REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 33 OF 2016

PATRICK MWANDOE MWANYALO…….. APPELLANT

VERSUS

REPUBLIC…..……...RESPONDENT

(From original conviction and sentence in Criminal Case Number 103 of 2015 in the Senior Resident Principal Magistrate's Court at Wundanyi delivered by Hon G.M. Gitonga (RM) on 8th April 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Patrick Mwandoe Mwanyalo, was charged jointly with Ferdinand Munyere (hereinafter referred to as " the Appellant's Co-Accused") with two (2) Counts. Count I was in respect of the offence of rape contrary to Section 10 of the Sexual Offences Act No 3 of 2006 with the alternative charge being that of committing an indecent act with an adult contrary to Section 11(A) of the same Act. Count II related to a charge of malicious damage to property contrary to Section 339 (1) of the Penal Code Cap 63 (Laws of Kenya). During trial, the Appellant herein was the 1st Accused person while his Co-Accused was the 2nd Accused person therein.

2. Having convicted the Appellant and his Co-Accused on Count I and sentenced them to life imprisonment, the Learned Trial Magistrate, Hon G.M. Gitonga (RM), made no finding in respect of the alternative charge. Notably, he convicted both of them on Count II but he did not specify the penalty that he meted on them.

COUNT I

"On the 20th day of March 2015 at about 12.15 am within Taita Taveta County in association intentionally and unlawfully caused your penis to penetrate the vagina of L M M."

ALTERNATIVE CHARGE

"On the 20th day of March 2015 within Taita Taveta County in association intentionally touched the vagina of L M M."

COUNT II

"On the 20th day of March 2015 within Taita Taveta County acting jointly (sic) **willfully and**

unlawfully destroyed the dwelling house of L M M by breaking part of the wall using a wooden stick."

3. Being dissatisfied with the Judgment of the Trial Court, on 29th June 2016, the Appellant filed a Notice of Motion application seeking leave to file an appeal out of time. The said application was allowed and the Petition of Appeal was deemed to have been duly filed and served. The Grounds of Appeal were as follows:-

1. THAT the learned trial magistrate imposed on him a life sentence on 8th April 2016 without putting him into consideration of the question he asked pw 2 during his cross-examination(sic)**.**

2. THAT the learned trial magistrate erred in law and fact by convicting him without weighing the prosecution side and the defence side.

3. THAT the learned trial magistrate did not allow him to impose question (sic) **to pw 2 which would determine if he was known to him or not.**

4. He filed Written Submissions and Amended Grounds of Appeal on 5th October 2016. On 22nd November 2016, he filed Further Written Submissions in response to the State's Written Submissions that were dated and filed on 8th November 2016.

5. The Amended Grounds of Appeal were as follows:-

1. THAT the learned trial magistrate erred in both law and facts, when he fully relied on incredible evidence adduced by the prosecutions (sic) **witness yet he failed to find that the same could be safely impeached under Section 163(1)(c) of the Evidence Act Cap 80 Laws of Kenya.**

2. THAT the learned trial magistrate erred in law and facts when he failed to find that the provisions of Section 2(1)(6) (sic)**of the Sexual Offences Act No 3 of 2006 were not adhered to as required by the law.**

3. THAT the pundit trial magistrate erred in law and facts by failing to consider no tangible evidence was found/presented to the court linking him to the commission of a sexual act with the complainant.

4. THAT the pundit trial magistrate erred in both law and facts by failing to consider the prosecution failed to prove their case beyond reasonable doubt as required by the law.

5. THAT the learned trail magistrate erred in law and facts by failing to consider that the circumstance (sic) **was not conducive for a positive identification.**

6. THAT the learned trial magistrate erred in law and facts by failing to consider that his conviction was against the weight of the evidence.

7. THAT the learned trial magistrate erred on law and facts by failing to consider that the sentence against him was excessive in the circumstances of the case before the pundit trial magistrate (sic)**.**

6. When the matter came up on 20th December 2016, both the Appellant and counsel for the State indicated that they would rely on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> "**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

8. The issues this court identified for its determination were:-

> **a. Whether or not the Prosecution proved its case against the Appellant herein beyond reasonable doubt; and**
>
> **b. Whether or not the sentence that was meted upon the Appellant herein was excessive in the circumstances of the case.**

9. The said issues were dealt with under the heads shown hereinbelow.

1. PROOF OF THE PROSECUTION CASE

10. Amended Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) were dealt with together as they were related.

11. The Appellant argued that it was not possible for him and his Co-Accused to have both raped Complainant, L M M (hereinafter referred to as 'PW 3") at 12.15 am on the material date and that the Charge Sheet should have indicated different times of the commission of the said offence. He contended that left as it was, it meant that they both penetrated PW 3 at the same time, which he said was not humanly possible.

12. He also argued that the lighting conditions were not conducive for his identification as the alleged incident was said to have occurred at night as a result of which PW 3's evidence as to who raped her could not have been free from errors. He further argued that PW 3's assertion that she recognised and identified him from his voice as she knew him well was insufficient to have positively identified him because people could have similar voices. He was emphatic that his identification was impaired by the darkness prevailing at 12.15am.

13. He submitted that it was necessary that there had to be adequate light to exclude the possibility of mistaken identity. He referred the court to the cases of **Turnbull (1975) 3 ALL ER** and **Abdalla Bin Wendo vs Republic (1953) E.A. CA 166** in this regard.

14. It was his further submission that the evidence of PW3 and that of her son, J K (hereinafter referred to as PW 2"), who did not witness the sexual act, was at variance sufficient to be impeached under the provisions of Section 163 (1) (c) of the Evidence Act that provide that:-

> **"The credit of a witness may be impeached in the following ways, by adverse party or with the consent of the court by the party who calls him. (sic) by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted."**

15. He pointed out that PW 2 testified that, using PW 3's phone light, he saw his Co-Accused enter their house and lay on PW 3 although he did not see what he did to her and that he, the Appellant, went behind the house and started demolishing the house whereafter he came and started pulling PW 3 from their house.

16. He contended that this contradicted PW 3's evidence who told the Trial Court that it is he who started

pushing the door which was bolted after which he went to back of the house with his Co-Accused and they started demolishing it. He added that her evidence was that he removed a knife which he used to threaten her, wore a condom, removed his trousers to the knee level, removed her pants and then had sex with her.

17. It was his averment that if his Co-Accused was raping PW 3 as had been contended by PW 2 and that PW 2 was holding PW 3's phone at the material time, it then meant that PW 3 could not have known exactly what he was doing behind the house and say with certainty who demolished her house. He suggested that there could very well have been another person who demolished her house.

18. He further pointed out that there was variance in PW 2's and PW 3's evidence regarding who had sex with PW 3 which contradiction made it difficult to know who between the two (2) was speaking the truth. He suggested that because his Co-Accused was arrested in PW 3's house and PW 2 had in fact testified that he had seen his Co-Accused lay on PW 3, then it could only have been inferred that the condom that was found in PW 3's house and the spermatozoatherein belonged to his Co-Accused.

19. He submitted the Prosecution failed to adduce water tight evidence to link him to the sexual act as no DNA analysis done to establish if the spermatozoa that were found in the said condom belonged to him despite such testing being provided for in Section 36 of the Sexual Offences Act.

20. He stated that it was not possible for Regina Mghoi (hereinafter referred to as "PW 7") to have seen the spermatozoa in PW 3's vagina if a condom had been used in committing the rape and that it was difficult for a woman who had given birth to get a tear during sex while using a condom because it had its own lubrication.

21. He added that the Learned Trial Magistrate was enjoined to state in his proceedings why he believed PW 3 in line with the Proviso of Section 124 of the Evidence Act but he did not do so. His contention was that his conviction was against the weight of evidence that had been adduced by the Prosecution witnesses.

22. He referred this court to the case of **Oketh Okale vs Republic (1965) E.A. CA 555 on page 557** in which it was held that the appellate court erred when it failed to re-analyse and re-evaluate the evidence that had been adduced in the trial court, that a conviction should only be based on the weight of the evidence adduced in court and that it was dangerous for a court to use a theory of his own canvassed evidence.

23. He argued that it was difficult to say from the evidence that was adduced by the Prosecution witnesses if he had common intention with his Co-Accused to commit the rape and added that he had only gone to PW 3's house to borrow a torch due to elephants but he left when he realised that she was not going to help him.

