



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL REVISION NO. 215 OF 2018**

**1. E O 1**

**2. E O 2.....APPLICANTS**

**VS**

**REPUBLIC.....RESPONDENT**

**(Revision arising from judgment delivered on 12<sup>th</sup> July 2018**

**in Mumias Criminal Case No. 137 of 2016**

**Republic vs. E O 01 and E O 02**

**by Hon. CC Kipkorir, SRM)**

**RULING**

1. The court file in respect of Mumias SPMCCRC No. 137 of 2016 was placed before me on 13<sup>th</sup> July 2018 for revision of orders made in the judgement delivered on 12<sup>th</sup> July 2018 in the matter by Hon. Cheruto C. Kipkorir, Senior Principal Magistrate.

2. The accused herein were arraigned before Hon SK Ngetich, Senior Resident Magistrate, on 2<sup>nd</sup> May 2016, to take plea on charges contained in a charge sheet dated 2<sup>nd</sup> March 2016, which was framed as follows –

‘ 1. E O 01

2. E O 02

CHARGE: GANG RAPE CONTRARY TO SECTION 10 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

PARTICULARS OF CHARGE; 1 E O 01: on the 27<sup>th</sup> day of February 2016 at 02.00 hours at [Particulars withheld] village Indangalasia location in Matungu sub-county within Kakamega County in association with another before court intentionally and unlawfully caused your penis to penetrate the vagina of C A a child aged 16 years

**ALTERNATIVE CHARGE**

COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

E O 01; on the 27<sup>th</sup> day of February 2016 at 02.00 hours at [Particulars withheld] village Indangalasia location in Mutungu Sub-County within Kakamega County intentionally and unlawfully caused your penis to penetrate the vagina of C A a child aged 16 years ‘

3. The record reflects that the said charges were read to the accused on the said date of 2<sup>nd</sup> March 2016. The minute by Hon SK Ngetich reads as follows verbatim –

*‘Charges read to Minors in Kiswahili language where they replied:*

*Count 1:*

*Accused 1 – Si kweli*

*Alternative Charge – Si kweli*

*Count II*

*Accused 2: Si kweli*

*Alternative Charge – Si kweli*

*Court Order: Plea of not guilty entered for both minors on the respective counts.’*

4. A trial was thereafter conducted, partially before Hon SK Ngetich and partially before Hon. Cheruto C. Kipkorir. Six prosecution witnesses testified, the accused persons gave sworn statements and called one witness. In the end, Hon. Cheruto C. Kipkorir found that the first accused, E O O1, committed the offence of rape, found him guilty and convicted him. The court however acquitted the second accused, E O O2, on the basis that he was not charged with the offence of gang rape.

5. Shortly after the reading of the judgement and before the court could pronounce sentence, the prosecutor addressed the court thus-

*‘From my record we have a charge sheet brought to court on the 2/3/16 in which there are two counts of gang rape and indecent act, which touches on first accused. The second accused has a similar count 2 which appears in a different charge sheet. Both charge sheets are in court. The charge you have indicated seems to have an amendment which is not reflected in our record and there is no mention of accused two in the second count.’*

6. The trial court then presumed that it had made an error in delivering a judgment based on one charge sheet which referred to the first accused only and omitted to consider a second charge sheet which had allegedly related to the second accused. In view of that the matter was referred to the High Court for revision.

7. I have scrupulously perused through the record in the court file in Mumias SPMCCRC No. 137 of 2016 and I have only come across one charge sheet. I have not seen any other charge sheet in the file. The contents of the charge sheet in the court file are those that I have recited at paragraph 2 of this ruling. The said charge sheet carries one main count of gang rape and one alternative count on

8. An indecent act with a child. In the one main count of gang rape the particulars relate to the first accused, E O O1, only. There is no count of gang rape relating to the second accused, E O O2, and as consequence there are no particulars of the alleged offence relating to him. His name only appears at the head of the charge sheet but not in the body of the charge sheet which carries the particular charges against the person named in the head.

9. I trust that Hon. Cheruto C. Kipkorir only had the charge sheet that is in the court record before me when she rendered the judgement in question. If there is or was another charge sheet which charges or charged the second accused with gang rape, or carries or carried particulars against the second accused, then the same is not in the court file in respect of Mumias SPMCCRC No. 137 of 2016. I believe that working with the charge sheet that she had before her, Hon. Cheruto C. Kipkorir had no option but to make the orders that she made.

10. There is no error in the record for me to revise under 364 of the Criminal Procedure Code, Cap 175, Laws of Kenya. I hereby accordingly order that the court file in Mumias SPMCCRC No. 137 of 2016 be returned to the said court for Hon. Cheruto C. Kipkorir to make final orders therein in disposal thereof. It is so ordered and directed.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 13<sup>TH</sup> DAY OF JULY 2018.**

**W MUSYOKA**

**JUDGE**