REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEALS NO. 48 AND 47 OF 2013

STEPHEN MUTUKU MAKAU……1ST APPELLANT

MUTINDA MAINGI……2ND APPELLANT

VERSUS

REPUBLIC ……..……..…….RESPONDENT

(***Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 1393 of 2012 delivered by Hon. T. Okello on 28th February, 2013).***

JUDGMENT

Background.

Stephen Mutuku Makau and Mutinda Maingi, the 1st and 2nd Appellants respectively, were jointly charged in criminal case 1393 of 2012 with gang rape contrary to Section 10 of the Sexual Offences Act No. 6 of 2007. The first count was against Stephen Mutuku Makau and it was alleged that between 5th and 6th March, 2012 at Njiru District within Nairobi Area Province, in association with the 2nd Appellant caused his penis to penetrate the vagina of FNW, a child aged 15 years. In the alternative he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2007 in that he intentionally touched the vagina of FNW, a child aged 15 years.

The second count was against the 2nd Appellant and it was alleged that between 5th and 6th March, 2012 at Njiru District within Nairobi Area province, the 2nd Appellant, in association with the 1st Appellant, intentionally caused his penis to penetrate the vagina of FNW, a child aged 15 years. In the alternative he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2007 by intentionally touching the vagina of FNW, a child aged 15 years.

Both appellants were found guilty in the main counts, convicted and sentenced to imprisonment of 15 years. They were however dissatisfied with that court's decision and have preferred the current appeal.

Grounds of Appeal.

The 1st Appellant filed supplementary grounds of Appeal dated 8th December, 2016. Firstly, he faulted the charge sheet as defective in that it was based on a non-existent provision of the Sexual Offences Act. Secondly, that his fundamental rights to a fair and impartial trial as enshrined in the Constitution were

infringed as the medical evidence was obtained in violation of Article 50(2) of the Constitution. Thirdly, that the plea taken was a nullity given that it was based on a non-existent offence. Finally, that the burden of proof was not discharged.

The 2nd Appellant also filed supplementary grounds of appeal dated 8th December, 2016. He was dissatisfied that the evidence of the complainant was not taken in accordance with the provisions of Section 31 of the Sexual Offences Act. Secondly, that the learned trial magistrate erred when he convicted the Appellant based on uncorroborated medical evidence. Finally, that the learned trial magistrate erred in failing to accord him a fair trial.

Submissions.

Each Appellant relied on filed written submissions. The 1st Appellant submitted that the offence of gang rape is provided for under Section 10 of the Sexual Offences Act No. 3 of 2006 and not of 2007. He submitted that this was a substantial defect that was not curable by Section 382 of the Criminal Procedure Code. He relied on ***Nyamai Musyoka v. Republic, Criminal Appeal No. 213 of 2009*** *to buttress the point. He submitted that the defect infringed on his right to a free and impartial trial and thus affected his ability to defend himself. He relied on* ***Ramadhan Ahmed v. Reginum[1955] 22 EACA 395*** *and* ***John Karana Wainaina v. Republic, Criminal Appeal No.61 of 1993*** *to buttress the point.*

On medical evidence, he submitted that the P3 Form was produced by the investigating officer who was not its maker. He submitted that he failed to object to its production because, being a lay person, he did not understand how the court worked. Accordingly, the production of the exhibit contravened Sections 33 and 77 of the Evidence Act. He also cited the case of ***Daniel Makokha Ogutu v. Republic, Kisumu Court of Appeal Criminal Appeal No. 155 of 2011.****Finally, he submitted that the case had not been proved beyond a reasonable doubt and urged that the appeal be allowed.*

The 2nd submitted that his right to a fair trial as enshrined in the Constitution was violated by allowing the complainant to testify through an intermediary. He also urged the court to look at the two medical reports which were produced and find that they were contradictory. As such, the medical evidence could not be relied on to corroborate the testimony of the complainant.

Learned State Counsel, Ms. Sigei opposed the appeal. She submitted that all the ingredients of the offence charged were proved, namely; penetration, that the assailant was in association with another or others and, finally, identification of the Appellants. She submitted that Section 31 of the Sexual Offences Act was properly applied as the prosecution demonstrated that the complainant (PW2) was a vulnerable witness and owing to her disability had to testify through an intermediary. Furthermore, her evidence was corroborated by the medical evidence and so the conviction was safe. She submitted that there was nothing unusual with PW5 producing the P3 Form as she is the one who had issued it. She urged the court to find that the case was proved beyond a reasonable doubt and dismiss the respective appeals.