24. On its part, the State submitted that the Appellant was properly identified by both PW 2 and PW 3 as the incident took place for about forty (40) minutes and there was sufficient light from the torch he was holding to have enabled PW 3 recognise her perpetrators. In addition, she stated that the Appellant was known to her as his mother was her neighbour.

25. It stated that although PW 2 did not witness PW 3 being raped by the Appellant herein, PW 2's evidence was clear that the Appellant was present on the material night. It was categorical that it was the Appellant who had sex with PW 3 and that the rape took place in a different room from the one that PW 2 and his sister were asleep on that material night.

26. It submitted that Section 3 of the Sexual Offences Act established the following ingredients:-

> **a. The accused intentionally and unlawfully commits an act which causes penetration into the victim's genital organs;**

b. The other person does not consent to the penetration; and

c. The consent is obtained by force or by means of threat or intimidation of any kind.

27. It argued that in a case of gang rape, all persons need not rape a victim because one could assist the other by pinning down the said victim. It referred this court to the definition of "gang" in the Black Law Dictionary which is **"a group of person or persons who go about together on an act in concert especially for antisocial criminal activities."**

28. It was its submission that it was clear that PW 3 did not consent to having sex with the Appellant and his Co-Accused as the same was done through intimidation and threats. It placed reliance on Section 42 of the Sexual Offences Act that provides:-

"for the purposes of this act a person consents if he or she agrees by choice and has the freedom and capacity to make that decision."

29. It also pointed out that the medical examination that was conducted on PW 3 by Restituta Mghoi (hereinafter referred to as "PW 7") showed that PW 3 had a vaginal tear noted at 6.00 o'clock, bloody discharge and traces of spermatozoa in her vagina. She also noted that PW 3's under pant was torn.

30. It was therefore its argument that PW 3's evidence was credible in line with the Proviso of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) that provides as follows:-

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

31. It also submitted that although PW 2 adduced unsworn evidence, he was a credible witness and his evidence had no defects for the reason that the Learned Trial Magistrate conducted a proper *voire dire* enquiry as provided in Section 19 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya).

32. It pointed out although Section 42 of the Sexual Offences Act empowered the Learned Trial Magistrate to sentence the Appellant to life imprisonment, it was conceding to the said sentence being reduced.

33. The said Section stipulates as follows:-

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

34. In respect of Count II, it stated that the same was proven by PW 3's evidence that the Appellant and his Co-Accused demolished part of the wall of her house, evidence it said was corroborated by PW 2, No 9093081 PC Shem Asher (hereinafter referred to as "PW 8") who tendered in evidence photographs of the said house showing a hole in the back wall, PW 6 who visited the house and confirmed that a wall of PW 3's house had been demolished.

35. It contended that although the Learned Trial Magistrate convicted the Appellant and his Co-Accused on Count II and erred in not elaborating the sentence they were to serve in respect of that Count, the Appellant was nonetheless guilty on both Counts.

36. It therefore urged this court to dismiss the Appellant's Appeal as it had no merit having proven its case beyond reasonable doubt.

37. Whilst this court noted the State's submissions regarding the Appellant's identification, it opted not to spend too much time on the same as perusal of the proceedings in the Trial Court showed that the Appellant did not deny having been in PW 3's house on the material date.

38. The gist of his appeal, however, was that he did not commit the alleged offence and that if the same was committed, then it could only have been committed by his Co-Accused who was found locked in PW 3's house.

39. According to PW 3, the Appellant and his Co-Accused forced themselves in her house after demolishing part of the wall and pushing the door open. She stated that the Appellant raped her as his Co-Accused held a torch. It was her testimony that the Appellant raped her and left his Co-Accused to continue.

40. During her Cross-examination by the Appellant herein, she stated that he wore his condom as she was lying on the floor and he had a knife. When Cross-examined by the Trial Court, she stated that the whole ordeal took place from 12.50 am to 1.30 pm when he left.

41. Jane Lagho Mwandoe (hereinafter referred to as "PW 4") stated that she went to PW 3's house in the company of twenty (20) other people after PW 3 alerted her about what had happened. She said she found a used condom in PW 3's house. She also found the Appellant's Co-Accused, whom she did not recognise,lying in PW 3's house.

