Ngima & another v Republic (Criminal Appeal E062 of 2021 & E008 of 2022 (Consolidated)) [2023] KEHC 21710 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21710 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E062 OF 2021 & E008 OF 2022 (CONSOLIDATED)

JN ONYIEGO, J

JULY 28, 2023

BETWEEN

NICHOLAS MUSYA MBUTHU ALIAS NGIMA ..... 1ST APPELLANT

SIMON KEDEGO MGHANGA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of D. Wangeci (P.M.) and delivered on 20.05.2021 in the Sexual Offences Case No. 1 of 2021 at Principal's Magistrate's Court at Voi)

JUDGMENT

1. The appellants were jointly charged with the offence of gang defilement contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that the said Nicholas Musya Mbuthu and Simon Kidego Mghanga on 31.12.2019 at around 0000hrs in Voi Sub county within Taita Taveta county intentionally caused penetration by use of a penis to the vagina of E.M.E, a child aged 17 years.

2. They were also charged 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 alternative charge were that on 31.12.2019 at around 0000hrs in Voi Sub county within Taita Taveta county intentionally and unlawfully touched the vagina of E.M.E, a child aged 17 years.

3. The case proceeded to full hearing and upon considering the evidence that was adduced before it, the trial court convicted the appellants and sentenced them to 30 years imprisonment.

4. The 1st appellant being dissatisfied with the said conviction and sentence preferred an appeal on grounds in the amended petition filed in court on 19.07.2022 which in essence faults their conviction as follows; the trial court failed to find out the basis of identification; the trial court failed to find out that

the circumstantial evidence relied on by the prosecution was likely to occasion a miscarriage of justice; that the fact of recent possession was not brought up in clear investigation; and that the conviction was not based on any sound principles.

5. The second appellant separately filed his grounds of appeal on 15th February 2022 vide criminal appeal no. E008 2022 which was later consolidated with E062 of 2022.On his part he cited the following grounds; age of the complainant was not ascertained; evidence tendered did not support the charge; there was no proof of penetration; trial court failed to consider his defence;

6. Reasons wherefore, the appellants prayed that this appeal be allowed, conviction quashed and sentence set aside.

7. Directions were given that the appeal herein be consolidated and canvassed by way of written submissions

Appellant's submissions.

8. The 2nd respondent filed his submissions on 19th July 2022 basically reiterating his grounds of appeal. Principally, he contended that the complainant did exonerate him from the offence as she claimed that it was the 1st appellant who defiled her.

9. The 1st appellant filed his submissions on 1st December 2022 thus submitting that the basis of identification was not properly supported to enable the court reach a safe conviction and that the said alleged lady who helped the complainant identify the appellants was not presented before the trial court as a witness. On the second ground, it was submitted that the trial court did not evaluate the circumstantial evidence in that, for the alleged offence to be considered to have happened the way it was alleged, then the same could have attracted the attention of the public and given that nothing was presented before the court to prove that the alleged house where the offence herein was alleged to have happened belonged to the 1st appellant, then the same proved that the conviction by the trial court was not safe.

10. The 1st appellant decried the trial court's conviction based on the doctrine of recent possession that the same was not proved as is required. He placed his reliance on the case of Malingi v Republic (1988) eKLR 255 where it was held that by the application of the principle of doctrine of recent possession, the burden would normally shift to the appellant to explain how he came into possession of the said item. He therefore pleaded with the court that the appeal be allowed, conviction quashed and sentence set aside. Lastly, it was contended that the court did not accord him the benefit of doubt as was stated in the case of Elizabeth Waithiegeni Gatimu vs Republic (2015) e kLR

11. The respondent represented by Ms. Ondeyo submitted in opposition to grounds 1,2,3 and 4 of the 1st appellant's amended grounds of appeal that the conviction by the trial court was proper as the ingredients of the offence were proven beyond any reasonable doubt. The respondent placed reliance on the case of Francis Matonda Ogeto v Republic [2019] eKLR to express the necessary ingredients of the offence of gang defilement which needs to be proved to wit; the age of the complainant, penetration and identification of the perpetrators.

12. In regards to the age of the complainant, the respondent submitted that the treatment notes and the P3 Form availed indicated that the complainant was aged 17 years old. That this was also supported by the evidence of PW1 who examined the complainant after the incident. The respondent relied on the case of Edwin Nyambogo Onsongo v Republic (2016) eKLR in respect to proof of the age of the complainant to wit that the same could be proved by documents, evidence such as birth certificate,

baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.

13. On the issue of penetration, it was submitted that the same was proved by the evidence of PW1 as well as the P3 Form and the treatment notes produced as Pex 1 and Pex 2 respectively. That upon examining the minor, the Dr. concluded that there was penetration as the same was exhibited by the fact that her genital organ was swollen and painful during the examination and further, the same had bruises. The respondent relied on the case of Erick Onyango Odeng' v Republic (2014) eKLR where it was held that in sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. That it is not necessary that the hymen be ruptured.

14. On identification, it was submitted that according to the complainant, she narrated how upon alighting at Maungu, she was able to see the appellant using the light at the stage. That she testified that it was the 1st appellant who carried her to his house where he defiled her for hours. Additionally, it was stated that when PW5 narrated to the lady she met on what had happened, the lady informed her that she knew the appellant so well including where he lived and further gave her the name of the 1st appellant. That it was such details that assisted the complainant and the police in tracing the appellants herein.

15. In the same breadth, that when the 1st appellant was arrested, he had the complainant's shirt which the complainant had described to the police to be torn as the same was confirmed by PW2 and PW4. As such, the identification was therefore positive. The respondent further relied on section 124 of the *Evidence Act* to support the proposition that no corroboration was needed in a criminal case involving sexual offence and that the court could convict on the sole evidence of the victim if the court found the reasons for believing the victim and also recorded that it was satisfied that the victim was telling the truth.

16. Further, the respondent contended that the circumstantial evidence through the doctrine of recent possession also pointed a blameworthy finger towards the appellants. That the complainant's graphic story on how the two appellants confronted and attacked her was further corroborated by the recovery of the victim's clothes in the 1st appellant's possession. As such, identification was therefore positive. Counsel placed reliance on the cases of Ahamad Abolfathi Mohamed & another v Republic [2018] eKLR and David Mugo Kimunge v Republic [2015] eKLR where the Court of Appeal held that before circumstantial evidence can form the basis of a conviction, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and no other person as the perpetrator of the offence. In the end, this court was urged to uphold the conviction by the trial court and dismiss the appeal herein.

17. I have carefully considered the grounds of appeal and the submissions by the parties herein. From a keen perusal of the appeal and grounds thereof, the main ground is whether the prosecution discharged the burden of proof. Having found so, I form the view that the elements of the offence which prosecution must prove are the following:

    i. Whether the appellants committed the offence of rape...

    ii. Whether the appellants were properly identified.

18. This being a first appeal, this court has a duty to reconsider and re-evaluate the evidence to arrive at its own conclusion. In the case of Kiilu and Another v R [2005] l KLR 174. The Court of Appeal stated the principles governing the hearing of first appeals to be 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 and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> 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' findings and conclusions; 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"

19. PW1, Joto Nyawa testified that the complainant was brought to the medical facility via OB Number 29xxx/19 whereupon he examined her genital area which had a swollen labia majora, the walls were tender, there was a bruised labia minora and further, the hymen was broken though not fresh. He stated that there was a white discharge and HVS was conducted and subjected to lab test but no spermatozoa was found; a pregnancy test was conducted and it was found that the complainant was pregnant. He therefore produced the PRC Form and the P3 Form as Pex 2.

20. PW2, Joseph Menza stated that he was the arresting officer and that on 31.12.2019, at around 7.30 am, a girl arrived to report a case of defilement by two men. That after interrogations, the report was booked in the O.B. and his colleague escorted the complainant to Maungu Health Centre and later to Voi Police Station for further investigations. He proceeded that on the following day, report emerged that the alleged perpetrators were within Maungu and so they proceeded to arrest the appellants.

21. PW3, Elma Mtwana stated that upon the complainant reporting that she had been allegedly defiled by the 1st appellant together with one Simon Kidego Mghanga, she escorted the complainant to Moi County Referral Hospital where the complainant was examined and further discovered that she was pregnant. That the complainant informed her that she was chased away by her sister and upon transit to Kitui, she boarded a transit lorry but on reaching Voi, the occupants told her that they had changed their minds and therefore they would not go to Kitui. She proceeded to state that the complainant upon alighting, was approached by a man who greeted her but she declined to respond. That the man slapped her for being rude and thereafter followed her and upon spotting a watchman to whom she ran to, another man who offered to help her carried her away to an abandoned house where he repeatedly defiled her. It was stated that thereafter, the complainant fled the scene and along the road, met a woman who helped her with a lesso given the fact that she was naked. The complainant later reported the matter to the police station and thereafter, she was taken for medical checkup after which she investigated the matter and thereafter charged the appellants with the offence herein.

22. PW4, Peter Maina testified that he was instructed by the OCS that one of the alleged suspects to a defilement case was spotted within the area but upon visiting the said suspect's house, he did not find him. That upon visiting the scene where the alleged offence had taken place, he gathered male clothes, girl's clothes and a jerrycan. He stated that the complainant later identified the clothes as hers. It was his statement that he later learnt that the suspect had been arrested but reiterated that the 1st appellant herein was well known to him as he operated at Maungu stage.

23. PW5, I.M.E stated that on 30.12.2019, she was chased by her aunt from Mtwapa and so she took a transit lorry to take her from Mtwapa to Kitui. That when she alighted, she met the 2nd appellant who

went and greeted her and given that she remained mum, he slapped her accusing her of being rude. Upon crossing the road, she met the 1st accused who pretended to care to offer her some help. After informing her of her predicament, he told her that nobody would be of any help to her; at that point, he grabbed and carried her on his shoulders to an unoccupied house where he defiled her.

24. She further stated that the 2nd appellant left as the 1st appellant continued defiling her till 3.00 a.m when he left and upon confirming so, she also fled and along the way, met a lady who helped her with a lesso and thereafter some clothes. It was her evidence that she explained to the said lady of what had happened to her and described the person who sexually assaulted her and the lady told her that she knew the person and so she went to report the incident to Maungu Police station. She proceeded that when she was examined by the doctor. She testified further that, while at the police station, the 1st accused was brought in when she realized that he was in her shorts and shirt. It was her evidence that the stage at Maungu was well lit and so, she saw the appellants quite well.

25. This court has the onerous duty is evaluate the evidence at hand and make a finding whether the offence of gang rape was committed by the appellants.

26. Gang rape is defined under Section 10 of the *Sexual Offences Act* as: -

> " Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life."

27. In a charge for gang defilement, the prosecution is required to prove that the offence of defilement was committed in association with another or others. It is instructive that where a person did not do the actual act of penetration within the meaning of defilement but was in the company of others who did the actual penetration, he too will be liable for the offence. The definitive parts of the section are found in the terms 'in association with another or others, or any person who, with common intention, is in the company of another who commits the offence.'

28. In addition to establishing the ingredients for the offence of defilement, the Court is thus required to establish whether the accused persons were in association of one another or had common intention to commit the offence.

29. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the Children's Act No. 8 of 2001 which defines a "Child" as "...any human being under the age of eighteen years."

30. In the case of Martin Okello Alogo v Republic [2018] eKLR the court stated that: -

> " On the issue of whether the age of complainant was proved, the importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. The age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. See Alfayo Gombe Okello -vs Republic Cr. Appeal No. 203 of 2009 (KSM) where the Court of Appeal stated: -
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> > "In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim as necessary ingredient of the offence which ought to be proved beyond reasonable doubt.

That must be so because dire consequences flow from proof of the offence under Section 8 (1) ...."

31. In the same breadth, in the case of Edwin Nyambaso Onsongo v Republic (2002) eKLR, in which the court cited the case of Mwolongo Chichoro Mwanyembe v Republic, Mombasa Criminal Appeal No. 24 of 2015 (UR) the Court of Appeal held that:

> " ...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents, guardian or medical evidence among other forms of proof..."