Determination.

I have considered the respective rival submissions and deduced that the following issues arise for determination:

1. *Whether the charge sheet was defective*

2. *Whether section 31 of the Sexual Offences Act was properly applied*

3. *Whether the case was proved beyond reasonable doubt*

The issue of defective charge sheet was raised by the 1st Appellant. He submitted that the same was fatally defective as it did not disclose an offence known in law. This was because the offence set out in the charge sheet was ***"Gang Rape Contrary to Section 10 of the Sexual Offences Act No. 3 of 2007****" which*

is a non-existent offence given that there is no statute known as ***"Sexual Offences Act No. 3 of 2007".*** *I concur with this submission but in my view find that the error may have been typographical. It relates to want of form and does not substantively affect the substance of the charge. It is therefore curable under Section 382 of the Criminal Procedure Code.*

The next issue is on the application of Section 31 of the Sexual Offences Act. The Appellants contend that it was misapplied in this case given that they were not allowed to cross examine the vulnerable witness and further that the court relied on uncorroborated evidence of the intermediary to convict them.

The entire Section 31 of the Act deals with vulnerable witnesses. It is important to restate it in this judgment so that the Appellants understand its applicability. The same provides as under;

> ***31.****(1)* ***A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is -***
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> > ***a. the alleged victim in the proceedings pending before the court;***
> >
> > ***b. a child; or***
> >
> > ***c. a person with mental disabilities.***
>
> ***(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of -***
>
> > ***(a) age;***
> >
> > ***(b) intellectual, psychological or physical impairment;***
> >
> > ***(c) trauma;***
> >
> > ***(d) cultural differences;***
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> > ***(e) the possibility of intimidation;***
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> > ***(f) race;***
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> > ***(g) religion;***
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> > ***(h) language;***
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> > ***(i) the relationship of the witness to any party to the proceedings;***
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> > ***(j) the nature of the subject matter of the evidence; or***
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> > ***(k) any other factor the court considers relevant.***
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> ***(3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.***
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> ***(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -***

(a) allowing such witness to give evidence under the protective cover of a witness protection box;

(b) directing that the witness shall give evidence through an intermediary;

(c) directing that the proceedings may not take place in open court;

(d) prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or

(e) any other measure which the court deems just and appropriate.

(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

(6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.

(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may -

(a) convey the general purport of any question to the relevant witness;

(b) inform the court at any time that the witness is fatigued or stressed; and

(c) request the court for a recess.

(8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including -

a. any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;

b. any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;

c. the need to protect the witness's dignity and safety and protect the witness from trauma; and

d. the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(9) The court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefore at the time of the revocation or variation.

(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

(11) Any person, including a juristic person, who publishes any information in contravention of

this section or contrary to any direction or authority under this section or who in any manner whatsoever reveals the identity of a witness in contravention of a direction under this section, is guilty of an offence and liable on conviction to imprisonment for a term of not less than three years or to a fine of not less than fifty thousand shillings or to both if the person in respect of whom the publication or revelation of identity was done is under the age of eighteen years and in any other case to imprisonment for a term of not less three years or to a fine of not less than two hundred thousand shillings or to both.

(12) Any juristic person convicted of any offence under this section shall be liable to a fine of one million shillings.

(13) An accused person in criminal proceedings involving the allegedcommission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness by stating the questions to the court and the court shall repeat the questions accurately to the witness

Before a trial court declares a witness as vulnerable, it must satisfy itself as to the conditions set under sub sections (1) and (2) of the Act. In this case, when PW2, the complainant herein was called to adduce evidence, the prosecutor informed the court that the witness had a hearing problem and was mentally retarded. He made a prayer that she be treated as a vulnerable witness pursuant to Section 1 of the Act. He then showed the court a report dated 13th June, 2013. The court accordingly made an order as follows:

"the witness is a vulnerable witness. The matter shall proceed in camera. The court has also observed that she is using hearing aid.''

