REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 183 OF 2019

CONSOLIDATED WITH

CRIMINAL APPEAL NUMBER 184 OF 2019

BETWEEN

LAWRENCE FRANK WANYAMA.....1ST APPELLANT

ALEX MAHAGA OLABA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(*Being* an appeal from the original conviction and sentence in the Chief Magistrate's Court

at Milimani Criminal Case No. 10 of 2018 delivered by Hon. M. Mutuku (CM)

on 16th August, 2019)

JUDGMENT

Background.

1. Lawrence Frank Wanyama and **Alex Mahaga Olaba**, hereafter the 1st and 2nd Appellants respectively were charged before the trial court with a number of offences. In the first count the 1st Appellant was charged of committing the offence of gang rape contrary to **Section 10** of the **Sexual Offences Act No. 3 of 2006.** The particulars of the charge were that on the 11th day of February, 2018 at [particulars withheld] Apartments in Highrise area within Nairobi County, he, in association with the 2nd Appellant intentionally and unlawfully caused his penis to penetrate the vagina of WA without her consent. There was an alternative charge in which he was charged of committing an indecent act with an adult contrary to **Section 11A** of the **Sexual Offences Act No. 3 of 2006** in that he intentionally and unlawfully touched the vagina of W.A. against her will.

2. The 2nd Appellant was charged in the second count with committing the offence of gang rape contrary to **Section 10** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on 11th February, 2018 at [particulars withheld] Apartments in Highrise Area within Nairobi County, he, in association with the 1st Appellant intentionally and unlawfully caused his penis to penetrate the vagina of WA without her consent. In the alternative he was also charged with the offence of committing an indecent act with an adult contrary to **Section 11A** of the **Sexual Offences Act No. 3 of 2006** in that he intentionally and unlawfully touched the vagina of WA. against her will.

3. The Appellants were arraigned before the trial court where they denied the offences. Upon conclusion of the trial they were found guilty and convicted on the two main charges and sentenced to serve fifteen (15) years imprisonment each. They are dissatisfied with both the conviction and sentence against which they have preferred respective appeals to this Court. The appeals have been consolidated for purposes of this judgment.

4. Whilst awaiting the hearing of the present appeal, an application was lodged by the Respondent and a ruling delivered on 2nd June, 2020,

reported as **Lawrence Frank Wanyama & Another *v.* Republic [2020] eKLR.** The crux of that application sought to remedy an obvious error on the record that formed the paramount ground upon which the Appellants underpinned their appeals. In the ruling this court dismissed the effort by the Respondent for leave to adduce additional evidence and as such this appeal shall be determined on the basis of the impugned record.

Grounds of Appeal

5. The Appellants' respective Petitions of Appeal are dated 30th August, 2019. Both have raised similar grounds of appeal which are that;

