IN THE COURT OF APPEAL
AT KISUMU
[CORAM: NYAMWEYA, ACHODE & MATIVO JJ.A.]

CRIMINAL APPEAL NO. 98 OF 2020

BETWEEN

DENIS OKEMWA.....1ST APPELLANT
WILLIAM SIMBA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisii (Sitati, J.) dated 11th October, 2019 in HCCA No. 114 and 115 of 2013).

JUDGMENT OF THE COURT

1. The appellants, Denis Okemwa and William Simba were jointly charged with the offence of gang rape contrary to section **10** of the Sexual Offences Act (the Act) at the Chief Magistrate's Court at Kisii in **Criminal Case No. 1679 of 2010**. The particulars of the offence were that on 17th October 2010 in Kisii Central District, within Kisii County, with the common intention, they committed the offence of gang defilement to DN a girl aged 7 years by causing their penises to penetrate the vagina of the said DN. The appellants faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Act.
2. The appellants denied the charges and in the ensuing trial, the prosecution marshalled a total of 7 witnesses, namely, the complainant (PW1), the complainant's mother, (PW2), the complainant's grandmother, (PW3), an administration police officer, (PW4), a clinical officer from Kisii Level 5 Hospital,

(PW5), the Investigating Officer, (PW6), another investigating officer, (PW7). Upon being put of their defence, the appellants elected to give sworn defence. However, they did not call any witness in support of their respective defences. At the conclusion of the case, the trial magistrate returned a verdict of guilty on the main count of gang defilement. After considering their mitigation, the learned magistrate sentenced them to serve 30 years imprisonment.

3. Aggrieved by the said decision, the appellants appealed to the High Court at Kisii in **Criminal Appeal Numbers. 114 of 2011** and **115 of 2011** respectively seeking to overturn their conviction and sentence. The two appeals were consolidated, heard and determined together. ***Sitati, J***. in the impugned judgment dated 11th October 2013, upheld both the conviction and sentence.

4. Undeterred, the appellants have filed the instant appeal seeking to reverse the High Court decision. The appellants filed separate grounds of appeal and submissions. The 1st appellant has cited 4 grounds in his undated memorandum of appeal, namely: (a) the medical evidence did not connect him with the offence; (b) he was denied an opportunity to cross-examine the complainant despite the trial court being satisfied she was intelligent enough to testify; (c) he was supplied with witness statements at the close of prosecution case, which was too late; (d) the prosecution failed to avail crucial witnesses.

5. In his undated amended memorandum of appeal, the 2nd appellant cited 15 grounds of appeal which can be condensed as as follows, that: (a) the amended charge sheet was defective; (b) the offence

of

gang rape was not proved; (c) the prosecution failed to call one Andrew Osoro, an eye witness; (d) the trial court failed to consider his alibi; (e) the victim's age was not proved; (f) the victims evidence was uncorroborated (g) the conviction was based on circumstantial evidence; (h) the prosecution evidence was marred by inconsistencies, discrepancies and contradictions; and (k) penetration was not proved since the hymen was intact and presence of epithelial cells and pus cells is not evidence of penetration.

6. The appellants pray that their appeals be allowed and the conviction and sentence be set aside.

7. When this appeal came up for virtual hearing before us on 2nd September 2025, the appellants appeared in person while ***Mr. Solomon Njeru***, learned Senior Assistant Director of Public Prosecutions appeared for the respondent. Both parties relied on their written submissions.

8. In support of his appeal against the sentence, the 1st appellant maintained that the 30 years jail term meted upon him was harsh and excessive in the circumstances, and that the complaint's birth certificate was produced, therefore her age was not conclusively proved. He maintained that a suspect's guilt cannot be inferred from the circumstances and cited ***P.O.N vs Rep (2019) eKLR*** in support of the holding that for a conviction to be based on circumstantial evidence, the accused person's guilt should be the only rational inference that can be drawn from the proven facts and if there is any reasonable possibility consistent with innocence, it is the duty of the court to acquit the accused.

9. The 1st appellant urged this Court to find that the ingredient of penetration as defined in section 2 of the Act was not proved. He contended that DNA test was not carried out to ascertain his culpability, and that PW5 testified that no tears or bruises were noted, the hymen was intact, no discharge was noted, no sperms were seen, no pus or epithelial cells were seen and only redness of the orifice was seen. It is also the 1st appellant's case that the offence is alleged to have occurred on 17th October 2010 and the victim was examined on 3rd November, 2010, 16 days after, which puts the observations into question.

10. Lastly, the 1st appellant submitted that the charge sheet was defective because it did not contain the words "one after another" or "in turns." In support of this assertion, the 1st appellant cited ***Opoya vs Uganda [1969] E.A. 236*** in which a charge sheet was found to be defective for failing to state the ingredients of the offence.

11. On his part, the 2nd appellant submitted that the prosecution failed to prove its case beyond reasonable doubt because there is no evidence linking him with the offence. Further, physical examination on himself revealed no physical injury to his genitalia, but there was presence of pus and epithelial cells. It was his submission that there was no evidence to corroborate PW1's evidence linking him to the offence and the prosecution evidence was hearsay. Further, Dr. Faith Ogeto was not called as a witness which divested him the opportunity to cross-examine her.

12. The 2nd appellant also submitted that there was no basis to support the sentence of 30 years imprisonment because the victims the age was not proved. He maintained that the offence of gang rape was never proved, therefore, the 30 years sentence ought to be set aside because PW2 and PW3's evidence was hearsay because none of them witnessed the offence and their evidence did not corroborate PW1's evidence.

13. The 2nd appellant submitted that the charge sheet does not contain the words *"one after the other"* or *"in turns"* which according to him is a requirement for the offence of rape. For authority, he cited the case of ***Opoya vs Uganda (1969) EA 236*** in which the court found the charge sheet to be fatally defective for failing to disclose the ingredients of the offence.

14. The 2nd appellant argued that the prosecution failed to call Andrew Osoro, the first person to see the victim after the incident and who took her to hospital. He also submitted that Dr. Faith Ogeto who filled the PRC form and treatment notes was a crucial witness but he was not called. To buttress his submission, he cited the case of ***Bukenya and Others vs Uganda 919720 E.A 549*** in support of the holding that if the prosecution fails to call a crucial witness, the court can make an adverse finding that the evidence of the adverse witness would have been adverse to the prosecution.

15. Regarding his *alibi*, it was his submission that the same was never displaced by the prosecution evidence and the police failed to investigate and check the reliability of his *alibi* as was held in ***Victor Mwendwa Mulinge vs. R (2014) eKLR***.

16. Mr. Njeru, in opposing the appeal submitted on two points. First, he conceded the appeal and maintained that before the High Court the 1st appellant orally raised an additional ground contending that he was not accorded an opportunity to cross-examine the complainant who adduced unsworn evidence. He maintained that both the trial court and the first appellate court did not address the said issue. Therefore, the appellants were prejudiced because the said omission is a gross violation of their rights to a fair trial guaranteed under Article 50 (k) of the Constitution which stipulates that every accused person has the right to adduce and challenge evidence. Furthermore, section 302 of the Criminal Procedure Code stipulates that witnesses called by the prosecution shall be subjected to cross examination by the accused person. He cited ***Nicholas Mutula Wambua vs Republic, MSA CRA No. 373 of 2006 (unreported)*** where this Court cited with approval the decision of the Supreme Court of Uganda in ***Sula vs Uganda [2001] 2 EA556*** in support of his aforesaid submission. Mr. Njeru conceded the appeal urging that the appellant's right to a fair trial was infringed since they were denied the opportunity to cross-examine the complainant.

17. This is a second appeal, therefore, our jurisdiction is limited to considering matters of law as stipulated by Section 361 of the Criminal Procedure Code. Addressing its jurisdictional demarcation in second appeals, this Court in ***Hamisi Mbela Davis & Another vs Republic [2012] KECA 147 (KLR)*** stated:

"This being a second appeal, this Court is mandated under Section 361(1) of the Criminal Procedure Code to consider only

issues of law. As was held in M'Riungu v Republic (1983) KLR 445:-

"Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin vs Glyneed Distributors Ltd (t/a MBS Fastenings)."

18. Similarly, the Supreme Court in ***Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR)*** stated thus:

> ***"Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."***

19. Upon analyzing the entire record and the parties' submissions, we find that the following issues fall for determination: (a) whether the appellants were accorded an opportunity to cross-examine the complainant; (b) whether the offence of gang rape was established beyond reasonable doubt, (c) whether the appellants' *alibi* defence was considered by the two courts below; (d) whether the charge sheet was defective; (e) whether the prosecution deliberately

avoided to avail key witnesses, and, (f) whether there is any basis for this Court to interfere with the sentence.

20. Regarding the first issue, it is important to mention that the prosecution conceded this appeal on the basis that the appellant's right to a fair trial was violated because of the failure by the trial court to give them an opportunity to cross examine the complainant. Mr. Njeru maintained that the said issue was raised orally before the trial judge but, according to him, the learned judge never rendered herself on the said issue nor is the issue mentioned in the proceedings. It is important to underscore that an appellate court is not bound by the prosecution's concession in a criminal appeal because its role is to independently review the entire case for errors of law or fact, ensuring justice is served. Courts are expected to re- examine evidence and arguments, rather than relying on concessions, to reach their own independent decisions. This principle allows the court to address issues of misdirection, wrongful admission or rejection of evidence, or fundamental breaches of fairness, even if the prosecution initially agrees with a point in the appeal.

21. We have independently and carefully scrutinized the entire record. We note that the violation of the appellants' right to a fair trial guaranteed under Article 50 (2) (k) of the Constitution premised on the alleged failure to be accorded an opportunity to cross examine the complainant was never raised at all either before the trial court or the first appellate Court. This Court will not address grounds not argued in the High Court. This court's role is to review the evidence

and arguments presented before the trial court and escalated to the first appellate court. Therefore, this court will not consider new arguments raised for the first time before this Court, and more so, those that require factual re-evaluation or contradict the record of the lower court. This approach ensures that the first appellate court has the opportunity to make a pronouncement on the issues before they are raised on appeal to this Court, preventing this court from acting as a first appellate court and ensuring the orderly progression of litigation. (See this Court's decision in ***Alfayo Gombe Okello vs Republic [2010] eKLR).*** Accordingly, the appellants are precluded from raising the said issue before this Court.

22. Next, we will address the issue whether the offence of gang rape was established beyond reasonable doubt. In order to do justice to this issue, it is necessary to understand the critical ingredients of the offence of gang rape. A useful starting point is the words of section **10** of the Act which creates the offence of gang rape. It reads:

"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."

23. In ***Ashok Kumar vs State of Haryana, (2003) 2 SCC 143,*** the Supreme Court of South Africa while interpreting an equivalent provision of the law stated:

"8… In order to establish an offence under Section 376(2)(g)….,

the prosecution must adduce evidence to indicate that <u>more than</u>

one accused had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that she had been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. In other words, this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention presupposes prior concert which may be determined from the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same intention independently of each of the offenders. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence."(Emphasis added).

24. To bring the offence of gang rape within the purview of section **10** of the Act, the prosecution is required to prove *inter alia* that - (i) more than one person had jointly acted; (ii) they had acted with the common intention to rape the victim; (iii) a plan or association amongst the offenders, either preconceived or formulated at once at the time of commission of the offence, which is reflected by the element of participation in action in any manner or by the proof of overt inaction, when certain amount of action would have been required to prevent the offending act, and (iv) in furtherance of such common intention one or more persons of the group had actually committed offences of rape on the victim or victims. Under the said provision, where a victim is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons is be deemed to have committed the offence of gang rape.

25. It is very clear that in a case of gang rape under the above provision, an act by one is enough to render all in the gang for punishment as long as they have acted in furtherance of the common intention. Further, common intention is implicit in the above provision and all that is needed is evidence to show the existence of common intention. A reading of the evidence tendered particularly by PW1 shows that she was coming from a posho mill carrying maize flour. In what appeared to be a gesture of goodwill and kindness, the 2nd appellant decided to help her carry the maize flour. But this turned out to be a trap. The 1st appellant carried her and took her to a place where there was Napier grass and removed her under wear and defiled her. The 2nd appellant also defiled her through the anus. Their actions clearly show that they acted jointly, with a common intention.

26. The two courts below arrived at the concurrent findings of fact that the appellants committed the offence of defilement. This Court cannot interfere with those findings of fact unless such findings were founded on no evidence or unless, on the totality of the evidence relied upon, no reasonable tribunal would arrive at such findings. (See ***Adan Muraguri Mungara vs Republic [2010] KECA 131 (KLR)).*** As alluded to above, we are clear in our minds that the ingredients of the offence as provided under section **10** of the Act were proved. We find no reason to interfere with the concurrent findings by the two courts below on the issue under consideration.

27. We will now address our minds to the complainant's age. Both PW2 and PW3 testified that the complainant was 7 years old. This evidence was never controverted. This Court in ***Mwalango Chichoro Mwanjembe vs Republic [2016] eKLR*** stated:

"The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof..."

28. We find no reason to question the findings by the two courts below that the complainant was aged 7 years at the time of the offence.

29. The other question is whether the appellants were properly identified as the offenders. From her evidence, the complainant identified the appellants by their names. This was therefore a case of recognition rather than identification. We are guided by the dictum by this Court in ***Shalen Shakimba Ole Betui & Shadrack Koitimet Ole Betui vs R, CR.A NO. 284 OF 2005***:

"The present was a case of recognition rather than identification and on our part we have considered this issue and are satisfied that in view of the concurrent findings of the two courts below the appellants were positively identified, nay recognized by PW1 and PW2. There could be no possibility of a mistaken identify. We are satisfied that the appellants were convicted on very sound evidence of recognition in circumstances which were conducive to proper identification/recognition, Anjononi and Another v. R, [1980] KLR 54 at p. 60."

30. Accordingly, we are satisfied that the appellants were properly identified as the offenders. In fact, their evidence did not rebut the complainant's evidence on this issue.

31. Regarding penetration, the learned judge heavily relied on the evidence tendered by PW5 who testified that there was redness of the vaginal orifice that was tender and even though the hymen was intact and there were no visible tears, there was presence of epithelial cells and pus cells that confirmed an inflammation. Ultimately, the conclusion arrived at by PW5 was that there was physical (mild) genital injury because of intact hymen.

32. The learned judge found that the 1st appellant was medically examined and results were that there was presence of epithelial and pus cells similar to those found in the complainant and the learned judge concluded that the reason the pus cells and epithelial cells were not found on the 2nd appellant is because from the complainant's evidence, the 2nd appellant inserted his penis into her anus most of the time while the 1st appellant inserted his penis in her vagina.

33. The appellants have contended that PW5's evidence contradicted that of PW1 since it was PW5's testimony that the penetration was not deep due to the absence of tears and the intact hymen yet it is PW1's evidence that she was walking with her legs apart, was bleeding and felt pain. The appellant also questioned why it took 16 days to examine PW1. It is important to underscore that an intact hymen is not conclusive evidence of absence of penetration. Section 2 of the Act defines penetration as the partial or complete insertion of one person's genital organs into the genital organs of another person, or into the anus. This definition has been construed to mean that penetration does not need to be complete. As was held by the

Uganda Court of Appeal in ***Twehangane Alfred vs Uganda [2003] UGCA, 6***, in sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

34. The Supreme Court in ***AML vs Republic [2012] eKLR*** held that penetration does not have to be proved exclusively by forensic or medical evidence but it can be established through credible testimony of the complainant. This Court in ***P.K.W. vs Republic [2012] eKLR*** stated that a broken hymen alone is not conclusive proof of penetration, but medical evidence corroborating the complainant's account should be given due weight. Having considered the evidence on record, we note that both the two courts below believed the complainant's evidence. Pursuant to the proviso to **Section 124** of the Evidence Act, in sexual offences, the evidence of the victim, if it is credible suffices to found a conviction without corroboration. In this case, besides the complainant's evidence, there was medical evidence that she had been defiled. The complainant gave clear evidence detailing how the two defiled her. We therefore find no merit in the appellants' ground that there was no evidence to support their conviction.

35. The appellants are adamant that their *alibi* was not considered by the two courts below. Regarding this issue, the learned judge stated that having considered the appellants' *alibi*, she found no merit in their defences. This Court in ***Erick Otieno Meda vs Republic [2019] eKLR*** laid down a four-tier test for an alibi defence as follows:

"The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:
a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
c.The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
d.The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail."
The Court proceeded to note that:
"The law today is that it is up to the prosecution to displace any defence of an alibi and show that the accused was present at the place, and at the time the offence was committed by the accused or his accomplices."

36. We find that both the trial court and the first appellate court made concurrent findings on the credibility of DN, and believed that she spoke the truth. We are therefore satisfied that the appellants were correctly linked to the offence. As the decisions by the two courts below show, the respondent's *alibi* was considered and the two courts below were satisfied that it did not dislodge the prosecution evidence. We have no reason to depart from the concurrent finding by the two courts below.

37. Concerning the appellant's argument that the charge sheet was defective, it is important we point out that the entire record does not contain the charge sheet. In fact, our attempt to locate the original trial record were unsuccessful. Nevertheless, from the record, we

note that the first appellate court held that when the prosecution applied to amend the charge sheet in accordance with section 214 of the Criminal Procedure Code, the charges were read afresh to the appellants in a language they understood and thereafter the appellants were given an opportunity to recall any witness who had already testified. The appellants opted not to recall the witnesses. The first appellate judge addressing this issue followed the dictum in ***Kilome vs Republic [1990] KLR 194*** and held that the omission of the words *"one after the other"* or *"in turns"* did not cause any prejudice to the appellants in putting up their respective defences.

38. Faced with a similar issue, this Court in ***Isaac Nyoro Kimita & another vs R [2014] eKLR*** stated:

"In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants "jointly" defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term "jointly" in the particulars of the charge?" [Emphasis added]

39. Decided cases underscore that the appellant must demonstrate that the amendment occasioned prejudice to him. In this regard, the Supreme Court of India in ***Willie (William) Slaney vs State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391]*** stated:

"Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be

done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

40. Looking at the record and the evidence as a whole, we are not satisfied that the appellants did not understand the nature of the charges against them. It is quite clear from their cross-examination of the prosecution witnesses, and in particular, PW2 and PW3 that they understood the case against them, therefore, there is nothing to suggest that there was a failure of justice. Therefore, in as much as the particulars did not capture the words *"one after the other"* or *"in turns,"* in our view, the absence of the said words on the charge sheet did not render the charge sheet fatally defective. Our position is reinforced by the following sentiments of this court in ***George Njuguna Wamae vs Republic, Crim. App No 417 of 2009,*** wherein it stated as follows regarding the effect of section 382 on defects alleged in the charge:

"By dint of this provision, to reverse the findings of the courts below on account of an error, omission, or irregularity in the charge, we must be satisfied that such error, omission or irregularity has occasioned a failure of justice, and in making that determination, we must consider whether the issue being raised now could have been raised at an earlier stage in the proceedings. We are of the considered opinion that there was no failure of justice and that the appellant did not suffer any prejudice arising from the manner in which the statement of offence was framed in the charge sheet. The offence with which he was charged was clearly disclosed as robbery with violence contrary to section 296(2) of the Penal Code...More importantly, this is the kind of objection which, under the provision to section 382, should have been taken at the earliest opportunity before the trial court if the appellant considered the charge to be defective or otherwise lacking in clarity."

41. Regarding the failure by the prosecution to call the complainant's uncle who took her to hospital after the incident, the two courts below made a concurrent finding that the prosecution did not have to call every possible witness to prove the allegations against the appellants and that a fact can be proved by any number of witnesses and if that number is one, so be it. The learned judge went on to state that she was satisfied that the allegations against the appellant were proved beyond any reasonable doubt, the failure by the prosecution to call the complainant's uncle notwithstanding.

42. Having considered the evidence on record we note that in ***Timothy Kipngetich Kangongo vs Republic*****, Eldoret CR Appeal No. 65 of 2018,** this Court stated on the same issue as follows:

"It is therefore clear to us that in considering the effect of the failure to call a witness, the court ought to consider the evidence adduced vis-à-vis the evidence of the witness who was not availed. To deliver on this task, it is imperative to consider the elements of the offence charged and then assess whether the evidence on record proved all the prerequisite elements. In a charge of defilement, the key elements are age of the complainant, proof of penetration and identity of the perpetrator."

43. Having considered the evidence on record, we find that the failure to call the complaint's uncle did not weaken the prosecution's case. It has not been shown that the evidence adduced had gaps which could have been filled by the uncalled witnesses. Also, there is nothing to suggest that the evidence of the uncalled witnesses could have been adverse to the prosecution case for this Court to make an adverse inference against the prosecution. We therefore find no merit in the appellants' ground that there was

failure by the prosecution to call a crucial witness.

44. Lastly, the appellants maintained the sentence meted upon them is harsh and excessive and in mitigation, they stated that they are rehabilitated and reformed and they are ready to be re-integrated back to the society having obtained valuable skills and qualifications while incarcerated. They therefore prayed for leniency and reduction of their sentence. However, severity of sentence in a second appeal is a question of fact pursuant to section 361(2) of the Criminal Procedure Code. Underscoring this statement of the law, this Court in ***Paul Tanui vs Republic (2010) eKLR*** stated:

"Second appeals to this Court are on a point of law only and the severity of sentence is expressly a matter of fact (see Section 361(1) (a) of the Criminal Procedure Code). It is clear that an appeal against the severity of sentence as opposed to the legality of the sentence is not maintainable."

45. Accordingly, **Section 361(1) (a)** of the Criminal Procedure Code divests this Court the jurisdiction to entertain appeal challenging the severity of the sentence which it describes as a matter of fact as opposed to an issue of law. Therefore, this Court in a second appeal cannot interfere with a lawful sentence imposed by the trial court and upheld by the first appellate court, unless, the trial court had no jurisdiction to pass the sentence or it was enhanced by the first appellate court. Under section 10 of the Act, any person who, in the company of another person or persons and with a common intention commits 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.

46. In this case, the appellants were sentenced by the trial court to 30 years' imprisonment after she considered the aggravating and mitigating circumstances of the case. It is noteworthy that even during mitigation the appellants were not remorseful and as a result the trial magistrate in exercise of her discretion sentenced them to 30 years imprisonment which sentence was upheld by the first appellate court which found that it had not been established that the trial court acted on wrong principles or that the sentence was unlawful.

47. It is trite law that sentencing lies pre-eminently in the discretion of the trial court. A court exercising appellate jurisdiction cannot, in the absence of a material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be usurping the sentencing discretion of the trial court. Accordingly, this Court can only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection or where the it can be described as shocking, startling, or disturbingly inappropriate. Accordingly, we are satisfied that the first appellate court rightly upheld the sentence. We can only add that the sentence imposed is lenient considering that the complainant was aged 7 years and Section 10 of the Act only prescribes a minimum sentence of 15 years which can be enhanced to life imprisonment if there are aggravating circumstances. Luckily for the appellants, no notice of enhancement of sentence was filed before the first appellate court or before this Court, possibly because

the prosecution was conceding the appeal. In conclusion, we find that the appellants' appeal against conviction and sentence is without merit and the same is hereby dismissed in its entirety.

48. Orders accordingly.

Dated and delivered at Kisumu this 30th day of January, 2026.

P. NYAMWEYA

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed
DEPUTY REGISTRAR