During the hearing in camera, the court proceeded with the voire dire examination. Only two questions were put to her; namely, when she was born to which she could not answer and which school she attended to which she answered she did not know. Pursuant thereof, the prosecutor informed the court that the witness could testify using an intermediary who was her father and also a witness. The Appellants had no objection. The court then made the following order :

"since the intended intermediary is a witness, he shall give evidence first before helping the court in communicating with the complainant".

Proceedings do show that PW1 was JWW who was the father of PW2. It is unfortunate to note that the trial did not hide the identity of PW2 as expected pursuant to sub section (4). For purposes of this judgment I will name her as F.N.W. Before her testimony was taken, the court noted that she was to be heard with the help of her father PW1 and further that she was to give an unsworn evidence. Under Sub-section (1) (a), (b) and (c) of the Act, the categories of witnesses who are vulnerable is given as: the alleged victim in the proceedings pending before the court, a child or a person with mental disabilities. Under Sub-section (2) the court is conferred with powers to declare any other witness other than the accused a vulnerable witness if in the opinion of the court on account of age, intellectual, psychological or physical impairment or trauma, cultural differences, the possibility of intimidation, race, religion, language, the relation of the witness to any party to the proceedings, the nature of the subject matter of the evidence or any other factor the court considers relevant, the witness is vulnerable.

In the present case, PW2 was declared a vulnerable witness on account of her mental and hearing disabilities. Although the court did not note the content of the report that was tendered by the prosecutor demonstrating her disability, in the original record is a letter dated 13th June, 2012 from Kenyatta National Hospital giving a report on PW2's mental status. It is noteworthy that this report must have been made for purposes of the trial proceedings because the plea was taken on 13th March, 2012. However, it clearly shows that the child had a history of mental and hearing disability, and there was therefore nothing wrong with requesting for the report for purposes of the trial proceedings. It was signed by a Dr. I. Kanyama, a Consultant Psychiatrist at the Hospital who indicated that PW2 was a child known to suffer from mental retardation and hearing speech deficit. It also indicated that she

attended [Particulars Withheld] *Primary School, Special Unit since 2006. The report further gives a detailed account of what PW1 informed the doctor had happened to her on 5th March, 2012 at about 7.30 pm. The witness was obviously referring to the defilement case.*

Back to Section 31, once the court deems a witness as vulnerable and finds that his or her evidence will be adduced through an intermediary, certain parameters must be met. The same are clearly spelt out under Subsection (7) thus:

> *(7)* ***If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may -***
>
> ***(a) convey the general purport of any question to the relevant witness;***
>
> ***(b) inform the court at any time that the witness is fatigued or stressed; and***
>
> **(c)** ***request the court for a recess.***

It is also worth noting that before a vulnerable witness testifies, certain protective measures as outlined under Sub-section (4) must be undertaken. In the instant case, the only protective measure that appears to have been taken was in relation to hearing the case in camera. It did not prohibit the publication of the identity of the complainant or the complainant's family which in the view of this court was extremely necessary. The court in so doing would have given regard to the circumstances of the case after interrogating PW1, the father to PW2 on the disposition of the witness pursuant to Subsection (8) of the Act. Under Sub-section (8) the court ought to have recorded the conversation between itself and PW1 which informed it to take any of the protective measures outlined under Sub-section (4).

Be that as it may, it is important to note that whatever evidence a vulnerable witness gives should be what the witness states though the intermediary. The court must take note of that. And where the witness cannot speak, the court should also note.

In my view, that is why under Subsection (10), a court shall not convict an accused person charged with an offence under the Act solely on the uncorroborated evidence of an intermediary. The Statute then places an exception to the proviso to Section 124 of the evidence Act to the effect that in sexual assault cases where the victim is a child, the court can convict solely on the uncorroborated evidence of the victim if it believes in it. Of course, the mischief intended to be cured by this provision is solely because where the intermediary turns to be the one who solely speaks for the victim, he may give his own evidence or view intended to secure a conviction against an accused. I deduce from the cross examination of PW2 that it was indeed PW2 who spoke the words recorded in her evidence in chief. This is attested by the fact that the court noted that she could not answer any questions that were raised in the cross examination. Since, pursuant to sub section (10) the evidence of PWI must be corroborated it behooves this court to reevaluate the entire evidence, as this court is legally mandated to, before arriving at its own independent conclusions.

Before doing so however, I must address the issue raised by the 2nd Appellant they were not accorded a fair trial because they were not allowed to cross examine PW2. It is clear on record that before she gave her testimony, the court conducted a voire dire examination and ruled that she did not have capacity to give a sworn statement. Although, this notwithstanding, the court allowed her cross examination, it is clear that due to her mental disability she was unable to answer any questions. As such, it was not possible to cross examine her. That ground of appeal fails.

PW2 *testified that she was on her way to school when both Appellants took her to their house. They then started suckling her breast and had sex with her in turns starting with the 1st Appellant. After defiling her, they left her behind after which she went home. They gave her a soda together with ugali and vegetables. Thereafter, she went to school and was also taken to hospital.*

PW1, *who was PW2's father testified that on 5th March, 2012 at around 7.00 pm, she was informed by her elder daughter that PW2 had left the house at 6.00 pm and had not returned by 7.30 pm. They looked for her but could not find her. At 9.00 p.m. they reported at Dandora Police Station. PW2 showed up the following morning when she informed her father that she had been with two bad boys who did something bad to her and touched her breast. She then led her father to the house of the Appellants which was about 200 meters away. Both Appellants were in the house. They informed PW1 that they had only accommodated PW2 overnight. PW1 informed some neighbours who helped in apprehending the Appellants. They were escorted to Dandora Chief's Office and thereafter to the Police Station. PW2 was in turn taken to Nairobi Women Hospital where she was treated.*

PW3, MW *was an elder sister to PW2. Her evidence was that she went home on the material date at about 5.30 p.m but did not find her younger sister PW2 at home. She informed her mother who was at home who in turn told her to look for her. They also informed PW1 about her missing sibling. Thereafter the matter was reported to the police Station. She entirely corroborated the evidence of PW1.*

PW4, Dr. Dennis Wambua *of Nairobi Womens Hospital examined PW2 on 6th March, 2012 on allegations of defilement by two men. There were visible injuries on her external genitalia which was also inflamed. She had vagina discharge and a freshly broken hymen. Other tests were negative and the doctor concluded that she had been sexually assaulted.*

PW5, PC Irene Kimotho *was the investigating officer in the case. She summed up the evidence of the witnesses. In addition, she took both Appellants for examination by a police doctor after which her P3 forms were filled. PW2 was also examined by a Police doctor and she produced her P3 form as Exhibit 3.*

After the close of the prosecution case, the trial court ruled that the prosecution had established a prima facie case warranting the Appellants to be put on their defence. Each of them gave an unsworn statement of defence. The 1st Appellant Stephen Mutuku Makau denied ever committing the offence. He stated that he was arrested when he went to the police Station to report that PW1 owed them some money. He stated if he knew he had defiled PW2 he would not have dared go to the Police Station.

The 2nd Appellant on the other hand also denied committing the offence. He stated that he worked at Gikomba on the material date until 8.00 pm. At about 9.30 pm, he arrived at Dandora and at the bus stage found some people standing who were accompanied by the complainant. At the time he was in the company of the 1st Appellant. PW2 touched the 1st Appellant by the shoulder. They proceeded to where they were going but PW2 followed them. They stopped at a shop to buy some item where PW2 found them. The shopkeeper said that he was an uncle to PW2. He went with the 1st Appellant to his house leaving PW2 at the shop. On the following day when they were leaving for job at Rwai, the shopkeeper informed them that PW2 had followed them after they left the shop. It is then that PW1 stated that they had defiled PW1. They were accordingly arrested and thereafter charged. The 2nd Appellant also confirmed that they were examined by a police doctor although they were not shown the results.

From the brief testimony of PW2, she did clearly state that she was taken by two men to their house as she walked from school. The two men had sex with her and also touched her breast. She was able not only to state where the two men lived but did in fact lead PW1 to the house of the two men which was about 200 meters from her home. The two men happened to be the two Appellants who were found in one house. She also clearly identified them in court during the trial. My view is that with PW1's disability, there was no reason shown why she would have implicated the Appellants. Her mind was clear that she followed two men and it was not therefore a coincident that two men, the Appellants, were found in the house she identified as the scene of crime.

Although both Appellants gave unsworn statements of defence, the 2nd Appellant did acknowledge having met PW2 on the fateful day. His departure from the prosecution's case was only that he and the 1st Appellant left PW2 at a shop in the night and it was only on the following day that it was said they defiled her. That evidence in as much as its authenticity could not be tested by crose-examination gave credence

to PW2's testimony that indeed the two Appellants walked with her the previous night. When PW1 went to the house of both Appellants on the following morning he found when they had not left for work. At that point, PW2 was able to identify them as the persons who had defiled her. In the circumstances, I have no doubt in my mind that the Appellants were positively identified as the persons who were with PW2.

On medical evidence, a medical examination at the Nairobi Women's Hospital was done on the following day 6th March, 2012. Vaginal examination showed inflamed external genitalia, vaginal discharge and a freshly broken hymen. This again demonstrated that the defilement had been committed within a short time before the examination. A report from the hospital was adduced by PW4, Dr. Dennis Wambua. It also concluded the presence of sexual assault. In addition, the P3 Form produced by PW5 in respect of PW2 did also show that PW2 had been defiled. Respectively, the prosecution proved beyond a reasonable doubt that sexual assault namely defilement had been meted against PW2.

I would, nonetheless wish to comment on the 2nd Appellant's submission that the medical evidence was unreliable because the P3 Form was produced by a incompetent person, the investigating officer. His argument was that it could only be produced by the maker, Dr. Kamau of police surgery. Back to the proceedings, both Appellants did not oppose the production of the P3 Form. Although generally expert documents should be produced by their makers, Section 77 of the Evidence Act allows any other person to adduce an expert document such as medical, analyst, document examiner's and geologist reports so long as the authenticity of the documents is not disputed. The Section provides as follows;

> ***77 (1) In criminal proceedings any document purporting to be report under the hand of a government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***
>
> ***(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.***
>
> ***(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.***

In the present case, the Appellants did not submit that the P3 Form was not genuine. They did not also put doubt to the signature of the maker. Therefore, in the absence of their objection, the said P3 Form was properly admitted as an exhibit.

With respect to the age of the complaint, PW1 the father exhibited a Birth Certificate EXB (1) which showed that PW1 was born on 7th January, 1997. Effectively, as at the time of defilement, she was 15 years old. The charge was therefore properly framed. I conclude then that the testimony of PW2 was sufficiently corroborated to warrant a conviction.

With regard to the sentence, under Section 10 of the Sexual Offences Act, any person who is found guilty of the offence of gang rape is liable to imprisonment for a term of not less than 15 years but which may be enhanced to life imprisonment. In the present case, the Appellants were each sentenced to 15 years imprisonment in the main counts which was the minimum sentence. Where the law does not set the minimum sentence, the trial court must exercise its discretion in sentencing. That discretion however, must be exercised judiciously. For instance, the sentence must be commensurate with the offence, facts of the case, circumstances of the commission of the offence and the moral blameworthiness of the offence. See the case ***of Omuse vs Republic 2009 KLR 2014*** *where the Court of Appeal in referring to* ***Ambani vs Republic [1990] KLR, 161*** *noted as follows:*

> ***"Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in***

sentencing for the court to have failed to look at the facts and circumstances of the case in their entirely before settling for any given sentence."

Although a sentence is intended to be a deterrent measure, in this case I think that the trial court failed to take into account the age of the complainant who was a child with both mental and hearing disabilities. The Appellants clearly took advantage of her circumstances to gang-rape her. It is a case that called for a more deterrent sentence. They both mitigated for leniency; the 1st Appellant pleading that he had a wife and children as well as parents whom he took care of. The 2nd Appellant stated that he took care of his cousins and his children as well as their parents. Since both Appellants had families they took care of, it called for more moral responsibility towards other children and the society at large. Their actions could not be forgiven. It is most unfortunate that the probation officers report which was called for by the trial court spoke so well of them, as law abiding citizens. However, that notwithstanding, the evidence on record overwhelmingly implicated them. Accordingly, I will enhance the sentence so that it serves as a warning to would-be-offenders.

In the result, this appeal fails and the same is dismissed, save that the Appellants' sentence is hereby enhanced to an 18-year jail term respectively for each of them. The period each of them was in custody of one year, fifteen days shall be deducted from the jail term. Each of them will therefore serve 16 years and eleven months. It is so ordered.

DATED AND DELIVERED THIS 28th DAY OF MARCH, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. 1st Appellant in person

2. 2nd Appellant in person

3. Miss Kimiri for the Respondent.