> **i. the learned trial magistrate erred in law by failing to swear in the complainant, PW1 and relying on unsworn evidence which omission occasioned and resulted in a grave failure of justice to the Appellants.**
>
> **ii. the learned trial magistrate erred in law and fact;(a) by failing to record the proceedings correctly and confusing the role of defence and prosecuting counsel repeatedly (b) allowing the defence(*which ought to read 'prosecution')* *counsel to amend and substitute the charges, (c) not distinguishing the cross examination of the 1st and 2nd Appellants, (d) not appreciating the discrepancies in the evidence that indicated that the offence in question occurred in 2017 and not 2018 and (e) admitting electronic evidence contrary to the law.***
>
> **iii. the Honorable magistrate erred by relying on the worthless, contradictory and discredited evidence of the complainant and other witnesses.**
>
> **iv. the learned trial magistrate erred by failing to consider the conduct of the Complainant and ignoring her admission that she was intoxicated and had on her own admission elected to spend the night at the 1st Appellant's residence.**
>
> **v. the learned trial magistrate erred in selectively impugning the prosecution's evidence and yet giving credence to the same evidence.**
>
> **vi. the learned trial magistrate erred by disregarding stark prosecutorial impropriety of withholding pertinent evidence on the existence of a pregnancy and the DNA results.**
>
> **vii. the learned trial magistrate erred by failing to note that the Prosecution failed to call key witnesses mentioned by the Complainant in her evidence.**
>
> **viii. the Appellants' convictions were against the weight of the evidence**
>
> **ix. the trial magistrate erred by failing to give adequate consideration to the sworn and unchallenged evidence of the defence.**
>
> **x. the learned trial magistrate erred by shifting the onus of proof and requiring the Appellants to prove their innocence.**
>
> **xi. the learned trial magistrate erred by drawing adverse inferences from the fact that the Appellants deleted electronically recorded evidence.**
>
> **xii. the learned trial magistrate erred in holding that the sexual acts between the complainant and Appellants were not consensual and erred in misdirecting herself on what constitutes consent.**
>
> **xiii. Section 10 of the Sexual Offences Act No. 3 of 2006 is unconstitutional under Articles 159 and 160 of the Constitution of Kenya in that; (a) it proscribes a minimum penalty that may be imposed for the offence, (b) the provisions of the section give the Court partial, restricted and limited discretion in the sentencing process, (c) the provisions provides a maximum sentence which may be enhanced to life imprisonment thereby rendering the sentence as arbitrary, uncertain and incapable of being determined in law and (d) it partially takes away the discretion of the court in the sentencing process, and**
>
> **xiv. the learned trial magistrate erred in admitting and relying on a generic Victim Impact Statement prepared and signed by a person who was not the victim as provided under the Victims Protection Act, No. 17 of 2014 rendering the sentence illegal and unlawful.**

6. It was accordingly the Appellants' prayer that the court allows the appeals by quashing the convictions and setting aside the sentences.

Submissions

7. The appeal was canvassed by way of written submissions which parties highlighted on 16th June, 2020. Mr. Bowry appeared for the 1st Appellant, Mr. Mukuna for the 2nd Appellant and Ms. Akunja for the Respondent. Submissions for the 1st Appellant were filed on 18th December, 2019, those of the 2nd Appellant on 3rd December, 2019 and for the Respondent on 19th February, 2020.

8. For the reason highlighted that this appeal shall purely be hinged on the defect in the trial court proceedings, I find no reason to delve into other submissions that may touch on the merit of the case unless it so warrants.

9. The relevant submissions related to the first and second grounds of appeal; which regards the failure to swear the complainant before she

gave evidence. On this, Mr. Bowry submitted that there was no doubt in his mind that PW1 testified before she was sworn and he simply highlighted that the question of a retrial does not arise in the circumstances of the case. He supported this by arguing that it was wrong to expose both the complainant on the one hand and the Appellants on the other in a sexual offence case. He added that the case had caused unnecessary publicity which would expose the witnesses. He submitted further that on the whole reevaluation of the evidence, credit accords to the Appellants. He stated that the complainant, PW1 repeatedly lied. He cited the case where PW1 testified that she became pregnant after the alleged rape and if that were the case, she ought to have been pregnant by the time she was testifying.

10. Mr. Bowry went on to submit that the trial magistrate misdirected herself by not finding that the sexual intercourse was consensual and that PW1 was not capable of consenting. To the contrary, he argued that PW1 was in full control of her faculties when she consented to the intercourse.

11. Counsel also submitted that the trial court erred in failing to consider the 1st Appellant's defence and repeatedly contradicting itself.

12. He also submitted that the trial was irregular and tainted with unconstitutionality. The first issue was that **Section 10** of the **Sexual Offences Act** prescribed a minimum mandatory sentence that was unconstitutional. Secondly, that the Constitution does not permit a trial in camera. That although he was aware of **Article 50(8)** of the **Constitution**, the learned trail magistrate failed to give reasons as to why the proceedings were conducted in camera and who was present during the proceedings. Further, it was important to record what part of the proceedings was heard in public. Accordingly, **Articles 51 and 52(d)** of the **Constitution** were violated.

13. He relied on the case of **Charles Karuga Wahome *v* Republic [2007] eKLR** to buttress the submission that the circumstances of the case did not warrant a retrial. He urged the court to quash the conviction, set aside the sentence and order the freedom of the 1st Appellant.

14. On his part Mr. Mukuna aligned himself with the submissions of his senior, Mr. Bowry on this issue and simply reiterated that a retrial is not tenable. He added that there was a glaring irregularity in the manner the Appellants were sentenced, an issue I shall consider later in the judgment, and further taking into account that the Appellants have been in custody for two years, the best recourse would be to set them free.

15. In pleading for the freedom of both Appellants, counsel submitted that the Appellants' reputation had already been injured. That they were both rugby players and because of the case they both dropped from the National Rugby Team. That the 1st Appellant lost a professional contract to play American football in Finland whilst the 2nd Appellant lost an academic sponsorship to study at a Canadian University. Hence, a retrial can only aggravate the harm that is already suffered.

16. Counsel finally added that **Sections 10 and 11** of the **Sexual Offences Act** are unconstitutional as they prescribe minimum mandatory sentences thus, fettering the court's discretion to impose an appropriate sentence premised on both the aggravating and mitigating circumstances.

17. Counsel urged the court to declare the trial a mistrial and find that no reasons warrant a retrial and accordingly acquit the Appellants. Mr. Mukuna too relied on the case of **Charles Wahome Karugu v Republic (supra)**to buttress the urge that the Appellants be set free.

18. Ms. Akunja for the Respondent submitted that the notwithstanding the failure to swear the complainant, her evidence was subjected to cross examination and re-examination. She urged the court not to visit the mistake of the court on the victims or the prosecution. Further, that the Appellants were represented by able counsel and hence no prejudice was occasioned by the failure to record that PW1 was sworn.

19. In this regard, Ms. Akunja urged that if the court finds that the record of proceedings was defective, to be pleased to order a retrial. She submitted that a conviction was likely to result if a retrial is ordered as the evidence ably established all the ingredients of the offence of gang rape. She cited both **Sections 42 and 43(4)** of the **Sexual Offences Act** to buttress the submission that the Appellant has sexual intercourse with PW1 without her consent. She submitted that the Appellants took advantage of her drunkenness to rape her, a fact corroborated by the Appellants who said she had smoked bhang.

20. As regards the inconsistencies in proceedings, counsel submitted that they were minor typographical errors that did not affect the substances of the witnesses' evidence. As such, the court ought to disregard them.

21. On the submission that **Section 10 and 11** of the **Sexual Offences Act** are unconstitutional, she submitted that the Supreme Court has since the case of **Francis Kariokor Muruatetu and another v Republic [2017] eKLR** declared minimum mandatory sentences unconstitutional.

22. As regards that it was unconstitutional to hold the proceedings in camera, counsel submitted that **Article 50(8)** of the **Constitution** and **Section 31** of the **Sexual Offences Act** allows the conduct of proceedings in camera especially where the witnesses or a party to a case is vulnerable.

23. In urging the court to order a retrial, Ms. Akunja submitted that an acquittal would amount to an injustice on the part of the complainant and added that the prosecution witnesses were available to testify afresh. She urged the court to be guided by the factors set out in the case of **Mwangi v Republic [2006]2 KLR 94** that a court ought to consider if a retrial should be ordered.

Determination

24. It is not in issue that the record of proceedings, both written and typed indicates that the complainant was not sworn when she gave her evidence. Indeed, this fact is the basis on which the application by the Respondent for leave to adduce additional evidence was hinged. The onus of this court is thus simple; to determine whether the defect violated the law and in turn vitiated the trial.