42. Samuel Mwasaru (hereinafter referred to as "PW 5") confirmed that he was part of the group that arrested the Appellant while he was drinking bangara, an illicit brew. He said that he visited PW 3's house and saw that part of the wall had been demolished, a fact that was also confirmed by PW 8. In her Cross-examination, PW 7 stated that the Appellant was not brought to hospital for medical examination.

43. Notably, PW 2's evidence regarding the role the Appellant and his Co-Accused played during the alleged incident contradicted that of PW 3. PW 2 said that the Appellant's Co-Accused removed his trouser, held and lay on PW 3and that she locked him in their house. He did not mention anything the Appellant threatening PW 3 with a knife. His evidence was that the Appellant herein came from behind their house and started pulling PW 3 from her house but he never entered their house.

44. On her part, PW 3 stated that the Appellant's Co-Accused did not rape her but he touched her breasts and body and that it was the Appellant who had removed his trousers until his knees and had sex with her. She was clear that it was the Appellant's Co-Accused who was left outside the house. She never mentioned anything about the Appellant's Co-Accused having laid on her.

45. M W M (hereinafter referred to as "PW 1")corroborated PW 3's evidence that she was raped by the Appellant herein, who she knew well as he came from Maunguand that PW 3 had locked the Appellant's Co-Accused in her house.

46. This court was left confused as to where the Appellant's Co-Accused collected the said condom from that No 70931 Corporal Fredrick Onyiego (hereinafter referred to as "PW 6") said he collected from PW 3's house. Her evidence was that the Appellant dropped the Trust Condom he had used when he had sex. There was no evidence that was adduced to show that there was sufficient lighting for the Appellant's Co-Accused to have known where the Appellant had dropped the used condom.

47. In view of the inconsistencies in the evidence by PW 2, PW 3 and the Appellant herein, this court was completely unable to decipher exactly what transpired on that material night. This court therefore analysed PW 7's evidence with a view to making sense of the alleged incident.

48. According to PW 7, when she examined PW 3, she noted that her pant had blood stains, her hymen was torn with a tear on the vaginal wall on the mid lower part, there was a bloody discharge from her vagina, she had injuries to her hand and there was evidence of spermatozoa after a high vaginal swab was done. It was reasonable to expect that PW 3's hymen was broken because she already had two (2)

children, a fact that PW 7 alluded to.

49. This court noted PW 7's assertions that it was not easy to distinguish between spotting that was ordinary and that which had been caused by an injury making it difficult to conclude authoritatively that the bloody discharge was a result of the alleged rape.

50. While this court noted that there was a tear at 6.00 o'clock, the Prosecution did not lead evidence to advance a logical scientific explanation to demonstrate how spermatozoa were found in PW 3's vagina after a condom had been used. If as PW 3 stated the Appellant raped her while wearing a condom and that his Co-Accused did not rape her, this court was baffled as to where the spermatozoa in her vagina came from.

51. Notably, neither she nor PW 6 nor PW 7 mentioned the said condom to have had any tears that would have allowed spermatozoa to flow high into her vagina. Even so, this court was at a loss why DNA testing on the spermatozoa was not done as the Appellant, who PW 3 said had raped her, was known to her and was in fact arrested the following day. This could either have linked the Appellant herein to the sexual act with PW 3 or exonerated him.

52. Going further, this court was unsure of what to make of PW 3's evidence that after she locked the Appellant's Co-Accused in her house, she went and reported the matter to the Village Elder who alerted other neighbours. In her Re-examination, she said that she never left her house. She had stated as follows:-

> **"…2nd accused was arrested by members of the public and taken to Mwakitau Police Post. He was arrested in my house, I had not left my house."**

53. There was further contradiction in PW 3's and PW 1's evidence.PW 1 said that PW 3 went to her house with her two (2) children at about 2.30 am and told her that the Appellant had raped her and that she had locked a suspect in her house. However, neither PW 2 nor PW 3 said anything about them going to PW 1's house at 2.30 am. In fact, PW 2 stated that after the Appellant, PW 3 locked the Appellant's Co-Accused in their house and they went to report the matter to his grandmother.

54. If they had indeed gone to PW 1's house as PW 1 had contended, nothing would have been easier than for PW 2 to have told the Trial Court as much as much was that was not a piece of evidence he could have forgotten. If he could remember going to his grandmother's place, then he could also have recalled to PW 1's house as it was in the dead of the night.

