REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 12 OF 2018

HR……...……..……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 19 of 2017 delivered on the 28th day of February, 2018 by Hon. J. Nthuku, SRM]

JUDGMENT

1. The appellant and his co-accused in Eldama-Ravine PMC Criminal case No. 19 of 2017 were convicted of the offence of gang rape c/s 10 of the Sexual Offences Act and sentenced to serve 30 years and probation for 3 years, respectively. In sentencing the accused the trial court found that 1st accused was an adult and the 2nd accused a minor as follows:

> *"Court:*
>
> *I have looked at the Probation Officer's report and also the report from the school where the 1st accused person joined school.*
>
> *The report/letter from the teacher shows he was born in 1997 and he joined class one in 2001. I have noticed that he is also a repeat offender he was convicted for defilement and placed on probation in 2011. (1st accused: It is true I was placed on Probation in 2011 for defilement).*
>
> *The second accused is a minor according to the school records.*
>
> *Sentence*
>
> *The 1st accrued HR is therefore sentenced to thirty (30 years) imprisonment. His name to be entered in the register of dangerous sexual offenders.*
>
> *The 2nd accused person who is a minor is placed on probation for 3 years.*
>
> *Right of appeal 14 days."*

2. The two accused persons were not represented by Counsel in the trial Court apparently in breach of the provisions of section 186 (b) of the Children Act, at least as regard the 2nd accused whom the trial Court found was a minor and treated him as such by the order for Probation for 3 years.

3. As regards the appellant, the trial Court proceeded to sentence on the basis that he was an adult upon considering a pre-sentence report filed by the probation officer as ordered by the trial court upon conviction for the offence on 1/2/18 when in mitigation the 1st accused told the Court that he was a student and the mother said her son was a minor in proceedings for the day recorded as follows:

> *"**Prosecution**: I have no previous records.*
>
> ***Mitigation by 1st Accused**:*
>
> *I pray for forgiveness. I am a student [particulars withheld] High School.*

***2nd accused in Mitigation**:*

I am a student. I pray for a non-custodial sentence. I am at [particulars withheld] Primary School.

ER – mother to 1st Accused: My son is a born 2003. He is a minor.

Court:

The Probation Officer to avail to this Court reports for the two accused person specifically their ages according to registration details of their respective schools i.e. [particulars withheld] Primary School in Emining for HR and [particulars witheld] Primary for KK.

Mention on 7th February, 2018 for reports and sentencing.

HON. J. NTHUKU

SENIOR RESIDENT MAGISTRATE

01.02.2018

4. In convicting the appellant and his co-accused, the trial court had found the charge of gang rape proved as follows:

"The issues for this Court's determination are:

1. Does the Sexual Offences Act have and offence termed gang defilement?

2. If yes, has it been proved against the two accused person?

3. Has the age of the complainant been proved?

4. Has indecent act been proved against the 1st accused person?

On the 1st issue above, section 10 of the Sexual Offences Act reads:

"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 the offence termed gang rape…"

The accused persons herein are charged with an offence of gang defilement. Though the same is not specifically stated under the margin section of the Act, section 10 does talk of an offence amounting to defilement so though the charge sheet talks of gang defilement as opposed to gang rape, that is not a fatal attack as it doesn't occasion any prejudice or miscarriage of justice.

On the offence of gang rape where the victim is a minor the Act should specifically create a section talking of gang defilement because the ingredients of gang rape are totally defilement from those of gang defilement. To prove gang defilement, on must prove the victims was a minor so there was no consent, prove penetration and also that one or more persons were acting in association with one another. For gang rape, the issue of age isn't an ingredient and this is the reason I fear the two should be separated.

Back to the ingredients of gang rape/gang defilement and whether the same have been proved by the prosecution. The child PW1 said she was aged 16 years, her child immunization card which was produced in this case shows 14th March, 2002 as her date of birth. This means as at 25th August, 2017 she was aged 15 years. Her mother also stated the child is aged 15 years so I am satisfied the child was aged 15 years.

On the issue of penetration. She said she was compelled to have sexual intercourse. The Clinical Officer said the child's hymen was freshly broken and she had a tear on the labia with bleeding from the vagina which wasn't due to menstruation, these injuries coupled with the evidence of PW1 hence no doubts in my mind that there was partial or complete insertion of a penis into the child's vagina therefore penetration has been proved.

On who caused the said penetration, the child said that the 1st accused person defiled her as the 2nd accused watched out for the 1st accused person. The two accused persons denied being in the said house with the child. Her mother in her evidence stated that when they went looking for the child, as they approached the house of the 2nd accused person, he rushed inside, came out in the company of the 1st accused and the two ran away after locking the house. It is in this house that the complainant was found. This was in broad day light, the child's mother said she didn't know the 1st accused but her husband asked the accused persons to hand over the keys to him but they declined and ran away. He was forced to kick the door open. For PW2 and her husband to ask for the keys form the attackers of PW1 it means these are people who were close by and being day time, she saw them clearly so there is no possibility of mistaken identity and assuming that PW2 didn't identify/recognize the people she saw escaping what about the complainant? She

was in this house with her attackers the entire night and the following day. She had ample time to identify them so I am satisfied that she didn't mistake the attackers for the two accused persons herein.

None of the accused persons alluded to grudges between them and the complainant or her family, there was not possibility of a frame up. The complainant had no reason to lie against the two accused persons. She reported that she had been raped by the 1st accused person and gave his name as HR to the police. It is not possible she made up this story because her mother and the doctor corroborated her evidence. I am satisfied that the 1st accused person herein sexually defiled PW1 as the 2nd accused person held a panga to subdue her to submission. This is in line with section 20 (1) of the Penal Code which reads "when an offence is committed, each of the following persons is deemed to have taken part in committing the offence, and to be guilty of the offence and may be charged with actually committing it: that is to say:

(e) Every person who aids or abets condition in committing the offence."

The 2nd accused person aided the 1t accused in defiling the complainant.

I find that the charges of gang rape contrary to section 10 of the Sexual Offences Act. Has been proved against the two accused persons herein HR and KK beyond reasonable doubt and I convict them (both) under section 215 of the Criminal Procedure Code Cap. 75 Laws of Kenya."

Appeal

5. The appellant by Petition of Appeal dated 19/3/18set out the following grounds of Appeal:

1. "That the learned trial Magistrate erred in both in law and fact in failing to appreciate that the medical evidence did not support the charges.

2. That the learned trial Magistrate erred in both law and fact by failing to appreciate that the appellant was a minor under 18 years and ought to have been accorded a Borstal sentence.

3. The learned trial Magistrate erred both in law and fact by failing to appreciate the Provisions of Section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006 on sentencing".

6. The appellant then filed written submission of 27/9/2018 attaching a copy of his birth certificate indicating date of birth as 29/10/2000 making him a minor at time of the offence, trial and sentence.

7. At the hearing of the appeal, the Ass. DPP, Miss Macharia, did not oppose the appeal urging the court to give the appellant the benefit of doubt as regards his age as follows:

"3/4/19

Coram: HON JUSTICE EDWARD MURIITHI

COURT ASSISTANT: DAISY

STATE: MS MACHARIA

APPELLANT: Present

Appellant

I have written submissions

Appellant

I did not have legal representative. I was sentences before I got to 18 years. I was 17 years old. I refer to the Certificate of Birth attached to the submissions. I was sentenced on 28/2/18.

DPP

I do not oppose the appeal. The accused had a previous conviction but he was not represented as a minor. I have looked at the Probation Officer's Report and the letter attached indicating that he was born in 1997 yet he was in class 1 in 2001 when only 4 years. The mother had indicated the trial Court that he was born in 2003, and that he was a minor. Then the mother said she was confused and the other birth certificate had been lost and she obtained a replacement of the original.

The head teacher's report indicate appellant joined standard 1 when he was four years which cannot be correct. *We pray that the court gives the appellant the benefit of doubt and rely on the Birth Certificate produced and attached to the submissions.*

That's all.

Appellant

I pray the Court to help me as a have suffered in prison. I have been in custody for 1 year since 16/7/2017".

Issue for Determination

8. I have considered the evidence before the trial court and the grounds of appeal and submissions thereon before the court, and frame the following issues for determination:

a) Whether the age of the appellant was established, and if so or otherwise;

b) What is the impact of the fact of the appellant's age to the proceedings; and

c) What are the appropriate orders in the circumstances of the case.

Determination

9. At the beginning of the trial, the court had ordered for an age assessment report on the 1st accused/appellant herein as follows:

"18.9.2017

Court

Plea of not guilty entered against both accused in count I and 1st accused in count II. Each shall be released on cash bail of Ksh. 200,000/= or bond of Ksh. 500,000/=. Hearing on 23/10/2017, mention 2/10/2017. Age assessment be done on 1st accused HR".

10. Upon return of age assessment report the court on 16/10/2017 said:

"16/10/2017

Court

I have seen the age assessment report. ***The accused person is an adult****. He is remanded at Eldama-Ravine G.K prison. Hearing on 23/10/2017. Mention on 18/10/2017 for pre-trial.*

11. By the further age assessment of the appellant upon mitigation, the Probation Officer's Report dated 14/2/18 attaching a letter for the Head Teacher [particulars withheld] Primary School indicated the appellant as 20 years that:

*"**Conclusion***

Your honour the accused before Court is 20 years old according to records obtained from the first school attended. It is also worth noting that his is not his first offence. He was previously convicted for defilement of a child in Cr. No. 1138/2011 where he was placed to serve on probation for three years with effect from 18/3/2013 to 17/3/2016. His age was given at 15 years by then. He completed the sentence satisfactorily.