25. Evidence in criminal trials is required to be taken on oath, with the only exception being in the circumstances of a child of tender age who does not understand the nature of the oath but is possessed of sufficient intelligence to justify reception of her evidence under **Section 19** of the **Oaths and Declarations Act.**

26. Section 151 of the Criminal Procedure Code on the other hand requires the taking of evidence in criminal cases on oath as follows:

> **"Every witness in a *criminal cause or matter* *shall be examined upon oath,* and the Court before which any witness shall appear shall have full power and authority to administer the *usual oath".***

27. Section 151 appears to impose a total bar to unsworn evidence. The Court of Appeal in the case of ***Amber May v Republic [1979] eKLR*** held with respect to the unsworn testimony of an accused person that:

> **"An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case."**

28. Justice Edward Muriithi in the case of ***Rashid Wachilu Kasheka v Republic [2015] eKLR*** stated as follows regarding an unsworn statement by a prosecution witness:

> **"In *Odongo v. Republic* (1983) KLR 301, the Court held that the unsworn statement of an accused is not evidence and could therefore not be used against his co-accused. If the statement of an accused made on oath is consistently rejected by the courts as being 'not evidence' as in *Odongo*, supra, and *May* before it and others after it, it must follow that the consequences of unsworn evidence given by a prosecution witness who should have been sworn is equally worthless and cannot be relied upon to found a conviction. Moreover, in permitting the receipt of unsworn evidence, whether by mistake or otherwise, is an illegality that renders the trial defective and a 'nullity' as in *R. v. Marsham ex. parte Pethick Lawrence* [1912] 2 K.B 362 DC…"**

29. The honourable judge went on to hold that the failure to swear the two prosecution witnesses rendered the trial of the Appellant therein defective and a nullity hence ordered for retrial.

30. The contestation by the Respondent in this case is that although the record of proceedings does indeed show that PW1 was not sworn, she in fact was sworn before she testified and the more reason she was cross examined by the defence. But one fact must be undisputed; that this court being a court of record relies on what is written in proceedings. The court was not present when the evidence was taken. It has no way to determine whether or not PW1 was sworn before she testified. This ultimately implies that there is overwhelming likelihood that the Appellants were convicted on the basis of an unsworn testimony, in total violation of **Section 151** of the **Criminal Procedure Code**. This kind of violation can in no way be curable under **Section 382** of the **Criminal Procedure Code**. It vitiates the entire proceedings.

31. In so holding, I align myself with Court of Appeal decision in the case of **Samuel Muriithi Mwangi V Republic [2006] eKLR** where the Court of Appeal stated as follows:

> **"The usual practice of all the courts in Kenya is of course to show in the record that a witness has taken an oath before testifying. In the record before us, there is no way in which we can determine one way or the other that the witnesses were or were not sworn before they gave their evidence. Most likely they took the oath before giving evidence. But there is also the probability that they might not have taken the oath and if that be the position it would mean that the appellant was convicted on evidence which was not sworn. That would be in violation of Section 151 of the Criminal Procedure Code and the provisions we have set out herein. That in our view, cannot be a matter curable under section 382 of the Criminal Procedure Code."**

32. Similarly, I would make an even finding; that it may probably be that PW1 was sworn before she testified. But as the record shows, she may not have been sworn rendering to a faulty conviction. The rationale for this is because the veracity of the evidence adduced is put in question. For this reason, I would not hesitate to hold that the proceedings were a total mistrial. What then remains for determination is whether ordering a retrial is the best recourse.

33. The Court finds guidance in the decision of the then East Africa Court of Appeal in **Vashanjee Liladhan *v.* Rex [1946] 13 EACA 150**, that.:

> **"An order for a retrial is the proper order to be made when the accused has not had a satisfactory trial."**

34. Even then, the court must consider several factors before an order for a retrial can be made. A *locus classicus* case on the considerations to be had before ordering a retrial is the Court of Appeal decision in **Yusuf Sabwani Opicho *v.* Republic [2009] eKLR** in which it was held that.:

> **"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 purpose 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. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."**

35. Counsel on both sides made immense submissions impugning and exhorting the evidence before the trial court, in equal measure. What is of paramount consideration is the factor whether if a retrial is ordered, the same is likely to result in a conviction. Thus, the court would be called upon to relook at the evidence afresh but be extremely cautious not to unduly preempt a possible decision in the retrial.

36. It is in this spirit that, for the court to be understood on the verdict it shall finally render, analyzes though in brief, the lengthy evidence that was adduced before the trial court. The same was heavily premised on the evidence of **PW1**, **WA** who was the complainant in the case. I will therefore, give in detail her evidence. She was a recent university graduate living on State House Road, [particulars withheld]. She recalled that on 10th February, 2018 she was at home when her friend called her at around 8.00 pm seeking to treat her for her birthday. She was picked up by her friend Trina who was alongside one Maara between 9.00 to 9.30 pm after seeking permission from her mother. They proceeded to Maara's house within Spring Valley where they found some other friends whom they joined on a veranda for drinks. She recalled taking a tot of vodka and that after an hour the 1st and 2nd Appellants arrived alongside one Sofie. She knew the 1st Appellant as they had been in school together but she did not know the 2nd Appellant whom she met on the night in question.

37. She recalled that she participated in a drinking game with the 1st Appellant and took about three shots of vodka before opting out. That soon thereafter Maara's grandmother ordered them to leave the house and since she could not find Trina she asked Sofie to give her a lift as she was driving. That she boarded the vehicle alongside the 1st and 2nd Appellants and in the course of the journey she asked the 1st Appellant where they were heading to. She decided to join them at the Harlequins club. She recalled that on the way there they stopped at a Chicken Inn outlet for food. They arrived at the Harlequins club at around midnight and she sat with Sofie near the club entrance until they were joined by one Amy. She did not have any drinks at the club. Shortly after the 1st and 2nd Appellants came back they suggested they move to Club Blackout which was close by. At Blackout they took vodka which they mixed with soda and she recalled they were there for about 20 minutes. She recalled being tipsy but still alert when Sofie informed them that she wanted to leave.

38. They left the club in the same company, namely; the 1st and 2nd Appellant, herself, Amy and Sofie. The vehicle was driven towards Highrise Estate and since she was a friend to the 1st Appellant she decided to spend the night at his place. She recalled the layout of the house as she had been alert enough to walk to the house where the 1st Appellant again suggested that they play a drinking game. He also offered her a soda which she drank and that that was the last thing she remembered as the next thing she recollected was the 1st Appellant raping her. She stated that she kept slipping in and out of consciousness. She also recalled being on all fours on the carpet and the 1st Appellant having sexual intercourse with her from the back while the 2nd Appellant had his penis in her mouth. That the Appellants took turns having intercourse with her and left her on the couch where she found herself when she came to. She testified that she was terrified, weak and confused when she woke up.

39. She recalled that at around 9.00 am, she communicated with her friend one Jeff whom she asked assists her with money so she could leave the apartment. He sent her Kshs. 400/- and the 1st Appellant hailed a taxi on her behalf. She left the house once the taxi arrived and proceeded to Imara Daima where Jeff lived. When she got there she and Jeff went to a chemist where she bought the morning after pill, Postinor2. He also bought her lunch and clothes. That Jeff alongside his girlfriend took her to Avenue Hospital but she was not treated as they informed her they did not have a post rape kit. They thus went to Nairobi South Hospital where Jeff paid the fees and she was seen by a doctor who suggested that they carry out a blood test before advising her to go to Mater Hospital as they did not have a post rape kit.

40. She went home after the medical examination by a taxi that Jeff hired. That although the doctor had advised her to go to Kenyatta National Hospital the following day she was traumatized and depressed when she got home and decided to ignore the whole incident. She informed the Court that a few days after the incident she reached out to the 1st Appellant on WhatsApp questioning him why he had taken advantage of her. She also recalled asking him for Kshs. 15,000/- to procure an abortion. It was her evidence that she did not want to report the matter as her friend had a similar experience and no assistance was offered to her. However, that once she shared her story on social media a Mr. Duncan Ondimu of the office of Director of Public Prosecutions reached out to her and advised her to report the matter at Kilimani Police Station.

41. She obliged and was escorted by the police to Nairobi Women's Hospital where she saw a doctor who also took a sample of her blood and urine. Further, a pregnancy test revealed that she was pregnant. She confirmed that she drank alcohol on the night in question and also smoked some bhang but that she was simply tipsy and not drunk. She identified the 1st and 2nd Appellants as the persons who sexually assaulted her.