55. PW 3's evidence that the Appellant's Co-Accused herein was arrested at 3.30am also concerned this court. This is because she said that her ordeal started at 12.15 am and ended at 1.30 am when the Appellant left. If as PW 3 stated the Appellant's Co-Accused was outside the house, why did she not run away as it was the Appellant who she had said had a knife and she had the opportunity of running away?

56. The other question was, why did she entice the Appellant's Co-Accused to get into her house when he was part of a gang that raped her? Why did she allow the Appellant's Co-Accused to sleep in her house for about two (2) hours? Why did help take so long to come? Since the house was mud walled, why did the Appellant's Co-Accused not continue demolishing the wall so as to escape as he had been locked in the house?

57. All these were pertinent issues that could have explained if really the Appellant's Co-Accused entered and slept in PW 3's as she had alleged. In the absence of credible answers to the said questions, serious doubts were created in the mind of this court.

58. Although PW 2 was a child who adduced unsworn evidence and broke down while testifying, this court was not persuaded to overlook the evidence of who raped PW 3. His testimony that it was the Appellant herein who had laid on PW 3 and he was able to set him apart from his Co-Accused when he testified dissuaded this court from ignoring the contradictions in his evidence.

59. Appreciably, PW 3's explanation that she was trying to sweet talk the Appellant's Co-Accused so that he could not rape her did not sound plausible to this court. Indeed, though possible but not probable, it was difficult for this court to comprehend how PW 3 could negotiate with a person who was part of a gang that had just raped her.

60. The Appellant's Co-Accused would by all standards have been a dangerous person. A prudent or reasonable person would not have been expected to invite such a dangerous person in the precincts of her home and put herself in a precarious situation.

61. Appreciably, the State rightly pointed out that a trial court can convict a person based on a victim's uncorroborated evidence as outlined in the Proviso of Section 124 of the Evidence Act, the inconsistencies and gaps in and PW 2's and PW 3's evidence led this court to conclude that there was more than met the eye in this case.

62. It is not in doubt that during trial, witness accounts differ. However, the variation of their testimony ought not to be so wide or divergent so as to lead a court to question whether an alleged incident occurred in the manner it has been described. Although the Appellant's evidence was unsworn and had very little probative value, the legal burden lay on the Prosecution to present a cogent and believable case. It was not for the Appellant to fill gaps in its case.

63. In the case of **Erick Onyango Ondeng' v Republic [2014] eKLR**, the Court of addressed its mind to the resultant effect of inconsistencies in the evidence that is adduced by the prosecution and stated as follows:-

> "…**As noted by the Uganda Court of Appealin *TWEHANGANE ALFRED VS UGANDA*, *Crim. App. No 139 of 2001, [2003] UGCA, 6*** it is not very contradiction that warrants rejection of evidence. As the court put it:
>
> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

64. In this case, having analysed the evidence that was adduced in the Trial Court, the Written Submissions by the respective parties and the case law that was relied upon, this court came to the conclusion that the contradictions, inconsistencies and gaps by PW1's, PW 2's, PW 3 and PW 7's evidence were so irreconcilable to have been sufficient to lead it to conclude that the Prosecution did not furnish sufficient evidence to the required standard, that of, proof beyond reasonable doubt, to prove the charge of gang rape against the Appellant herein. It also failed to take advantage of scientific evidence that could have linked the Appellant herein.

65. Indeed, this is a court of evidence and one that does not and must not determine a matter on presumptions or mere suspicions or innuendos.

66. As regards Count II, this court noted that PW 2's account was different from that of PW 3. In his evidence, he stated that the Appellant went behind the house and started demolishing the house. On her part, PW 3 stated that the Appellant and her Co-Accused demolished the wall to her house before they pushed their way through the door.

67. From her evidence, she identified the Appellant as the person who started knocking and pushing the door. Her contentions that "they" then went to the back of the house, started demolishing the house and then came to the door and pushed it again failed to demonstrate how she knew it was both the Appellant and his Co-Accused who were demolishing the wall. It was a dark night with no proper lighting at the material time.

68. Notably, as this was a case for malicious damage against two (2) persons, the Prosecution was expected to adduce evidence that would have supported its case to demonstrate that indeed PW 3 saw both the Appellant and his Co-Accused demolishing her house and that it was not only one of them who did it. It would be a travesty of justice to punish two (2) persons for the offence when the same had been committed by one person more so as the Prosecution had not demonstrated that there was common intention by both the Appellant and his Co-Accused to demolish PW 3's house at the material time.

69. It was therefore the view of this court that the Prosecution failed also to sufficiently demonstrate that the Appellant maliciously damaged PW 3's house.

70. In this respect, this court found merit in Amended Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) in the Appellant's Petition of Appeal and the same are hereby upheld.

II <u>SENTENCE</u>

71. Having found the aforesaid grounds in the Appellant's Amended Grounds of Appeal to have succeeded, there would have been no need to address Amended Ground of Appeal No 7herein as the same was now spent. However, this court nonetheless thought it necessary to address itself on the sentencing of the Appellant herein.

72. It found and held that the Learned Trial Magistrate erred by not pronouncing himself on the sentence the Appellant was to serve after he convicted him of the offence of malicious damage to property, a fact that was correctly pointed out by the State.

73. This court also noted that the sentence for the charge of gang rape was manifestly excessive. This is not to make light of the offence of rape. It is a serious offence. This is because it leaves a victim completely traumatised for life and completely violates and annihilates the victim as the sexual act is committed without such victim's consent. It is committed through intimidation, threats and instilling fear in the victim by force of any kind that places a victim in a helpless situation and thus submit to the act being committed without his or her consent.

74. The seriousness with which the offence is taken is well captured by the length of the sentence that has been prescribed under Section 42 of the Sexual Offences Act which is that, if a person is convicted, he or she is liable to imprisonment for a term of not less that fifteen years and that the same may be enhanced to life imprisonment.

75. Appreciably, the prescribed penalty gives both a minimum and maximum sentence. The flexibility of the sentence that can be meted on a convicted person is intended to give a trial court the opportunity to consider any aggravating circumstances that may exist in a particular case and decide on the most appropriate sentence.

76. Aggravating circumstances could include the threat of use of force by a weapon, actual use of the weapon, the type of weapon, nature or type of injury caused, the resultant effect of the injury, whether the injury was physical or psychological amongst other factors. This increases the culpability of the severity of the offence that is committed.

77. It was therefore the view of this court that against the backdrop that aggravating factors can range from minor to severe, the Learned Trial Magistrate herein could have perhaps analysed the circumstances including the fact that there was a knife but the same was not used. This court formed the opinion that the Learned Trial Magistrate appeared to have based his consideration of what constituted the aggravating circumstances herein on the effect the ordeal purportedly had on PW 3's children as opposed to the effect it had on PW 3. He rendered himself as follows:-

> **"As if this was not enough, the accused raped the complainant in the full glare of the children. This was traumatizing and greatly affected the children. I remember when the complainant's child testified as PW 2, he broke down in tears. In my view all these are aggravating**

circumstances”

78. Appreciably, as can be seen hereinabove, aggravating circumstances are personal to the victim and not to third parties who may have witnessed a crime which in this case was the alleged devious act of rape. If this court would have found the Appellant herein to have been guilty of the offence of gang rape and bearing in mind the range of aggravating circumstances that are likely to exist during the commission of an offence, it would have acceded to the State’s submission to reduce the sentence of life imprisonment that was meted upon him.Indeed, the sentence of life imprisonment appeared to have been manifestly excessive in the circumstances of the case sufficient to have warranted this court to interfere with the said Learned Trial Magistrate’s finding.

79. However, as this court found the Appellant’s Amended Grounds of Appeal to have succeeded for the reason that the Prosecution did not prove its case to the required standard, it did not find it necessary to delve into the details of the actual sentence it would have meted out to him as this would have amounted to a purely academic exercise.

DISPOSITION

80. The upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 29thJuly 2016 was merited and the same is hereby allowed.

81. The evidence that was presented in the Trial Court created doubt in the mind of this court leading it to quash the conviction and set aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. This court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

82. It is so ordered.

DATED and DELIVERED at VOI this 28THday of FEBRUARY 2017

J. KAMAU

JUDGE

In the presence of:-

Patrick Mwandoe Mwanyalo...Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk