REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 349 & 450 of 2009

JOHN AMUKUSI & ANOTHER ….....……. APPELLANT

DAVID MUKABANA ……...…….. APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

JUDGMENT

These appeals are consolidated. The two appellants were originally charged with the offence of rape contrary to Section 140 of the Penal Code and in the alternative indecent assault to contrary to Section 144 (1) of the Penal Code. In count two they were charged with the offence of stealing from the person contrary to Section 279 (a) of the Penal Code. These offences were said to have been committed on 3rd February, 2005. Subsequently, in January, 2007 the charges were substituted whereupon the appellants were charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006 and in the alternative the offence of indecent act with an adult contrary to Section 11 of the same Act. In count two they were charged with stealing from the person contrary to Section 279 (a) of the Penal Code.

The dates of the alleged offences remained the same, that is, 3rd February, 2005. After a full trial the appellants were convicted of the offence of gang rape contrary to Section 10 of the Sexual Offences Act and sentenced to 20 years imprisonment each. They were also convicted of the offence of stealing from the person contrary to Section 279 (a) of the Penal Code and sentenced to two years imprisonment each. The prison terms were ordered to run consecutively. These appeals arise from the said conviction and sentence.

At the hearing of these appeals the learned counsel for the Republic conceded the appeals. The grounds upon which the appeals were conceded are that when the offences were committed, the Sexual Offences Act No. 3 of 2006 which came into operation on 14th July, 2006 had not been enacted. Accordingly, the appellants could be charged under that Act in the substituted charge sheet. The learned counsel for the Republic also pointed out that there were some glaring gaps in the proceedings, and therefore could not ask for a retrial as this would be prejudicial to the appellants.

On my part, I have also looked at the record and, with respect agree with the learned counsel for the Republic that the Sexual Offences Act could not sustain the charges in view of the fact that it was not in operation when the offences were committed. That alone is sufficient to vitiate the trial.

The offences with which the appellants were charged were no doubt serious, but from the time of the alleged offences to date is a period of about seven years, and it will not be in the interests of justice to order a retrial. I also consider that from 30th June, 2009 they have been serving the sentences handed down by the learned trial magistrate.

Accordingly, no retrial shall be ordered. These appeals are hereby allowed, convictions quashed and

sentences set aside. The appellants shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

Dated, signed and delivered at Nairobi this 27th day of September, 2012.

A. MBOGHOLI MSAGHA

JUDGE