42. Amongst the persons PW1 informed about the rape was **IAA** who testified as PW6, **AI** who testified as PW7 and **Dr. Basher Dekow Warsame,** a medical doctor at Nairobi South Hospital who testified as PW2. The latter examined PW1 on 11th February, 2018 in the afternoon. PW1 informed him that she wanted a HIV and Hepatitis B test. PW1 hesitantly informed him that she had been raped within the last 24 hours upon which he counselled her on the importance of post rape care management but she declined a physical examination or further laboratory investigations. He recalled that she informed him that she had taken the emergency contraceptive pill, P2. The results for the tests done were negative. He advised her to come back in four months for further counselling. Amy was with PW1 at the Harlequins Club.

43. SM testified as **PW3** and was a friend of PW1 who corroborated the evidence of PW1 in so far as the happenings of the eventful night were concerned. She recalled PW1 accompanying the Appellants to Highrise Estate. **GGO**, PW4 had known PW1 with whom they had a romantic relationship in 2016 to 2017 before parting ways. He is the person who assisted her with money to call a taxi to his house and later take her to hospital for treatment. His testimony was that PW1 at first instance reported to her that the Appellants had raped her. **JA** testified as **PW5.** She was the mother to PW1 who entirely reiterated what PW1 had reported to her on the circumstances of the case including that the rape had resulted in pregnancy. **PW8, Peter Wanyama** a medical officer at Nairobi Women's Hospital produced a post rape care report dated 3rd April, 2018 in which the findings of an examination on PW1 were detailed including the fact that PW1 was then pregnant. The case was investigated by **PW9, PC Dan Owino** of DCI Kilimani who summed up the evidence of the prosecution witnesses and preferred the charges against the Appellants.

44. Both Appellant denied the charges. The crux of their respective defences was that the threesome sex they had with PW1 was consensual and in fact at the instance of PW1. The 1st Appellant was a student at the University of Nairobi and a rugby player for Harlequins. He lived at [particulars withheld] Apartments within Nyayo High Rise Estate. He testified that he knew the complainant before 10th February, 2018 but that they were not acquainted. He entirely corroborated the evidence of PW1 in so as it concerned how they met on the fateful night, the drinking of alcohol and bhang escapades was concerned and finally events leading he, the 2nd Appellant and PW1 to his house at High Rise Estate. He did also add that they recorded the threesome sex in their phones. He testified that at 10.00 am, PW1 left before promising to come back with her friend for a foursome.

45. He recalled that the following day he received a message from PW1 indicating that they had taken advantage of her and she was going to make them pay. He was surprised by the message and discussed it with the 2nd Appellant. He testified that at some point the complainant requested that he should pay her Kshs. 15,000/- but he was weary that if he paid her, she would keep asking for more. He recalled PWI posting the issue on Instagram and later reporting at Kilimani Police Station. It is after this that they deleted the videos from mobile phone. He denied committing the offence.

46. The 2nd Appellant entirely corroborated the evidence of the 1st Appellant. He maintained innocence and indicated that the sex intercourse was at the instance of PW1.

47. Both Appellants called a support witness, one **John Muchoki Njeri**, a registered clinical officer whose testimony was basically about how patients with a history of sexual assault are treated in hospitals.

48. While I must limit my deliberations, it is apparent in the evidence of the prosecution and defence that there were sexual relations between the Complainant and the Appellants on the night in question. What I have no doubt in my mind with, is the that fact that the evidence discloses that the intercourse was not consensual.

49. I cement this finding by the fact that the conduct of PW1 in the morning immediately after the ordeal, was a clear testimony that she did not consent to the relation. There is clear evidence that the Appellants, more so the 1st Appellant, upon arrival at his house at High Rise Estate deliberately gave her more alcohol that made her lose control of her mental faculties after which they raped her in turns. Further, PW1 did immediately report to her friends whom she was with through the night including one Jeff (PW4) about what had transpired to her. In categorical terms, she informed him that she had been raped. These words were echoed by PW2, the doctor who first treated her at the South B Hospital. All the prosecution witnesses did not deviate from this line of evidence and no contradiction was cited. PW1 was clear in her mind that the Appellants raped her by taking advantage of her intoxication.