A letter from the head teacher [particulars withheld] Primary School reveals that indeed he disappeared from the school in 2013 when he was supposed to sit his K.C.P.E. this coincides with the time of his trial and conviction. It is therefore my considered opinion that the records from the school are accurate on his age assessment as *first revealed on his admission to the school. Attached is a letter from the head teacher [particulars withheld]Primary School attesting to the facts.*

Kevin Kariuki

Probation Officer

Koibatek

14th February 2018

12. The letter from the Head Teacher, [particulars withheld]Primary School was in the following terms:

The Probation Officer

Koibatek Sub County

P O Box

E/Ravine

Date: 08-02-18

RE: HKK INDEX NO. **************

The above boy refers.

*Records kept in the office shows that the boy was born in **1997.** He was admitted 2001 in Std. one. He is Admission 089.*

He was registered for the 2013 KCPE with the above index number. He failed to do the national exam due to unknown reason.

He never come back here and his schooling from then is unknown to me. Thank you.

Yours faithfully

0723XXXXXX

Jonah Cherutich

Head teacher"

13. As submitted by the DPP, if the appellant was born in **1997**, he would have been on 4 years when he started standard one in January 2001 assuming he joined at the beginning of the year. I would agree that there is reasonable doubt as to the appellant's age, as to whether he was a minor at the time of the offence, trial and sentence.

14. The impact of this fact is that the appellant may have been unlawfully sentenced to an imprisonment term contrary to the provisions of section 190 of the Children Act which provides as follows:

> *"**190.** (1) **No child shall be ordered to imprisonment** or to be placed in a detention camp.*
>
> *(2) No child shall be sentenced to death.*
>
> *(3) No child under the age of ten years shall be ordered by Children's Court to be sent to a rehabilitation school.*

15. More importantly, in my view, is that the appellant's trial may have been a nullity since he was not represented by an advocate as required by Section 186 (b) of the Children Act as follows:

> *"**186.** every child accused of having infringed any law shall:*
>
> *(b) If he is unable to obtain legal assistance be provided by the Government **with assistance in the preparation and presentation of his defence**;*

Conclusion

16. As the court has no definite answer to the question of the appellant's age, the court must as urged by the DPP give the appellant the benefit of doubt as to his being of age at time of his trial. When that is done, the trial of the appellant must be declared a mistrial for being an illegal trial in contravention of section 186 (b) of the Children Act and the sentence of imprisonment for 30 years unlawful under section 190 (1) of the children Act.

17. The appellant's conviction shall, therefore, be quashed and the sentence of imprisonment for 30 years set aside.

Retrial

18. This is a text book case for the consideration of the principles upon which retrial shall be granted as set out in ***Fatehali Manji v. R*** cited in ***Opicho v. R (***2009) KLR 369 as follows:

> *"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the 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 interests of justice require it,"

That was stated in Fatehali Manji v The Republic [1966] EA 343. In many other decisions of this Court it has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interests of justice require it. See Muiruri v Republic [2003] KLR 552, Mwangi v Republic [1983] KLR 552, and Benard Lolimo Ekimat v Republic, Criminal Appeal No 151 of 2004 (UR)"

19. The factors on the appellant's side are that he is a young person who has spent about 1 year in Prison over sentence now declared illegal. On the complainant's side, there is the need to vindicate the complainant and deter the prevalence of sexual offences by appropriate sentence where the accused is found guilty is a proper trial.

20. As in *Opicho*, supra, the court considers the matter of gang rape and similar sexual offences to be serious enough to justify a retrial in the interest of justice. In *Opicho* where the appellant had been in custody for over 2 years, the Court of Appeal (Tunoi, Waki &Visram, JJA) held:

"*The allegations made against the appellant are extremely serious and of public interest as they relate to child abuse, a Phenomenon now typical on the world stage, and in this country due to its prevalence. It is in the interest of justice that the appellants receives fair trial and if he is to be acquitted or convicted, then it ought to be seen that it was, in either case, in accordance with the law. We are inclined in all circumstances of this case to order a retrial*".

21. Without prejudicing the merits of the case so as not to prejudice the retrial, I would consider that there is in the evidence presented before the trial Court material upon which a conviction might result from a retrial.

Orders

22. Accordingly, for the reasons set out above, the Court makes the following orders:

1. The conviction and sentence of the appellant for the offence of gang rape contrary to section 10 of the Sexual Offences Act is quashed and set aside.

2. The appellant shall be tried before a Court of competent jurisdiction differently constituted.

3. For purposes of directions as to the retrial, this matter shall be mentioned before the Magistrate's Court at Eldama Ravine on **26/4/19** and the trial Court file shall immediately be returned to the Court.

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF APRIL 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.