IN THE COURT OF APPEAL

AT NYERI

CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CRIMINAL APPEAL NO. 17 OF 2014

BETWEEN

J M M ..... APPELLANT

AND

REPUBLIC .....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Keroguya (Olao, J.) dated 11th December, 2013).

in

(H. C. CR. A. No. 126 of 2012)

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JUDGMENT OF THE COURT

The appellant, J M M, does not challenge his conviction in this matter although he had filed some 5 grounds of appeal intending to do so. He informed us that he was abandoning that appeal to plead instead for our reconsideration of the sentence. He further informed us that it was his first time to commit any offence and that, upon his imprisonment, he had been placed in a prison school as he served his sentence. He now wishes to continue with school elsewhere and pleaded for the Court's mercy.

The appellant's conviction and sentence is another statistic of the toll taken by the **Sexual Offences Act, No. 3/2006**, on young offenders who do not appear to have internalized the dire consequences of their hormonal upsurge and sexual lust. In this case, the appellant who was aged 18 was in a group of three other teenagers who were his friends at Kirimunge Shopping Centre in Kirinyaga District on 4th October 2010. At about 8.30 pm, they spotted a young girl, 24 year old PW1 who was walking back home from the market. They decided to have some fun and followed her. At some point near a lighted Catholic Church and Kirimunge Primary School, one of them grabbed PW1 by the head and blocked her mouth. She screamed and bit his finger. The other boys closed in and grabbed her and covered her mouth. Upon hearing the sound of an approaching vehicle, they carried her shoulder high to a nearby farm, tore her clothes and raped her in turns. They ejaculated into her at first but later wore condoms as they repeated their acts. When they were done they took off and left her lying there.

Unfortunately for them, PW1 recognized all of them as they came from the same village in Kirimunge.

She struggled to walk from the scene and walk to a nearby home where she informed the owner (PW2) about her ordeal and gave out the names of the rapists. She was assisted to call her brother who took her to hospital and a Clinical Officer (PW3) confirmed the rape and treated her. A village elder (PW4) made the report to the police the same night and they set out to look for the rapists. The following day (PW5) arrested the appellant and one month later another one was arrested, while the other two remained at large.

The appellant and the other boy were charged and tried before Baricho Senior Resident Magistrate (J. N. Mwaniki) for the offence of gang rape contrary to **Section 10** of the **Sexual Offences Act**. They were convicted for the offence and sentenced to serve 25 years in prison. On appeal to the High Court at Kerugoya **(Olao J.)**, the conviction was upheld but the issue of the ages of the appellants arose for purposes of sentence. They were subjected to age assessment tests and further evidence through birth certificates. It turned out that the appellant was barely 18 when the offence was committed while his co-appellant was below 18. The appellant's sentence was then reduced to 15 years, the minimum prescribed under the Act and the co- appellant was sentenced to serve 3 years in a borstal institution.

A second appeal to this Court lies on matters of law only as expressly spelt out under **Section 361(1)** of the **Criminal Procedure Code.** The section further declares in sub section (a) that :

> "***(a) on a matter of fact, and severity of sentence is a matter of fact; or***
>
> ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under Section 7 to pass that sentence."***

There is thus a caveat against revisiting lawful sentences such as the one meted out in this case. Only the legality of sentence may be re-examined in appropriate cases.

To his credit, the appellant abandoned the appeal on conviction and we need not say anything more about it. But this was long after he had denied the offence and necessitated a lengthy trial. The sentence meted out was the bare minimum and he was lucky that it was not enhanced to life as the law permits. It is unfortunate that his youth will now be spent behind bars but Parliament designed the **Sexual Offences Act** for the *"prevention and protection of all persons from harm from unlawful sexual acts."* Women and men of all ages must feel safe and protected from rapacious, randy and proclivities of others, which are evident all over the country.

For those reasons, we find no valid reason to interfere with the sentence as pleaded by the appellant and we order that the appeal be and is hereby dismissed.

Dated and delivered at Nyeri this 3rd day of February, 2016

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR