

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL REVISION NO.109 OF 2016

BETWEEN

BEMASA BIM GEMBE & 3 OTHERS.....APPLICANTS

AND

REPUBLIC.....RESPONDENT

(From original Mbita's Court SRM's Cr.C. No.534 of 2016)

RULING

1. By a letter dated 10th October 2016 duly signed by the Senior Resident Magistrate at Mbita Law Courts, Ms Samson Ongeri Omwenga, this file was presented to me with a request to revise the sentence meted by the said magistrate on 10th September, 2016.

2. The convicted persons namely **BEMASA BIM GEMBE** (1st accused), **ELIUD ODHIAMBO NYAWADE** (2nd accused), **JOHN OKINYI OLATA** (3rd accused) and **MICHEAL OTIENO OJWANG** (4th accused) were each charged with gang rape contrary to **Section 10** of the **Sexual Offences Act** and an alternative charge of committing an indecent Act with an adult contrary to **Section 11** of the **Same Act**.

3. They were all acquitted on the main charge of gang rape contrary to **Section 10** of the **Sexual Offences Act**. The 1st and 3rd accuseds were also acquitted on the alternative charge of committing an indecent act with an adult contrary to **Section 11 (A)** of the **Sexual Offences Act**. However, the 2nd and 4th accused were convicted on that alternative charge and sentenced to serve 10 years imprisonment.

4. **Section 11 (1)** of the **Act** deals with indecent act involving a child and provides as follows:-

11 (1) “any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

5. However the applicable section in regard to the offence the two were convicted for **Section 11A** which provides:-

“Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or both.”

6. This means the sentence meted of 10 years imprisonment far exceeds what is legally provided and indeed is illegal.

7. Consequently in exercise of the High Court's power to revise under **Section 364**, the sentence is revised and is set aside on grounds that it is illegal.

8. The same shall be substituted with the legally provided penalty which is that the accused persons shall

serve 5 (five) years imprisonment which shall run from the date of conviction.

9. The right of appeal remains.

Written and dated this 25th day of **October**, 2016 at **Homa Bay**

H.A. OMONDI

JUDGE