REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.123 OF 2016

(As consolidated with Cr. Appeal Nos.128 & 130 of 2016)

(An Appeal arising out of the conviction and sentence of Hon. H.M. Nyaga – CM

delivered on 31st August 2016 in Makadara CMC. CR. Case No.5445 of 2012)

JAMES MWENDWA MUINDI..........................1ST APPELLANT

JOHN MWANGI WANDERI............................2ND APPELLANT

LARRY JOHN AMBUGULI..............................3RDAPPELLANT

ERICK ODHIAMBO OPONDO........................4THAPPELLANT

VERSUS

REPUBLIC..RESPONDENT

JUDGMENT

The 1st Appellant was charged in the first count, with the offence of **gang rape** contrary to **Section 10** of the **Sexual Offences Act**. The particulars of the offence were that, between the nights of 14th and 15th October 2012, in Nairobi County, the 1st Appellant in association with John Mwangi Wanderi and Larry John Ambughuli who are before court, intentionally and unlawfully caused his penis to penetrate the vagina of OAA, a child aged 14 years. In the alternative charge, the 1st Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act, 2007.** The particulars of the offence were that between the nights of 14th and 15th October 2012 in Nairobi County, he intentionally rubbed his penis against the vagina of OAA, a child aged 14 years.

In the second count, the 1st Appellant was charged with the offence of **gang rape** contrary to **Section 10** of the **Sexual Offences Act.** The particulars of the offence were that between the nights of 14th and 15th October, 2012 in Nairobi County, in association with Eric Odhiambo Opondo who is before court and others not before court, he intentionally and unlawfully caused his penis to penetrate the vagina of MWN, a child aged 14 years. In the alternative charge, the 1st Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11(1)** of the Sexual Offences Act. The particulars of the offence were that between the nights of 14th and 15th October 2012, in Nairobi County, he intentionally rubbed his penis against the vagina of MWN, a child aged 14 years.

In the third count, the 2nd Appellant was charged with the offence of **gang rape** contrary to **Section 10** of the **Sexual Offences Act**. The particulars of the offence were that, between the nights of 14th and 15th October 2012, in Nairobi County, in association with James Mwendwa Muindi and Larry John Ambughuli who are before court, he intentionally and unlawfully caused his penis to penetrate the vagina of OAA, a child aged 14 years. In the alternative charge, the 2nd Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars of the offence were that between the nights of 14th and 15th October 2012 in Nairobi County, he intentionally rubbed his penis against the vagina of OAA, a child aged 14 years.

In the fourth count, the 3rd Appellant was charged with the offence of **gang rape** contrary to **Section 10** of the **Sexual Offences Act.** The particulars of the offence were that, between the nights of 14th and 15th October 2012 in Nairobi County, in association with James Mwendwa Muindi and John Mwangi Wanderi who are before court, he intentionally and unlawfully caused his penis to penetrate the vagina of OAA, a child aged 14 years. In the alternative charge, the 3rd Appellant was charged with the offence of committing an **indecent act with**

a child contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars of the offence were that between the nights of 14th and 15th October 2012 in Nairobi County, he intentionally rubbed his penis against the vagina of OAA, a child aged 14 years.

In the fifth count, the 4th Appellant was charged with the offence of **gang rape** contrary to **Section 10** of the **Sexual Offences Act.** The particulars of the offence were that between the nights of 14th and 15th October 2012 in Nairobi County, in association with James Mwendwa Muindi who is before court and others not before court, he intentionally caused his penis to penetrate the vagina of MWN, a child aged 14 years. In the alternative charge, the 4th Appellant was charged with the offence of **committing an indecent act with a child** contrary to Section 11(1) of the **Sexual Offences Act.** The particulars of the offence were that between the nights of 14th and 15th October 2012 in Nairobi County, he intentionally rubbed his penis against the vagina of MWN, a child aged 14 years.

When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, the 1st Appellant was convicted as charged on the main charges in the first and second counts and sentenced to thirty (30) years on each count. The sentences were to run consecutively. The 2nd Appellant was convicted as charged on the main charge in the third count and sentenced to serve twenty (20) years imprisonment. The 3rd Appellant was convicted as charged on the main charge in the fourth count and sentenced to twenty (20) years imprisonment. The 4th Appellant was convicted as charged on the main charge in the fifth count and sentenced to thirty (30) years imprisonment. The Appellants were aggrieved by their conviction and sentence and have each filed a separate appeal to this court.

In their petitions for Appeal, the 1st, 2nd and 3rd Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They were aggrieved that the trial magistrate conducted the trial in a manner that violated their constitutional rights to a fair hearing. They complained that their conviction was based on charges that were bad in law for duplicity. They faulted the trial magistrate for placing them within the joint enterprise liability whereas there was no evidence of *mens rea* that was established. They took issue with the trial magistrate's decision to convict them yet there was no evidence linking them to the offence.

In his petition for appeal, the 4th Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial magistrate failed to give reasons for the decision to convict him contrary to **Section 169** of the **Criminal Procedure Code.** He complained that the trial magistrate failed to appreciate that his identification was not cogent to sustain a conviction. He took issue with his conviction stating that the prosecution had not proved their case beyond any reasonable doubt. He faulted the trial magistrate for failing to observe the contradictions and inconsistencies in the prosecution case.

The four separate appeals were consolidated and heard together as one for the purpose of this appeal. During the hearing of the Appeal, the Appellants presented to court written submissions in support of their respective appeals. They urged the court to allow their appeals. Ms. Nyauncho for the State opposed the appeals. She made oral submissions to the effect that the prosecution had established its case on the charges brought against the Appellants to the required standard of proof beyond any reasonable doubt. She submitted that PW5 and PW6 testified on how the Appellants lured them to their house in Ex-muroto slums where they proceeded to defile them in turns. She averred that all the ingredients of gang rape were proved. She stated that the complainants were indeed defiled as per the medical examinations. The birth certificates produced proved that they were minors. She said that the Appellants were in association and had a common intention to defile the complainants even though there was evidence that some of them did not commit the act. Learned State Counsel maintained that the Appellants were positively identified. The complainants were in the Appellants' house the whole night. She stated that DNA evidence also linked the 1st Appellant to the offence. ***Prosecution's Exhibit 11,*** the complainant's underwear, was recovered from the house where the incident allegedly occurred. She therefore urged the court to dismiss the appeals.

The facts of the case according to the prosecution are as follows; PW1, Dr. Joseph Maundu, testified that on 11th October 2012, he examined PW6, MWN, who was 14 years old. PW6 informed him that she had been defiled. PW1 said that her underwear had bloodstains. He testified that there was a perennial tear between her vagina and anus. Her hymen was broken. PW6 had a whitish discharge mixed with blood which was fresh from the tear. He also examined PW5, OAO, who also alleged to have been defiled. PW5 had a perennial tear. Her hymen was also broken. She had fresh blood from the tear and a whitish discharge. PW1 stated that on 17th October 2012 he examined the 1st, 2nd and 3rd Appellants. They had no injuries on their private parts. On 22nd October, 2012 he examined the 4th Appellant who also had no injuries on his private parts.

PW2, Sohya Aboud, stated that she worked at Medecins San Frontieres Clinic. She testified that on 15th October 2012, PW6, MWN, was examined at the clinic after alleging she had been defiled. There were dried bloodstains on her clothes. She had bruises on her vagina on the fourchette, fossa navicularis and hymen. PW2 stated that they also examined PW5, OAO, on the same day. She had bruises on the fossa navicularis, hymen and inner walls of the labia minora. She also had a tear on the labia majora and vaginal bleeding. Medical reports of the two complainants were produced in court.

PW3, MNM, is the mother to PW6. She stated that her daughter was 13 years old at the time the alleged defilement occurred. On the material day she was at work. She came home at 8.00 p.m. and found that her daughter was not in the house. The next morning she got a call from a stranger who asked her to go to the chief's office. She found her daughter and PW5 at the chief's office. She was informed that her daughter had been defiled. Her daughter, PW6, told her that she had attended an ODM rally when she was accosted by a gang of ten men, and that it was *Mavado*'s gang that raped her. She stated that *Mavado* was the 1st Appellant. PW6 narrated to her how four men raped her. She later took PW6 to the hospital for examination.

PW4, LH, testified that she is PW5's mother. On the material day she went to church, as did her children. PW5 left the church before her. When she got home at 7.00 p.m. she did not find PW5 in the house. The next morning, she got a text message informing her that her daughter had been raped and that she was required to go to the chief's office. She found her daughter at the chief's office. PW5 narrated to her how she was raped by two men and that there was a third man present when it happened.

