REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 6 OF 2017 AS CONSOLIDATED WITH

HCCRA NO. 7 OF 2017

JOSEPH GITONGA.....1ST APPELLANT

J K.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from original conviction and sentence in the Principal Magistrate's Court at Marimanti in Criminal Case No.753 of 2016 delivered by HON S.M NYAGA - (Resident Magistrate (R.M) on 14th September, 2017).

J U D G M E N T

1. JOSEPH GITONGA and **J K** are the 1st and 2nd appellant respectively herein and both well charged with the offence of gang rape contrary to **Section 10** of **Sexual Offences Act No. 3 of 2006** vide ***Marimanti Principal Magistrate's Court Criminal Case No. 753 of 2016***.

The particulars were that on 10th November 2016 both the Appellants in association raped PK. They also faced alternative count of committing indecent acts on the same complainant. In the 2nd count the 1st Appellant charged with assaulting the same complainant contrary to **Section 251** of the **Penal Code** occasioning her actual bodily harm.

2. The record of proceedings show that both the appellants denied the offence in Count I with the 1st Appellant also denying the 2nd count. After trial, they were both convicted in count I that is for the offence of gang rape and sentenced to serve 40 years each in jail. They were both aggrieved by both conviction and sentence and preferred this appeal raising a number of grounds which I will consider shortly.

3. A briefly summary of facts deduced from the evidence tendered at the trial court indicate that the complainant/ or the victim of the offence was tricked by the Appellants and taken into a deserted remote place using a boda boda ridden by the 2nd appellant, and gang raped by the two. She told the trial court that she was rescued by Julius Mutwiri (PW2) and John Mboya Muthini (PW3) and taken to Chiakariga Police Post where P.C Fredrick Ndama (PW4) took action by escorting both the appellants and the complainant to Materi Mission Hospital after which he later charged the Appellants herein with the offence of gang rape. The investigating officer tendered in evidence the motor cycle used to facilitate the offence as P. Exh. 3 blood stained bra P. Exhibit 2(a) and blood stained biker as P. Exhibit 2 (b) and a pink pant as P. Exhibit 2 (c).

The clinical officer Emilio Mwenda Gaicho (PW5) relying on treatment notes from Materi Catholic Hospital (P. Exhibit 4) concluded that the complainant had been raped and tendered the P3 he authored as P. Exhibit 1.

4. When placed on their defence, the 1 Appellant testified that the complainant was his ***"wife"*** and was taking her for ***"treatment"*** when they were accosted in a bush by PW2 and other people who appeared drunk and assaulted before being escorted to Chiakariga Police Post. He denied committing the offence. On his part the 2nd Appellant defended himself against the accusations saying that he had been hired by the 1st appellant to ferry him and the complainant to Chiakariga market and he obliged after agreeing on the cost for transport and that it was while they were coming back to Mitunguu that they were confronted on a brumby stretch and stopped and beaten before being taken to the police. He denied committing the offence and accused the police for not listening to his side of the story.

5. The trial court upon evaluating the evidence found that the prosecution had proved their case in respect to the 1st count against both the appellants. The 1st Appellant was acquitted in respect to the 2nd account. Both the appellant were convicted and sentenced to serve 40 years each in jail. The trial court before sentencing the 2nd appellant went to lengths to establish his age because of conflicting reports regarding his age.

6. Both the appellants raised 9 grounds of appeal in their respective petitions as follows:-

(i) That the learned trial magistrate erred in law and fact by failing to note that the 2nd appellant was a minor (under age) in respect to the 1st appellant that the magistrate did not note that the complainant was the wife.

(ii) That the prosecution witnesses gave inconsistent contradictory and conflicting testimonies.

(iii) The prosecution case against them was not proved beyond reasonable doubt.

(iv) That the learned trial magistrate erred in law by sentencing the appellant to 40 years imprisonment contrary to the law.

(v) That the learned magistrate erred in law by failing to order D.N.A test of all the parties to ascertain the truth.

(vi) That their defence was rejected without reasons given.

7. The Appellants opted to proceed through written submissions. In his brief submissions the first appellant has mainly concentrated on the sentence terming it harsh and that the trial magistrate did not consider the mitigating circumstances like the fact that he was a first offender. He also complained that he did not get the benefit of legal representation.