32. In the case herein, the complainant stated that she was aged seventeen at the time when she was allegedly defiled. The PRC and the P3 Forms equally indicated that the complainant was aged 17 years and of importance to note is the fact that even the trial magistrate who saw the complainant also confirmed so as the complainant appeared before her. As such, the prosecution proved that indeed the complainant was a minor at the time when the offence herein was perpetrated.

33. On identification, the complainant stated that upon alighting at Maungu, she was able to see the appellant using the light at the stage. That it was the 1st appellant who carried her to a house where he defiled her for hours while the 2nd appellant beat her and saw the 1st appellant carry her away to a house where she would be defiled. Additionally, when PW5 narrated to the lady she met on what had happened, the lady informed her that she knew the appellant so well including where he lived and further gave her the name of the 1st appellant. In the same breadth, when the 1st appellant was arrested, he had the complainant's shirt which she had described to the police to be torn as the same was confirmed by PW2 and PW4. I have no doubt the two appellants were strategically positioned to scavenge on innocent passersby especially women for sexual exploitation.

34. In respect to penetration, Section 2 of the *Sexual Offences Act* defines penetration as:

> 'the partial or complete insertion of the genital organs of a person into the genital organ of another person.

35. The Supreme Court of Uganda held in the case of Bassita v Uganda S.C. Criminal Appeal Number 35 of 1995, that: -

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt". [See Sigei v Republic (Criminal Appeal E009 of 2021) [2022] KEHC 3161 (KLR].

36. In the case herein, the complainant testified that the 1st appellant was the person who defiled her while the 2nd appellant was responsible for beating her and further watched her being carried away by the 1st accused person to the house wherein she was defiled. PW1 in corroborating the testimony of the complainant stated that he examined the complainant in her genital area and the same had a swollen labia majora, the walls were tender, bruised labia minora and the hymen was broken though not fresh. He further stated that there was a white discharge and HVS was conducted and subjected to lab test

in as much as there was no spermatozoa found. As such, I am satisfied that this element was proved to the required standards. [See the Court of Appeal in the case of Erick Onyango Ondeng v Republic (2014) eKLR].

37. In regards to the doctrine of recent possession that has been disputed by the appellant following the fact that the trial court additionally used the same in convicting them, in the Penal Code, 'possession' is defined as either actual or constructive, thus:

(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;

38. The Court of Appeal in Kinyatti v R [1984] eKLR held that in defining "being in possession", full control of the object or article in possession of the accused is not necessary nor is it a requirement of that definition. It further held that in order to prove possession, it is enough to prove either that the accused was in actual possession of the item or that he knew that the item was in the actual possession or custody of another person or that he had the item in any place (regardless of whether the place belongs or is occupied by him or not) for his use or benefit or another person. The Court further explained that knowledge that the item is in actual possession or in one's custody or of another person may be inferred from the circumstances or proved facts of the particular case.

39. As already observed above, it follows that a person found with an item recently stolen who fails to explain how he came into possession of the item is presumed to have stolen the item. In order for the doctrine to be successfully relied upon by the prosecution, certain conditions must be met. The Court of Appeal explained the ingredients of the doctrine of recent possession in the case of Isaac Ng'ang'a Kahiga & another v Republic [2006] eKLR; Criminal Appeal No. 272 of 2005 (Nyeri) as follows:

> " It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

40. Once the primary facts are established, the accused bears the evidential burden to offer a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be plausible. [See Malingi v Republic [1988] KLR 225. In Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008, the Court of Appeal observed that;

> " Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden".

41. Given that the prosecution's evidence places upon the 1st appellant the burden to discharge a rebuttable presumption of having been in possession of the short and shirt in question, the 1st appellant therefore ought to have explained how he came to be in possession of the said short and shirt. The statutory rebuttable presumption is spelt out under Sections 111(1) and 119 of the *Evidence Act*. These sections stipulate as follows:

> 111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
>
> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:
>
> Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

> "119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

42. Where the prosecution proves that an article which is proved to be connected directly with crime after commission of the crime may in certain circumstances lead to the irresistible inference that the possessor of the article participated in the crime. (See Andrea Obonyo & Others –vs Republic 1962 EA. 542).

