment as the law mandatorily provides under section 8(2) of the *Sexual Offences Act* No 3 of 2006.

3. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.

4. The High Court (Sitati, J) dismissed the appeal and upheld the conviction and sentence in a judgment dated December 18, 2010.

5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. He has raised ten (10) grounds in his "home-grown" memorandum of appeal which he has filed in person. The grounds are that:

    1. The learned trial judgeerred in both law and fact by uplifting the sentence and failing to observe that the charge sheet was defective.

    2. The learned trial judgeerred in both law and fact by relying on prosecution witnesses whose testimonies in Court had glaring gaps, inconsistencies and untrustworthy.

    3. The learned trial judgeerred in both law and fact by upholding the sentence without taking into account the doctors report on HIV status of the child and the appellant which would warrant his acquittal.

    4. The trial judgeerred in both law and fact by ignoring the testimony of the investigating officer who exonerated the appellant from the scene of crime.

    5. The prosecution failed to bring two crucial witnesses alleged to have been with the victim, Toto and Ronny, hence prosecution's concealment of fact.

6. This honourable courtbe pleased to grant this appeal and/or re-sentencing in consideration of the many years the appellant has suffered in prison, from 200 to date.

7. This honourable courtbe pleased to note and observe that this appeal as indicated above is one of resentencing in light of the Supreme Court decision relating to constitutionality of death and life penalty in *Francis Karioko Muruatetu & another v Republic*, Supreme Court Petition No 15 of 2015 (as consolidated with Supreme Court Petition No 16 of 2015) (2017) eKLR.

8. The learned trial judgeerred in both law and fact by ignoring the provisions of article 27(1) of the Constitution, that every person has the right to equal protection of the law.

9. The learned judgeerred in both law and fact by ignoring chapter 50 and 55 of the *Constitution* by convicting the appellant to serve a life sentence.

10. It is the appellant's humble prayer that his alibi defence which was ignored by the Learned Trial Judge will now be considered as this would warrant his acquittal or resentencing.

6. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Mr Okango, appeared for the respondent. Both parties relied on their submissions.

7. The appellant contended that the charge sheet was defective and argued that the same indicated the incident took place on December 15, 2009 and yet during trial, the complainant and her mother (PW2) testified that the incident took place on December 13, 2009. He also stated that the age of the complainant in the charge sheet is indicated as 7 years, whilst PW2 testified that her daughter was aged 6 years.

8. The appellant also claimed that the learned magistratedid not conduct *voir dire* as required, of a minor and that in addition, there were glaring gaps and inconsistencies in the prosecution case. He contended that the prosecution failed to prove its case beyond reasonable doubt since upon medical examination, the complainant was found to be HIV negative whilst he (appellant) was found to be HIV positive, in addition to having syphilis. In this regard, he cited the case of *John Cardonwagner & others v Republic*, *Kiare v Republic* (1984) KLR 739 and *John Murithii Nyagah v Republic* (2014) eKLR.

9. Finally, the appellant argued that the conviction was unsafe because the trial court as well as the High Court ought to have drawn adverse inferences from the fact that crucial witnesses were not called. These witnesses, the appellant said, were the two witnesses who were allegedly with the complainant before the incident, the assistant chief to whom the first report was made, and the investigating officer.

10. In opposing the appeal, Mr Okango reminded the courtof its role as a second appellate court, being, to deal with matters of law only. He disputed the appellant's assertion that the charge sheet was defective and argued that even so, the same had been raised for first time in this second appeal. In this regard, he cited the case of *Alfayo Gombe Okello v Republic* [2010] eKLR for the preposition that the appellant gave no reason for his failure to raise the issue of a defective charge sheet earlier and urged the Court to find that it was not raised at the earliest opportunity although he could and should have.

11. Counsel rejected the appellant's argument that there were glaring gaps and inconsistencies in the prosecution case. He argued that in sexual offence cases, section 124 of the *Evidence Act* allows the

trial court to convict an accused person based on the evidence of the complainant, so long as the trial court records its reasons for believing such evidence. It was his submission that in this case, the trial court clearly recorded its reasons for believing the complainant and cited the case of *Bernard Kebiba v Republic* [2000] eKLR. On whether the trial court conducted *voir dire*, counsel submitted that the court properly conducted the same and was satisfied that the complainant was competent to give evidence on affirmation. In this regard, he cited the case of *Johnson Muiruri v Republic* [1983] KLR 445.