PW5, OAO, was one of the complainants. She stated that on the material day she went to church with PW6, then went back home for lunch. There was an ODM rally that was held at Dandora. She agreed with PW6 that they would meet later in the day and attend the said rally. After

the rally, at around 6.00 p.m. they went to the bus stop. A crowd of about ten young men approached and surrounded them. The men asked them to walk with them. PW5 stated that they complied. They took them to *Ex-Muroto* slum and separated them. She testified that five men took her to a *mabati* house which had a bed and a table. The 3rd Appellant ordered her to undress. She refused. He slapped her after which she complied and undressed. She stated that the 3rd Appellant inserted his fingers into her vagina and told the other men that she was a virgin. He then asked her to dress up. The 1st Appellant then entered the room. He told her that he did not care whether she was a virgin or not and proceeded to rape her. He did not use a condom. She stated that the 3rd Appellant stood there and watched. The 1st Appellant then took her panties and threw them and left. The 2nd Appellant entered the house. He wanted to rape her but the 3rd Appellant stopped him. The 3rd Appellant told her to lie on the bed. He slept next to her that night but she stated that he did not have sexual intercourse with her. The next morning, the 3rd Appellant took her to another house where she found PW6. PW6 was in the company of another man who was not before court. She testified that the two men questioned them, bought them breakfast and asked them to clean the house. They did as they were ordered. They afterwards released them. PW5 stated that she did not see the 4th Appellant in the house. After they left the house, she stated that they met PW5's relative who took them to the Chief's office. Police officers asked them to take them to the house where the incident occurred. She testified that they took them to the house where the 2nd and 3rd Appellants were arrested. She said that she knew the 1st Appellant who went by the name '*Mavado'* and the 3rd Appellant who was known as '*Sauce'*. They afterwards went to the hospital. On cross examination, PW5 stated that the 3rd Appellant lit a kerosene lamp when they arrived at the house. That is how she was able to identify them.

PW6, MWN, was the second complainant. She stated that she knew all the four Appellants as she had seen them in Dandora. This is where she lives. On the material day, she went to Church with PW5. They afterwards had lunch and proceeded to attend an ODM rally at around 3.00 p.m. The rally ended at 6.00 p.m. They went to a bus stop where a group of about ten men surrounded them. She stated that the 3rd Appellant held her and PW6 and ordered them to walk with them. Out of fear, they complied. When they reached Ex-muroto slums, the men separated them. The 1st and 4th Appellant took her to a *mabati* house. She was asked to undress. She refused. The 1st Appellant beat her and ripped her clothes off. He then placed her on a bed and raped her. He did not use a condom. The 4th Appellant was seated in the room smoking. After the 1st Appellant was done, the 4th Appellant proceeded to rape her as well. He used a condom. The men then took her to another house and questioned her. There was a kerosene lamp on the table. She stated that she saw PW5 in that house. They later took her to a 3rd house which had electricity. There were two men in that house, Karanja and Ngethe, who were not before court. She spent the night in that house where the said Karanja and Ngethe raped her in turns the whole night. The next morning, the 1st and 3rd Appellants came to that house with PW5. PW5 was questioned by the men. The 3rd Appellant brought them breakfast. They were ordered to clean the house. PW6 stated that the men released them at about 10.00 a.m. Her clothes were bloodstained. She produced the underwear she was wearing on the material day in court. She testified that on the way, they met someone she knew. He took them to the Chief's office. Her mother, PW3, came to the chief's office. They later took police officers to the house where the incident occurred. The 2nd and 3rd Appellants were arrested. On cross- examination, PW6 identified the 4th Appellant as **"Erico".**

The case was investigated by PW7, Inspector Evelyne Kemunto. She testified that on the material day she was based at Dandora Police Station. On 15th October 2012 she was instructed to investigate a case involving gang rape of two girls, PW5 and PW6. Both girls were 14 years old. Birth certificates of the two girls were produced in court. PW5 and PW6 narrated to her how they were gang raped by a group of young men. She visited the houses where the girls had allegedly been raped. She recovered the underwear that PW6 wore on the material day. She took it for analysis. She stated that PW6 was defiled by three men, including the 1st and 4th Appellant. The third man was not before court. She stated that PW6 informed her that the 1st Appellant did not use a condom. She took the 1st and 4th Appellants to hospital for examination. She later received a DNA report. She stated that PW5 and PW6 identified the four Appellants by their nick names. She added that PW5 and PW6 also physically identified the Appellants. On cross- examination, PW7 stated that no identification parade was mounted since the complainants knew the Appellants.

