



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 46 OF 2019

FREDRICK OCHIENG AGUKO.....1ST APPELLANT

VITALIS OCHOLA2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal against the conviction and sentence of the Principal Magistrate's Court at Winam

(Hon. C. N. Njalale SRM) dated the 31st January 2019 in Winam PMCRC No. 1 of 2018)

JUDGMENT

FREDRICK OCHIENG AGUKO and VITALIS OCHOLA were convicted for the offence of **Gang Defilement** contrary to **Section 10** of the **Sexual Offences Act**.

1. Their co-accused, **DO**, was also convicted for the same offence.
2. Fredrick and Vitalis were each sentenced to 15 years Imprisonment.
3. However, D, who was 17 years old at the time when the offence was committed, was sentenced to 3 years Probation.
4. Fredrick Ochieng Aguko and Vitalis Ochola appealed to the High Court, challenging the judgment of the trial court.
5. Fredrick submitted that the learned trial magistrate erred by sentencing him to a

“mandatory long-term sentence of 15 years imprisonment, notwithstanding the circumstances of the offender”

6. He said that the court ought to have taken into account the fact that the complainant was already 17 years and 11 months old, whilst the Appellant was only a few years above the age of 18.

7. In his considered opinion, the sentencing of a young man

“to death, but later to life; if allowed to stand would be against the realization of the full potential of the appellant as a human being, as he will not be in a position to contribute to the common good of himself and that of his community due to the long incarceration.”

8. In the light of the sentence of 15 years imprisonment, the Appellant reasoned that;

“... by the time he will be released upon serving the sentence, he will be too old, as his prime life would have been spent rotting in jail.”

9. The first Appellant submitted that pursuant to **Article 55** of the **Constitution**, the state was under an obligation to take measures, which include;

“.... affirmative action programmes to ensure that the youth are protected from exploitation. Thus placing a youth (appellant)

to rot in jail for 15 years,

Breaches and threatens his right.”

10. The first Appellant invited this court to derive guidance from the South African decision in **S Vs ZINN [1969] (2) SA 537**.

11. In that case, the trial court had expressed the view that the crimes committed were of such a magnitude that, if any weight were given to the circumstances of the Appellant, business and industry in the whole of Cape Town would come to a disastrous end.

12. The appellate court found that the foregoing description did not merely constitute a strongly worded but justified condemnation of the offence. The court held that the description constituted;

“... a hyperbole, exaggerating beyond permissible limits, the nature and effect of the crime, and minimizing the personality of the offender and the effect that punishment might have on the offender.

The over-emphasis of the effect of the appellant’s crime, and the underestimation of the person of the appellant, constitutes, in my view, a misdirection and in the result the sentence should be set aside.”

13. The appellate court then held that an appropriate sentence must take into account the following three factors;

(a) The seriousness of the offence;

(b) The personal circumstances of the offender; and

(c) Public interest or the Interest of the society.

14. In this case, the learned trial magistrate handed down the sentence after giving the first Appellant an opportunity for mitigation. She said that the mitigation had been given consideration.

15. The court expressed itself thus;

“I have considered the mitigation by the accused persons; the fact that accused persons are first offenders; the nature of the offence and the sentencing policy.

I also have the provisions under which the accused persons have been charged, which is Section 10 of the Sexual Offences Act.

Under the said provisions, I note that they are couched in mandatory terms.

I therefore sentence the 1st and 2nd accused persons to serve imprisonment for a period of 15 years.”

16. I find that, unlike in the case of **S Vs ZINN** (above), the trial court herein did not exaggerate the effect of the crime on either the Complainant or on the society in general.

17. I find that the trial court did not over-emphasize the effect of the crime.

18. If anything, by taking into account the Sentencing Policy and the nature of the offence, the trial court applied its mind correctly.

19. When the first Appellant says to this court that the 15 year imprisonment would stand in the way of his desire to realize his full potential as a human being, I first note that no such case was put before the trial court.

20. Therefore, it would be wrong for this court to find that the trial court had failed to take into account an issue which the Appellant had not placed before that court for consideration.

21. If the Appellant had provided the court with requisite information and material, to demonstrate that it was in the best interests of both the Appellant and the community, that he should not be incarcerated for a long period of time; and if such circumstances were in tandem with the statutory provisions, the court would have been wrong to disregard the said circumstances.

22. I have no idea why the first Appellant considers the time spent as a prison inmate, to be equivalent to “rotting away.”

23. In my understanding as a Judge, and more so as a person who has had the opportunity of serving as the National Chairman of the Community Service Order, the prison facilities do not lead to rotting of inmates.

24. Prisons provide correctional facilities and also empower inmates, through appropriate training.

25. I reject the unsubstantiated notion that persons who are imprisoned, “rot away.”

26. In my considered opinion, the Appellant has failed to demonstrate that the 15 years imprisonment was grossly disproportionate with the offence of Gang Defilement.
27. The sentence was lawful, and I find no reason in law, to warrant its variation.
28. The second issue raised by the first Appellant was that the trial court did not take into account the fact that he was;
- “... now socially re-adapted, reformed, rehabilitated, and genuinely repents that it was a sheer bad luck that got him in this predicament.”***
29. At the stage when the trial court was handing down the sentence, the court was not provided with any evidence that would have enabled it to make the assessments which the Appellant has now cited.
30. Therefore, I find that the trial court cannot be faulted for failing to take into account factors which are being raised subsequent to the making of the decision which is now being challenged.
31. On his part Vitalis Ochola, (the 2nd Appellant) submitted that the trial court erred by sentencing him to 15 years imprisonment, when he was 17 years old at the material time.
32. The 2nd Appellant referred this court to his examination-in-chief, when he said that he was 17 years old in the year 2017.
33. This offence was committed on 21st December 2017.
34. The Appellant did not tell the trial court what the date of his birth was.
35. A person cannot be one age for the whole year; by that I mean that if a person was born, say in January, his age would go up in the next January.
36. Therefore, a person born in January 2000, would be 18 in January 2018. Meanwhile a person born in August 2000 would be 18 in August 2018.
37. Thus the second person would still be under 18 until August, whilst the first person would have attained 18 as at January.
38. If the 2nd Appellant wanted the trial court to believe that he was still 17 at the time the offence was committed, he should have tendered evidence to prove that contention: that is what **Section 107** of the **Evidence Act** stipulates.
39. In any event, I note that during mitigation, on 31st January 2019, the age of the 2nd Appellant was expressly stated as being 23 years. Therefore, as at 21st December 2017, the 2nd Appellant cannot have been 17 years old.
40. The second issue raised by the 2nd Appellant was that the trial court ought to have given consideration to the unequal participation in the crime, when handing down the sentences.
41. In this case, the Complainant made it clear that it was only the 1st Appellant who literally defiled her. She said that the other two accomplices had held her hand and her neck, and pushed her into the house where the 1st Appellant defiled her.
42. In a literal sense, the 2nd Appellant did not physically cause his penis to penetrate the vagina of the Complainant.
43. However, it must be noted that the offence of Gang Defilement, under **Section 10** of the **Sexual Offences Act** is defined 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 than fifteen years but which may be enhanced to imprisonment for life.”***
44. As the offence was committed by the 1st Appellant, in association with the 2nd Appellant, both of them were properly convicted for the offence of gang defilement.
45. I have carefully re-evaluated all the evidence on record, and I note that the offence was committed at 6.30p.m. It was not dark. Therefore, in my considered opinion, there did not arise a need for the learned trial magistrate to delve into questions regarding the intensity of light or the source of such lighting.
46. I also find that this was a case of recognition.
47. The 2nd Appellant confirmed, during examination-in-chief, that;

“I know the complainant well. She is my neighbour.”

48. As the Appellants were positively recognized by the Complainant; and because the medical evidence provided irrefutable proof of penetration, I find that the convictions of the two Appellants was sound in every respect.

49. I also find that the sentences handed down by the learned trial magistrate were lawful.

50. Accordingly, there is no merit in the appeal of both Appellants. The appeal is therefore dismissed.

DATED, SIGNED and DELIVERED at KISUMU

This 4th day of **February** 2020

FRED A. OCHIENG

JUDGE