50. It matters not that she did not report the ordeal to the police immediately after the incident. It also matters not that she was not physically examined or that she showed no sign of pregnancy at the time she testified. What is vivid is that by her own evidence, corroborated by other key prosecution witnesses, the Appellants in turn had sex with her without her consent. I add that the lack of consent established by the commission of intentional or unlawful acts of the Appellants as defined under **Section 43(1), (2) and (4)** of the **Sexual Offences Act** was demonstrated by the prosecution. As to further evaluation of the elements constituting the offence of gang rape, I leave it to the trial court least I preempt the outcome of the trial.

51. My view therefore, is that if a retrial is ordered the same is likely to result in a conviction.

52. As for other considerations, it is clear that the defect in the proceedings was not occasioned by the prosecution. See: **Ahmed Sumar v Republic (1964) EA 481** at Pg. 483 the Court of Appeal stated thus;

> **"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.**

53. Hence, a retrial would not be according the prosecution an opportunity to fill in gaps in their evidence.

54. Although it is not in all cases where a defect is occasioned by a court that a retrial should be ordered, in this case, the overwhelming evidence pointing to the likely culpability of the Appellants demands that a retrial will serve justice. What is paramount is that each case should be considered on its circumstances as held by the Court of Appeal in **Benard Lolimo Ekimat v Republic [2005] eKLR** thus;

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

55. I am further of the view that a retrial will serve the interest of justice. The offence charged is very serious. It left the complainant very traumatized and she must be eager that a fair trial is conducted to its conclusion. It is unfortunate that the Appellants care much about their reputation and careers with less regard to the harm and injury occasioned to the complainant. They seem too concerned that they need not be subjected to further harm having ruined their careers. Whilst this is a selfish statement unconcerned about the impact the incident had on the complainant, on noting the seriousness of the offence, it persuades why a fair trial would satisfy all parties involved.

56. Further, the nature of the offence requires that both the legal justice and public interests be served. I disagree with the Appellants that because the matter was highly publicized, it would be wrong to further expose them and the witnesses through a laborious process of a second trial. On the contrary, for the same reason, justice demands that a fair conclusive trial is conducted. Furthermore, the Respondent has indicated that the prosecution witnesses are available and ready to testify. Thus, a retrial is the only proper order available to the Court.

57. Under this head, I find that no prejudice will be occasioned to the Appellants by the retrial. The initial trial commenced on 23rd April, 2018 and was concluded on 16th August, 2019. Since their conviction, they have been in custody for about 10 months. Cumulatively, therefore, they have been in custody for two years and ten months. They face a possible minimum penalty of fifteen (15) years if convicted. The period spent in custody, in my view cannot be considered as sufficient punishment. Hence, a retrial is the fairest way to go.

58. With respect to the case cited by both counsel for the Appellants of **Charles Karuga Wahome V Republic (supra)** is one that can clearly be distinguished from the instant one. In that case, the court declined to order a retrial premised on fact that the evidence on record on the identification of the Appellant was unsatisfactory. The Appellant had been charged with robbery with violence. A contrast scenario prevails in this case where there is sufficient evidence likely to result in a conviction.

59. On the submission that the Constitution was violated because the trial was held in camera is not an assertion based on either fact or law. **Article 50(8)** of the **Constitution** does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, so as to protect witnesses or vulnerable persons, morality, public order or national security. Further, and in accord with this Article, **Section 31 (4) (c)** of the **Sexual Offences Act** provides that a court can direct that the evidence of a vulnerable witness may not be taken in open court.

60. I agree with learned counsel, Mr. Bowry that the learned trial magistrate failed, before commencing the proceedings in camera, to state the reasons for doing so. However, that does not lessen the fact that a victim of a sexual assault by common usage is a vulnerable witness. This is cemented by **Sub-Section (1)(a)** of **Section 31** of the **Sexual Offences Act** which, in categorizing who vulnerable witnesses are states;

> **"A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare the witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness-**
>
> **a. The alleged victim in the proceedings pending before the court."**

61. Hence, the failure to record that PW1 was a vulnerable witness, reasons wherefore the proceedings would be conducted in camera did not dislodge PW1 as the victim in the offences. There was thus no violation of the Constitution. As well, that technical hitch did not in any way vitiate the proceedings.

62. Likewise, the mere fact that the trial court too, failed to indicate which parts of the proceedings were held in camera and which ones were held in open court did not also violate the Constitution. Of course prudence demands that this be done for good order of record but the error is technical and curable under **Section 382** of the **Criminal Procedure Code.**

63. It was further submitted that the proceedings were tainted with unconstitutionality on the ground that **Section 10** and **11** of the **Sexual Offences Act** are couched in mandatory terms in so far as the penalty is concerned. For purposes of this case, only **Section 10** applies. It is trite that it provides for a minimum mandatory sentence of fifteen (15) years which was imposed upon the Appellants. However, it is now settled law following the Supreme Court decision in the case of **Francis Kariokor Muruatetu & Another (2017) e KLR** that imposing a minimum mandatory sentence without according reasons is unconstitutional. What the Supreme Court rendered itself on is that a court must be guided by both mitigating and aggravating factors in imposing an appropriate sentence. In simple words, a court could still impose the minimum mandatory sentence provided under a statute but in doing so must be guided by the circumstances of the case.

64. There was also an argument by the Appellants' counsel that the sentencing of the Appellants was irregular premised on how the charges were framed. The submission was that the learned trial magistrate failed to pronounce sentence in count I in respect of the 2nd Appellant yet both Appellants were charged jointly. A similar reasoning was advanced in respect of count II; that the trial court failed to pronounce sentence in respect of the 1st Appellant yet he was jointly charged with the 2nd Appellant.

65. This argument is not only incorrect but has no legal foundation. The amended charge sheet was clear that each of the Appellants was singly charged with a separate count of gang rape and an alternative charge of indecent act. The 1st Appellant was charged in count I and the 2nd Appellant in count II. Hence, the sentence had to accrue individually to each of the Appellants. It is off the law to insinuate that both Appellants would have been charged in one count as jointly committing the offence of gang rape yet from the evidence adduced, each Appellant raped the complainant individually and in turn. A joint count would have been defective and in fact, dead on arrival.

66. As regards the minor inconsistencies cited in the proceedings, the same are so minor that they do not affect the substance of the evidence adduced.

67. Another ground raised though not argued was that the learned trial magistrate erred in law in allowing the amendment of the charge sheet. I would not belabor on this point because, under **Section 214** of the **Criminal Procedure Code**, the prosecution have a right to apply for amendment of a charge sheet any time before the close of their case. The amendment in this case was done within the law. That ground of appeal thus fails.

68. Finally, I would like to thank all counsel in this matter: Mr. Bowry, Mr. Mukuna and Ms. Akunja for the immense submissions they presented to the Court and the myriad case law they relied upon in the written submissions to push their respective cases. They also facilitated the smooth disposal of the entire matter. I did not however find it prudent to make an entire consideration of all the case law, after noting that the defect in the proceedings vitiated the trial with the result that a retrial is necessary.

69. In the foregoing, the appeal partially succeeds. I quash the conviction set aside the sentences and order that a retrial be conducted. The Appellants shall be escorted to Kilimani Police Station not later than 6th July, 2020 for preparations to take plea by 7th July, 2020. I order that the trial be heard on priority basis having regard that this is a retrial. I further order that the same be conducted by any other magistrate who

has jurisdiction other than Hon. S. Mutuku (CM) who conducted the first trial.

Dated and Delivered at Nairobi This 30th day of June, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Bowry for the 1st Appellant.

2. Mr. Simiyu and Mr. Mukuna for the 2nd Appellant.

3. Miss Akunja for the Respondent.

4. Both Appellants present.