PW8, Anne Wangeci Nderitu, stated that she worked as a government analyst at the Government Chemist. She knew Dr. Kangethe who prepared the DNA report. She was familiar with his handwriting and signature. She stated that Dr. Kangethe retired from Government service and was not available to produce the report. She applied to produce the report in court. There was no objection from all four Appellants. She testified that PW7 brought a pink underwear, a buccal swab from PW6, a buccal swab from the 1st Appellant and blood samples from the 4th Appellant for analysis. PW7 requested them to determine the presence and source of semen and bloodstains. After analysis, the underwear was found to have semen stains. DNA profiles generated from the semen matched with the buccal swab from PW6 and the buccal swab from the 1st Appellant.

The Appellants were put on their defence. In his unsworn statement, the 1st Appellant stated that he lived in Dandora. On the material day, there was an operation by vigilante groups in Dandora, where he was arrested alongside others. He denied being involved in the defilement.

In his unsworn statement, the 2nd Appellant stated that he lived in Maili Saba, Dandora. He was arrested on 15th October, 2018 by police officers at about 5pm. He stated that he had gone to buy a goat when he was arrested. He denied the allegations against him.

The 3rd Appellant also gave an unsworn statement. He stated that he lived in Dandora and worked as a garbage collector. On 15th October 2012, he was at work and was arrested by police officers at about 3.30 p.m. He was taken to the police station.

The 4th Appellant, in his unsworn statement stated that he lived in Dandora. He stated that he was walking home on 21st October 2012, when he was stopped by police officers. They asked him if he knew Opondo and he told them no. He was taken to the police station and charged.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32).** In the present appeal, the issue for determination is whether the prosecution established the charges of **gang rape** contrary to **Section 10** of the **Sexual Offences Act** to the required standard of proof.

This court has re-evaluated the facts of this case. Gang rape is committed when a person commits rape or defilement 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. In a case of defilement, the onus is on the prosecution to establish that there was penetration, that the victim of the sexual assault was a child and finally, the identity of the perpetrator. The first issue is whether the prosecution established that the victims were minors. Both complainants stated they were in class eight at the time of the incident. Their birth certificates were produced in court which confirmed that they both were 14 years of age at the time of the incident. The court therefore holds that the prosecution did establish that the complainants were children within the meaning of **Section 2(1)** of the **Children Act.**

Section 2(1) of the **Sexual offences Act** defines penetration as:

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

In the present appeal, proof of penetration was established by medical evidence. The complainants were examined at Medecins Sans Frontieres Clinic on 15th October, 2012. The medical reports confirmed that the complainants, PW5 and PW6, sustained multiple tears on the hymen, an indication that the complainants had been sexually assaulted. It was the complainants' first sexual experience. The complainants were also examined by Dr. Joseph Maundu on 17th October 2012. He testified that both complainants had perennial tear between the vagina and anus and their hymens were broken. The prosecution therefore did establish the element of penetration.

The third issue is the identity of the perpetrators. PW5 and PW6 both testified that they knew the Appellants very well as they had seen them in Dandora Estate where they lived. The four Appellants did confirm that they all resided in Dandora. PW5 stated that when she was taken inside the house, the 3rd Appellant lit a kerosene lamp. He asked her to undress. He inserted his fingers into her vagina. The 1st Appellant then entered the room and proceeded to rape her. The 2nd Appellant also entered the house with the intention to rape her but was stopped from doing so by the 3rd Appellant. PW5 was therefore able to see and identify the 1st, 2nd and 3rd Appellants since the room was well lit. In addition, PW5 stated that the next morning, the 3rd Appellant took her to another house where she met PW6. He questioned them and brought them breakfast. PW5 had therefore spent a considerable amount of time with them to enable her positively identify the three Appellants, especially since she had seen them around the neighborhood prior to the incident. She testified that she knew the 1st Appellant by the nickname ***"Mavado"*** and 3rd Appellant were known by the nickname ***"Sauce".***

Her testimony was corroborated by PW6 who stated that she had also seen the Appellants in Dandora where she lived. PW6 stated that the 1st and 4th Appellants took her to a house where they proceeded to sexually assault her. They afterwards took her to another house which had a kerosene lamp and questioned her. PW6 therefore had the opportunity to identify the 1st and 4th Appellants as they conversed with her since the room was lit. She stated that the next morning PW5 came in and was questioned by the 1st and 3rd Appellants. She stated that the 1st Appellant went by the nickname **"Mavado"**, 3rd Appellant was "Sauce" and 4th Appellant was known as **"Erico"**. PW5 and PW6 were released by the gang at 10.00 a.m. They therefore had another opportunity to identify their assailants in broad daylight.

From the above evidence, it is clear that the complainants spent sufficient time with the Appellants to enable them positively identify them. They had seen the Appellants in their neighborhood prior to the occurrence of the incident. The investigating officer testified that PW5 and PW6 gave a physical description of the Appellants as well as their local nicknames which led to their arrests. The complainants described in detail what role each Appellant played and even gave the names of two other assailants, Karanja and Ngethe, who were not before court.

In addition, there was DNA evidence of the 1st Appellant's involvement. PW7 took a pink underwear that PW6 wore on the material day, a buccal swab from PW6, a buccal swab from the 1st Appellant and a blood sample from the 4th Appellant for analysis. After analysis, the underwear was found to have semen. A DNA profile generated from the semen matched with the buccal swab from PW6 and the buccal swab from the 1st Appellant. PW6 testified that the 1st Appellant did not use a condom when he sexually assaulted her but the 4th Appellant used a condom. Positive DNA test results prove that the 1st Appellant did indeed sexually assaulted PW6.

This court is therefore satisfied that the identification of the Appellants was sufficient to sustain a conviction since there was sufficient light; the complainants spent a considerable amount of time with the assailants at night and in the morning. They released the complainants at 10:00 a.m. They also gave the assailants' nicknames in their first report that they made to the police as well as in their testimonies. They knew and had seen the Appellants in their neighborhood prior to the sexual assault.

The 2nd and 3rd Appellants in their grounds of appeal and submissions stated that they did not defile the complainants, neither did they have any intentions of doing so and therefore ought not to have been convicted on the charge of **gang rape. Section 10** of the **Sexual Offences Act** under which the Appellants were charged provides as follows:-

> ***"Any person who commits the offence of rape or defilement under this Act 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 than fifteen years but which may be enhanced to imprisonment for life."***

Therefore, in an offence of gang rape, there must be more than one assailant who acts in association, with a common intention, even though not all of them carry out the actual rape or defilement. PW5 in her testimony stated that:

> ***"...while in the house with the 3rd accused, the 2nd accused entered the house. He wanted to rape me but 3rd accused stopped him."***

Section 20 (1) (b) of the **Penal Code** defines principal offenders to include:-

"..every person who does or omits to do any act for the purpose of enabling or aiding another to commit the offence".

It is clear that the 2nd Appellant entered the house with the intention of raping her but was stopped from doing so by the 3rd Appellant. The 3rd Appellant on the other hand ordered PW5 to undress. When she refused, he slapped her and so she had to comply. He then went ahead and inserted his fingers into her vagina and told the other men that she was a virgin. His actions clearly point to an intention to defile PW5. He forced her to undress and inserted his fingers into her vagina to check whether she was a virgin. *What if the 3rd Appellant found out that PW5 was not a virgin?* There are very high chances that he would have proceeded to defile her. Both the 2nd and 3rd Appellant clearly had intent to rape the complainants. **Section 21** of the **Penal Code** provides that:

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

This provision was expressed in ***Njoroge v Republic* [1983] KLR 197** where the Court of Appeal stated that:

> ***"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavors to effect the common assault of the assembly …… Their common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault."***

The prosecution proved through the testimony of PW5 and PW6 that the Appellants acted in concert. This court therefore finds that the Appellants had a common intention and that the offence of gang rape was duly proved.