43. In the case herein, the complainant testified that after the 1st appellant defiled her, he left her naked and thereafter, she also fled the scene. She continued that on 01.01.2020, while at the police station, both accused persons were brought in and the 1st accused person was wearing her shirt and short. It was therefore outright that the 1st accused person was squarely placed at the scene of crime and therefore was expected to offer an explanation as to how he came into possession of the shirt and short which in my view, the same was not done to negate such strong evidence as adduced by the prosecution.

44. In regard to the 2nd appellant, he was responsible for assaulting the complainant after she refused to respond to his greetings; further, he saw the 1st accused person intervenes and carry the complainant to where she was eventually defiled. Section 21 of the Penal Code stipulates that:

> " When two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

45. The provision squares well with the following passage in the case of Njoroge v Republic 1983 KLR 197 and Solomon Munga v Republic 1965 EA 363 where both courts held as to the elements on the principle of common intention thus;

> " If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death

was caused by act of someone of the party in the course of the endevours to effect the common object of the assembly."

46. In addition, it is my view as was the view of the trial court that the evidence against the appellants was water tight in line with the principles in the case of Republic v Cheya case 1973 EA w

47. here it was held that;

> " The existence of common intention being the sole test of total responsibility it must be proved that the common intention was and that the common Act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of constructive intention must not be too readily applied or pushed too far. The mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under the section. It is only when a court can with some judicial certitude hold that a particular accused must have pre-conceived or premeditated the result which ensued or acted in concert with others in order to bring about that result that this section can be applied."

48. In the instant case, the 2nd appellant was responsible for assaulting the complainant when the complainant refused his greetings. That when the 1st accused intervened, he continued assaulting the complainant and left after the 1st accused person had left with her. As such, the 2nd appellant upon seeing the 1st appellant carrying the complainant and having known the possibility of the complainant being injured, reconciled to the said fact that led to the 1st appellant sexually assaulting the complainant. In that regard, the concept of common intention became applicable.

49. In the foregoing, the ground(s) faulting the trial court for having convicted on an unsafe evidence is therefore dismissed as the prosecution proved its case beyond any reasonable doubt.

50. On sentencing, it is of importance to note that the appellants did not submit on the same but having made a prayer that the sentence meted out to be set aside, this court shall proceed to determine whether the same is called for.

51. The section under which the appellants were charged states that a person convicted of such offence is liable to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment to life. However, the issue of whether court's are strictly bound to apply the mandatory sentences is now settled by the court of appeal where it has been stated not once that court's inherent jurisdiction in sentencing cannot be taken away through legislation. That courts can mete out any sentence they find appropriate in the circumstances of the case. See Joshua Gichuki Mwangi vs Republic Criminal Appeal No. 84 of 2015.

52. In the same spirit, the court of appeal recently in Julius Kitsao Manyeso vs Republic Criminal Appeal No.12 of 2021 Malindi declared the sentence of life imprisonment unconstitutional.

53. Equally, the Court of Appeal in Jared Koita Injiri vs. Republic [2019] e KLR held as follows:

> " In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that

around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another v Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

54. In the instant case, the complainant at the time of the occurrence of the offence was aged 17 years. Under Section 10 of the *sexual offences Act*, a person who commits an offence of defilement or rape in association with another is liable upon conviction to imprisonment for a term of not less than fifteen years. Taking into account that the law provides for a minimum sentence of 15 years, the court should have given the lesser penalty unless there existed exceptional circumstances or reasons to warrant enhancement to a more punitive sentence. In the instant case, I do not find any special reason to warrant enhanced sentenced beyond the minimum sentence.

55. In the circumstances and guided by the cited case law, I am inclined to set aside the sentence of life imprisonment imposed on the appellants and substitute the same with 15 years' imprisonment to run from the date of their sentence in the lower court.

ROA 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JULY, 2023.

.....

J.N. ONYIEGO

JUDGE