8. The 2nd Appellant on his part submitted that at the material time of the offence he was a minor and that he was not accorded the protection of law as a child in conflict with the law. He further submitted that the trial magistrate ordered for his age assessment before sentencing but that the assessment done showing that he was between the ages of 16-17 years was rejected and that a 2nd assessment showing that he was between ages of 17 and 18 years was used to conclude that he was 18 years of age. The 2nd appellant has contended that the learned trial court should not have relied on doubtful reports to pass the sentence he meted out against him.

9. The Respondent through the office of Director of Public Prosecution opposed this appeal. On the contention by the 1st appellant that the complainant was his wife, the state has contended that the burden of proof lay on the 1st appellant to show that the complainant was his wife. It is contended that the 1st Appellant should have called witnesses to prove that the complainant was his wife in which case consent to sex would have been assumed.

10. On the question of the age of the 2nd appellant the Respondent has submitted that the trial court can't be faulted because it swiftly ordered for age assessment when the issue cropped up and that the prosecution expressed doubts about the first report that indicated that the 2nd appellant was between 16-17 years old and that it was on that basis that a 2nd medical opinion was sought which indicated that the appellant was between 17- 18 years old. The State contended that it was common sense that the 2nd appellant was an adult as he was reported to be having a wife and children.

11. I have considered this appeal which in my view only raises two issues;

(i) Whether the sentences meted against the appellants were too harsh.

(ii) Whether the 2nd appellant was a minor at the material time.

The reason why I have come up with only the two issues is that there is no doubt based on the evidence tendered that the prosecution's case was proved to the required standard. There is no doubt in my mind that the evaluation of the evidence and the conclusion reached that the complainant was gang raped was a correct conclusion. Perhaps that may have informed the appellant's written submissions because contrary to the nine grounds raised, the written submissions just concentrated on the two issues I have framed above. This court finds therefore that the conviction of both the appellant was proper and correct given the overwhelming evidence tendered by the prosecution. The issue that their defence was not considered is therefore unfounded because the same was considered but when weighed in the scales of justice their defence was found wanting and incredible as opposed to the prosecution's case found to be strong and sufficient to sustain conviction against the 1st appellant and a reference against the 2nd Appellant as the word ***"conviction"*** may not be used given the provisions of **Section 189** of **Children's Act** when I will delve into later in this judgment. I am not pursuaded by the 1st appellant's contention that the complainant was his wife because if she was he could not be doing what he did in the bush.

12. Having found that conviction was proper the only remaining issue in this appeal is the sentence. The appellants have gone separate way in faulting the sentence meted out against them with 1st Appellant faulting the sentence for being harsh and excessive while the 2nd Appellant has challenged his sentence on the ground that being a minor he should have been accorded the protection of the law given to minors in conflict with the law.

13. To begin with the 1st appellant challenge, is that **Section 10** of the **Sexual Offences Act** under which the appellant's were convicted provides for a sentence of not less than 15 years. The law provides that this sentence may be enhanced to life imprisonment. It is therefore a matter of discretion for a trial magistrate to mete out an appropriate sentence so long as it is not less than 15 years and being a discretionary exercise, this court as an appellate court can only be invited to intervene if a wrong principle was applied or if the trial court failed to take a relevant issue into account or took an irrelevant issue into account thereby arriving at an inappropriate sentence.

14. The trial court took into account the following factors when determining the sentence meted out.

a. The probation report which he described as ***"negative"***

b. The fact that the victim was pregnant and hence the danger of the unborn child was exposed.

c. That the 1st appellant were not remorseful or regret committing the offence.

d. The fact that the appellant took advantage of complainant's poor back ground and used as a ***"sex tool".***

The above factors appeared to have played a role in the exercise of the trial court's discretion to sentence the appellants to 40 years imprisonment.

15. I have looked at the probation report in respect to the 1st appellant and note that apart from the allegation of having separated from his wife, the probation officer recommended a custodial sentence in view of the nature of the offence committed by the 1st Appellant. I do not see any other reason why the learned trial magistrate viewed the report as negative when he was not considering the possibility of handing him a non custodial sentence because of limitation provided by the statute (Sexual Offences Act) that provide minimum jail sentence

16. Secondly the trial court considered the fact that the complainant was pregnant but really there was no medical evidence to show that the victim was indeed pregnant if so and the age of the pregnancy. There was also no evidence to show that the appellant knew if at all that the complainant was pregnant. There is no doubt that the trial court took this factor seriously as captured by the judgment,

"This is a very serious and only that our law does not provide for such offence. It is grave to endanger future generation. Not different from attempted murder."

Of course the law under **(Section 10 Sexual Offences Act)** provides for the offence of gang rape and its penalty with prison term of not less than 15 years but judging from the tone of the sentencing, the trial court appeared to have felt that the punishment provided was not commensurate or harsh enough which I find a misdirection on the part of the learned trial magistrate.

17. Thirdly, the trial magistrate found that the appellants were ***"not remorseful"*** and had not tried ***"to approach the victim and her family to ask for forgiveness."*** However a look at what the 1st appellant told the trial court in mitigation appears that he was remorseful. He asked for leniency from the trial court in order to educate his children whom he said were young. For the trial court to fault the appellant for having not approached the victim for forgiveness when they were in custody was expecting more than what appellant could practicably do. Furthermore there was no victim's report indicating that the appellants had not sought for forgiveness to inform the trial court's finding. The finding therefore was extraneous from the proceedings and should never have been a factor in determining the appropriate sentence to be meted out.

I also find the finding by the trial magistrate that the appellant took advantage of the ***"poor background of the victim to use her as a sex tool"*** to be an extraneous factor because the source of the information is not indicated. The trial court found the fact to be ***"terrible to imagine"*** indicating that it really weighed heavily in his exercise of discretion to determine that the proper sentence was 40 years jail term. That was erroneous notwithstanding the seriousness of the offence for which the appellant was convicted..

18. The Appellants were first offenders and that is a mitigating which appears to have been omitted by the learned trial magistrate and had he considered it perhaps the sentence passed might not have been that harsh.

19. Now turning my attention to the 2nd Appellant, the record of proceedings suggests that the Respondent is justified in its contention that the trial court acted swiftly to establish the age of the 2nd Appellant by ordering that age assessment be conducted. It is true going by the proceedings that after conviction, the 2nd Appellant in his mitigation pleaded for leniency stating that he was a minor and the trial court for good measure ordered for age assessment to be conducted before passing the sentence. The 2nd Appellant vide an order of the court was escorted to Gatunga Model Health Centre where the doctor assessed the age and as per the report dated 12th July, 2017 on record, the doctor opined that;

" age is assessed to be between 16 to 17 years. Most probably 16 years."

20. The prosecution doubted the opinion of the doctor and applied for summons to Dr .John Wamaki, the Medical Officer who carried out the age assessment exercise. That however never materialized due to unavailability of the said doctor forcing the prosecution to apply for 2nd medical opinion which was granted.The 2nd appellant was escorted to Embu Teaching and Referral Hospital where a dental officer named Beatrice Wanza Ndolo opined that the 2nd appellant was,

"between 17 and 18 years of age."

21. The trial court found some difficulty ***"to ascertain the actual age of the 2nd accused (2nd Appellant) so as to ensure a legal and appropriate sentence"*** because ***"not even experts have been able to help this court."*** I have however looked at the two reports and found that while the initial report shows that the age was assessed by a doctor, the 2nd report age was done by a dental officer and not a full doctor. The trial court fell into error because despite finding the report to be to use his own words ***"tricky",*** he nevertheless found 2nd report to be ***"more reliable compared to the first report."*** The basis for this though not very clear seems to have been unconfirmed report that the 2nd appellant was a father which really should not have been an issue because who says a 16 year old person is unable to father a child.

22. It was also erroneous for the trial court to make a finding that the 2nd Appellant is ***"way above 18 years old"*** contrary to medical assessment conducted by experts. The 2nd medical opinion put the age between 17- 18 years old and the 1st report signed by a doctor put the age between 16-17 years old. The probation officer stated that the 2nd Appellant's parents stated that the Appellant was aged 17 years old at the time social inquiry was conducted (12th January 2017). In the face of the evidence laid before the trial magistrate, the 2nd Appellant, in all probabilities could not have been 18 years old at the material time of the offence. The appellant at the hearing of this appeal showed this court original birth certificate and the copy is annexed to his submissions and even though I disallowed the production of the same based on the objection by the Respondent, the certificate of birth shows that he was born on 9th January, 2001 which is in tandem with the opinion of Doctor John Wamwaki who opined that ***"possible year of birth was 2000-2001".*** Of course the trial magistrate did not have the benefit of the birth certificate at the time of passing the sentence because the 2nd appellant did not produce it at the time, but the evidence placed before him was not sufficient to conclude that the 2nd appellant was way above 18 years of age. I do not agree with the Respondent's counsel contention that age can be ascertained through physical observation and common sense. This is because for one looks can at times be deceptive and it is unsafe to base a conviction or sentence solely upon appearance. Secondly as I have observed, the medical opinion of Doctor Wamwaki indicated that the 2nd Appellant was a minor. It is true that he was unavailable to defend his opinion but so too was the 2nd medical officer whose qualification as I observed appears on the face of the report to be a medical officer but not a doctor because even reading from the report she signed the report on behalf of Chief Executive Officer Embu Teaching and Referral Hospital. Such a report certainly could not and should not have been used to override Dr. Wamwaki's opinion. Furthermore the dental officer (Beatrice Wanza Ndolo) clearly indicated that the 2nd appellant in her opinion was between 17& 18 years old on 11th September 2017. So looking at the date of the offence (10th November, 2016) even going by her opinion, it was highly unlikely that the 2nd Appellant was over 18 years of age at the material time. The finding by the learned trial magistrate was clearly not supported by the evidence other than the opinion of the probation officer Mr. Kurogat whose opinion was based on the reported fact that the 2nd appellant had fathered a child and was married. I have seen the report of another probation officer called Mr. Thaimuta E.G signed on 20th July, 2017 indicating that the 2nd Appellant was reportedly aged 17 years old which against seems to counter the opinion of Mr. Kurogat the other probation officer. So this clearly shows that it was totally unsafe for the learned trial magistrate to rely on Mr. Kurogat's report because he was not an expert and his report regarding age is contradicted by Mr. Thaimuta. The trial magistrate in my view erred in concluding that the 2nd appellant was an adult when he was a minor.

23. The trial court should have upon establishing that the 2nd Appellant was a minor dealt with him in accordance with the provisions of **Section 191 (1**) of the **Children's Act**. It was erroneous to jail the 2nd appellant to 40 years imprisonment because the same was contrary to the provisions of Section **190 (1)** of the **Children's Act** which outlaws imprisonment of children or persons under 18 years of age as defined under **Section 2** of the **Children's Act.**

24. In view of the foregoing this court finds this appeal partly has merit only to the extent of sentence. As I have observed above, I do find that the evidence tendered by the prosecution was sufficient to sustain a conviction against the 1st Appellant and pursuant to the provisions of **Section 189** a reference against the 2nd appellant as the law precludes the use of ***"conviction"*** and ***"sentence"*** when it is in respect of a minor. The conviction against the 2nd Appellant is therefore set aside and in its place I find him guilty of the offence charged and a reference under Section 189 of the Children Act is entered against him for the offence of gang rape contrary to Section 10 of Sexual Offences Act.

On sentence this court for the aforesaid reasons finds merit on the appeal and in respect to the 1st Appellant I set aside the 40 year jail term and in its place pursuant to **Section 10** of **Sexual Offences Act** enter jail term of 15 years. In respect to the 2nd Appellant again for the reasons advanced, I set aside the 40 year jail term and in its place pursuant to the provisions of **Section 191(1),** and further in view of the one year spent in jail, I hereby place him on probation for a period of 3 years and direct the children's officer nearest to his place of abode to strictly ensure that he complies to the directives given to him by the children's officer including and not limited to making perioding appearance to the Children's Officer. He shall henceforth be treated as child offender until he attains the age of 18 years.

Dated, signed and delivered at Chuka this 26th September, 2018.

R.K. LIMO

JUDGE

26/9/2018

Judgment dated, signed and delivered in the open court in the presence of the appellants in person and Mr. Machirah for State/Respondent.

R.K. LIMO

JUDGE

26/9/2018