The 2nd and 3rd Appellants argued that they were not provided with witnesses statements. This court has carefully perused the proceedings and noted that on the first arraignment on 17th October 2012, the trial court ordered that the Appellants be furnished with witnesses' statements. When the matter came up for hearing on 28th August 2013, the prosecution informed the trial court that they were not ready to proceed. The Appellants objected to the adjournment and stated they were ready to proceed. On the next hearing date on 2nd September 2013 the Appellants stated that they were not ready to proceed as they did not have witnesses' statements. The court adjourned the matter. On 4th December 2013, the next hearing date, the prosecution had two witnesses and all the Appellants stated that they were ready to proceed. They did not complain to the court that they were not ready to proceed with the hearing due to lack of statements. They ought to have informed the court if indeed they did not have the said statements for the two witnesses. On the next hearing date, 17th December 2013, the prosecution was ready with two witnesses. However the Appellants informed the court that they were not ready to proceed with the case. The trial court adjourned the matter.

This court notes a new magistrate took over the conduct of the matter on 23rd June 2015. The Appellants were given an opportunity to recall the two witnesses who had already testified. They declined and requested that the case proceeds from where it had reached. If indeed they did not have witness statements for the witnesses who had already testified and were prejudiced by the same, *why did they decline to recall them?* On that same hearing date the prosecution stated that they were ready to proceed with two more witnesses. Again, the Appellants did not intimate to the court that they did not have witnesses' statements. They stated that they were ready to proceed with the case. They even went ahead and cross- examined the two witnesses.

The Appellants' argument is that the court record does not reflect that they were given witness statements. This argument verges on technicality to the effect that failure of the court to record that an accused person has been given witnesses' statements is *per se* proof of violation of his constitutional right to fair trial. Case law provides a more functional approach. While it is good practice for a trial court to record that it has given orders for an accused person to be provided with the statements or has facilitated their supply, failure to record this is not necessarily fatal. In the case of **Francis Muniu v Republic [2017] eKLR** the Court held thus*:*

> ***"It is salutary practice for the Court to do so when it has given orders. Indeed, it is salutary practice for the Trial Court to satisfy itself that an Accused Person has all the reasonable facilities for his defence and all the prosecution disclosure documents before commencement of trial. However, an Accused Person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the Court. This minimum obligation on the Accused Person triggers the Court's duty to ensure the documents are supplied before commencement of the trial."***

In the present appeal, as in the **Francis Muniu Case,** there is evidence that the Appellants participated in the trial vigorously through cross-examination. It is in an indication that they knew the charges facing them well. There is also no indication that the trial court proceeded with a hearing after the Appellants intimated that they did not have witnesses' statements. These two factors leads to the conclusion that the fair trial rights of the Appellants were not violated in this case. They either received the witness statements or failed to fulfill their minimal obligation to inform the Court that they did not have the statements, if at all.

With regards to the issue of duplicity of charges submitted by the 2nd and 3rd Appellants, the same can be disposed of peremptorily. The particulars of the charges in count 1 and count II solely relate to the 1st Appellant, particulars of charge in count III solely relate to the 2nd Appellant, particulars of charge in count IV solely relate to the 3rd Appellant, and lastly particulars of charge in count V solely relate to the 4th Appellant. The name of each Appellant is indicated at the beginning of the particulars of each count in the charge sheet. None of the Appellants have been charged of the same offence in more than one count. The submission in that regard fails.

The minimum sentence prescribed under ***Section 10*** of the *S**exual Offences Act*** is a term of not less than 15 years' imprisonment which may

be enhanced to life imprisonment. It is not apparent from the sentencing notes of the trial magistrate why the minimum sentence for the 2nd, 3rd and 4th Appellants was enhanced. This court therefore reduces the sentences of the 2nd, 3rd and 4th Appellants to each 15 years' imprisonment. The custodial sentence of the 1st Appellant as meted out by the trial magistrate is upheld.

The conviction of the 1st, 2nd, 3rd and 4th Appellants is affirmed. The sentence of the 1st Appellant is upheld. The sentence imposed on the 2nd, 3rd and 4th Appellants is set aside and substituted with one of 15 years' imprisonment each to run from the date of conviction.

The upshot of the above matter is that save for the sentences of the 2nd, 3rd and 4th Appellants, the appeal is dismissed. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF JANUARY 2019

L. KIMARU

JUDGE