12. As regards the appellant's contention that the prosecution did not prove its case beyond reasonable doubt as the medical reports showed different HIV results, counselsubmitted that the medical evidence showed that the complainant was defiled despite the fact that she did not contract HIV from the appellant. He argued that the same was not evidence that there was no defilement. In this regard, he cited the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No 72 of 2013.

13. Counsel also disputed the appellant's assertion that the prosecution failed to call two crucial witnesses. He argued that failure to call the witnesses, who were children, was not prejudicial to the appellant since they were not at the scene of the incident and neither did he demonstrate how their evidence would have aided his case. Further, Counsel submitted that the age of the complainant was estimated to be 7 years by the clinical officer, while her mother (PW2) testified that her daughter was 6 years. In this regard, he argued that the age of the complainant being either 6 or 7 years was not fatal as she was still below the 11 years provided for under the law which the appellant was charged.

14. Lastly, as regards resentencing, counselargued that the court could review the life imprisonment to 30-year imprisonment and cited the case of *Maingi & 5 others v Director of Public Prosecutions & another*, Petition No E017 of 2021 [2022] KEHC 13118 (KLR), which addressed the issue of constitutionality of mandatory minimum sentences. In that case, Odunga, J as he then was, held and gave orders that:

> " To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of the Constitution. However, the courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences."

In addition, counselalso relied on the case of *Joshua Gichuki Mwangi v Republic*, Nyeri Criminal appeal No 84 of 2015.

15. As rightly stated by the respondent's counsel, this being a second appeal, our jurisdiction is indeed limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In *Samuel Warui Karimi v Republic* [2016] eKLR, it was held as follows:

> " This is a second appeal and this courthas stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong v R*, [1984] KLR 611."

16. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. To start off, drawing from our mandate as a second appeal court as held in *Samuel Warui Karimi v Republic* (*supra*), we have taken a keen note of the manner in which

the proceedings were recorded by the trial magistrate. Two aspects are of particular interest because they go to the root of fair trial.

17. First, there is a question whether the learned magistrate properly conducted voir dire given that the complainant in this case was a minor. This court has given guidance on the issue of voir dire examination in *Johnson Muiruri v Republic* as follows:

> " We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kariga Kiume we said "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voir dire examination whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is collaborated by material evidence in support thereof implicating him (Section 19, *Oaths and Statutory Declarations Act*, cap 15 Laws of Kenya. The *Evidence Act*, section 124, cap 80, Laws of Kenya). (Emphasis added).
>
> It is important to set out questions and answers when deciding whether a child of tender years understands the nature of oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions"
>
> A similar opinion was expressed by the Court of Appealin England in *Regina v Campell*
>
> > "If the girl (ten years) had given unsworn evidence then then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration.
>
> Dealing with the question of the girl taking oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of nature of solemnity of an oath, the Court of appeal in *R vs Lal Khan* made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen....(Emphasis added.
>
> There Lord Justice Bridge said:
>
> > "The important consideration.....when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct"
>
> There were therefore two aspects when considering whether a child should be sworn: first that the child had sufficient appreciation of the particular nature of the case and, secondly a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day to day life"
>
> It is fortunate that we can reinforce some of the foregoing views by the decisions of our own former perceptive court of appeal.....In *Gabriel Maholi v R* again our former Court of appeal said that even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to

ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood.

18. In both *Kivevo Mboloi v Republic* and *Musyoka Mwasya v Republic*, this court held that failure to conduct a voir dire rendered the entire evidence of the complainant of no use to the court. In cases where there is no other evidence sufficient to sustain a conviction, the failure to conduct voir dire properly is fatal. See *Nyasani s/o Bichana v Republic*.

19. In the present case, what appears, in the typed record is as follows:

> " Examination of a minor by court
>
> My names are MA am aged 7 years, I go to school, [Particulars Withheld] Academy, am in class II, I know and here to tell the court the truth. I go to church at Kakonde S.D.A
>
> Court: Minor examined and found competent to give evidence on affirmation."

20. We think that this *voir dire* is not the epitome of the ideal thorough-going voir dire of minors but that, in itself, would have been insufficient to render the conviction unsafe. We are far more worried about the second problematic aspect of the record: this is recordation of the proceedings in a language that appears plain to us not to be fidel to what the complainant testified in court.

21. The learned magistrate recorded the evidence of the complainant as follows:

> " On December 15, 2009, the father to Musa came and found us playing with the other children, he locked the other children in the house, he took me to a maize plantation and started defiling me. He removed my clothes. I had a maroon skirt; I had a pant....."

22. We have no doubt in our mind that a 6 or 7-year old girl in Rongo would not use the word "defile" in court proceedings. Such a girl would have had a more metaphorical or euphemistic expression to explain what happened to her. It seems plain to us, therefore, that this reproduction of the proceedings was not faithful to what actually happened in court. During the hearing of the appeal, we raised this matter with Mr Okango, learned state counsel, and, to his credit, he conceded that it was highly unlikely that the complainant used those words.

23. Our dissatisfaction with the proceedings does not end there. In her testimony, PW2, the mother of the complainant is recorded as saying the following during cross-examination:

> " Mama Musa is my co-wife, you were arrested at your shamba, I framed up the case, you did the act early and the child kept quiet."

24. At the High Court, the learned judge consulted the handwritten notes to untangle the disturbing part where the witness appears to say that she framed the appellant. However, the learned judge leaves open a second source of bemusement with the record: if the appellant is Baba Musa as the complainant testified; and if Mama Musa is the complainant's mother's co-wife, does that make the complainant a biological or adopted child to the appellant? Even more crucial, does that make PW2 the complainant's wife? If so, this would have important implications for the analysis of the evidence – including the appellant's theory that the complainant's mother had framed up the case. Unfortunately, that analysis remained undeveloped and un-done and cannot be satisfactorily undertaken on second appeal.

25. As Mr Okango conceded, there is yet another aspect of the case that is troubling: the failure to call witnesses who, in context, seem crucial. First, the complainant testified that she was playing with her two friends, Toto and Roney, when the appellant called her and locked the other two children in the

house and went with the complainant in to a maize plantation where he defiled her. These two other children who were allegedly locked up are clearly crucial witnesses who would have corroborated that part of the story. The fact that they were not called to testify in the circumstances of this case must yield an inference adverse to the prosecution. This is also true for the Assistant Chief who was the first authority figure to whom the incident was reported. The failure to call these witnesses in this case is only made worse by the fact that the investigating officer was not called to testify either. The end result is to firmly place this case in the Bukenya exception – eponymously named after the case, *Bukenya & others v Uganda* [1972] EA 549 where the Court of Appeal for Eastern Africa held that:

> "The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."

26. In the present case, the fact that the incident allegedly happened on December 13, 2009 and was not reported until about two weeks later – on December 27, 2009; and medical examination carried out on December 29, 2009, there was a need to call these witnesses to remove any reasonable doubts that the minor was not defiled by a third party during the intervening period. The un-explained failure to call these witnesses throws a shadow of doubt about the certainty of the conviction.

27. Finally, we have noted from the trial court record that the appellant informed the court that he had two witnesses he wanted to call to prove is alibi defence. The court noted his request and directed that witness summons be issued to the witnesses. This was on June 4, 2010. However, when the trial resumed on June 15, 2010, the two witnesses were not in court. The learned magistrate does not indicate why they were not there and if the witness summons were ever issued. The learned magistrate simply recorded "Accused present" before recording him as saying "That is the close of my case."

28. It would seem to us from the above that the court failed to give the appellant all the facilities for his defence that he needed as demanded by article 50(2)(c).

29. In view of all these concerns about how the trial was conducted, concerns which rise to the level of attaining categorization as questions of law appropriate for review at the second level of appeal, we must conclude that the conviction in this case was unsafe and must be reversed. If the reversible errors were merely the procedural infirmities we have pointed out (reflected in the issues of recordation of proceeding and failure to accord the appellant adequate facilities for his defence), we would have reversed the High Court judgment; set aside the judgment of the lower court and then carry out an analysis whether to order for a retrial. However, in this case, the procedural infirmities are compounded by substantive evidential infirmities (reflected in the failure to call crucial witnesses). This confluence of procedural and substantive infirmities ineluctably leads to the outcome that the conviction in this case must be quashed and the sentence set aside.

30. Consequently, we reverse the judgment of the High Court. Instead, we enter judgment acquitting the appellant. He shall be released from custody forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF FEBRUARY, 2023.

P. O. KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR