REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO.48 OF 2014

TITUS NGUGI……...…….APPELLANT

VERSUS

REPUBLIC ……..... RESPONDENT

(From the original conviction and sentence in Criminal Case No.763 of 2012 of the Senior Principal Magistrate's Court at Kandara by Hon. P. Nditika – Ag. Senior Principal Magistrate)

JUDGMENT

The appellant, **TITUS NGUGI,** was convicted of the offence of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of2006.

The particulars of the offence were that on diverse dates between 25th December 2012 and 27th December 2012 in Kandara District of Murang'a County, jointly in association with another inserted their penises into the anus of **S J W**.

He sentenced to 15 years imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised three grounds of appeal that can be summarized as follows:

1. That the trial learned magistrate erred in law and in fact by failing to appreciate that the prosecution case was riddled with contradictions.

2. That the trial learned magistrate erred in law and in fact by convicting him on evidence that was wanting.

The state conceded the appeal through M/s. Lydia Wang'ombe, the learned counsel.

Briefly the facts of the prosecution case are as follows:

The appellant was arrested after the complainant had alleged that he had sodomized him in company of another.

In his defence the appellant denied any involvement in the offence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA**

R W M (PW1) is a girl who was aged 11 years at the time she testified. This is certainly a child of tender years. Before proceeding to take her evidence, the court had a duty to conduct a voir dire to ascertain whether she understood the obligation of an oath and if she was found not to understand the same, there was a second step of investigating whether such a child was intelligent as to understand the duty of telling the truth. This examination must be recorded. In the case of ***JOHN WAMBUA MUTUNGA Vs. REPUBLIC [2005] eKLR*** *the court of appeal held:*

> ***"There are two steps to be borne in mind. The first step is for the court to ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child – witness appears in court. The investigation need not be a long one but it has to be done and has to be directed to the particular question whether the child understands the nature of an oath. If the answer to this question is in the affirmative, then, the court proceeds to swear or affirm the child and to take his or her evidence upon oath. On the other hand, if the child – witness does not understand the nature of an oath, he or she is not necessarily disqualified from giving evidence. The second step then follows. The court may still receive his evidence if the court is satisfied, upon investigation, that he is possessed of sufficient intelligence and understands the duty of speaking the truth. Again investigation in this respect need not be a long one but it must be done and when done, it must appear on record. Some basic but elementary questions may be asked of the child to assess the level of his intelligence and whether he understands the duty of speaking the truth or otherwise. Where the court is so satisfied, then, the court will proceed to record unsworn evidence from the child – witness"***

In the instant case this was not done. In the above cited case the failure to observe the said procedure resulted in the case being declared a mistrial.

The relevance of this girl's evidence was not demonstrated for she purported to have seen the appellant coming from the house of the complainant at 1 pm on 25th December 2012 whereas the complainant testified to have been sodomised at night at about 7 pm.

The prosecution witnesses contradicted each other as to where the knife was recovered. According to **R W M (PW1)** it was recovered in the house of the complainant (S). **Cpl. Julius Kamau (PW2) testified that it was recovered on the left pocket of the appellant**.

The evidence of **James Mburu Kimani (PW3)** is that he never saw the knife though he was present at all material time. **Ap. Sgt. Peter Kamau (PW4)** said it was recovered from the second accused who has since been acquitted. These witnesses cannot be trusted to tell the truth. The decision of the court of appeal in the case of **NDUNGU KIMANYI V REPUBLIC (1979) KLR 282** where the court stated:-

> **"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."**

is very relevant to the present case.

I have noted that the complainant testified through a dumb and deaf interpreter, Eunice Agunda (PW6). This is what he said:

> **"My names are S J. I stay with my grandmother. My village is called [particulars withheld]. I cannot be able to tell my years. between 22nd and 25th December 2012 at &pm somebody got hold of me. My trouser was removed. The people did insert their penis in my anus. The accused are before court."**

He said very little of evidential value compared to what was attributed to him by **James Mburu Kimani (PW3).**

The court ought to have complied with section 31 of the Sexual Offences Act and declare the complainant a vulnerable witness. After complying with the requirements of section 32 f the said Act, proceed to appoint an intermediary through whom he should have testified. Since the complainant was not deaf and dumb, it was unnecessary to have him testify through a deaf and dumb interpreter.

From the foregoing analysis I concur with the learned counsel as to the reasons she conceded the appeal. The appeal is therefore allowed. The conviction is quashed and the sentence set aside. Consequently, the appellant is set at liberty unless if otherwise lawfully held.

DATED at MURANG'A this 19th day of August 2016

KIARIE WAWERU KIARIE

JUDGE