IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 124 OF 2014

BETWEEN

JAMES GICHUKI MAGU …………………………………… APPELLANT

AND

REPUBLIC ……………………………….………………. RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Malindi (Meoli,J.) dated 27th June,2014

in

H.C.Criminal Appeal. No. 111 of 2011)

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JUDGMENT OF THE COURT

The appellant and another were jointly tried for the offence of gang rape contrary to **section 10** of the Sexual Offences Act, convicted and sentenced by the trial Magistrate to serve 10 years imprisonment each. They appealed to the High Court, but the appeal by the 2nd appellant was withdrawn before the hearing, while that brought by this appellant was dismissed. In dismissing the appeal the learned Judge (Meoli, J) noted that the sentence of 10 years imprisonment was illegal and corrected it by substituting it

with 15 years imprisonment. Although the appeal by the 2nd appellant in the High Court had been withdrawn, the learned Judge, though alive to this fact, proceeded to set aside the illegal sentence in respect of a party who was not before her and substituted it with 15 years imprisonment.

The appellant now brings this second appeal to this Court contending that the learned Judge relied on inconsistent and uncorroborated evidence; that the existence of a grudge between the appellant and PW3 was overlooked; and that the medical evidence did not support the charge, while independent witnesses were not called. He has also contended that the two courts below failed to consider his defence. These grounds are condensed in his written submissions where the only issues raised relate to the enhancement of sentence from 10 to 15 years, lack of conclusive medical evidence, including DNA testing, linking the appellant with the offence and the need for corroboration of the complainant's evidence.

Mr.Kiprop, learned counsel for the respondent in opposing the appeal submitted that in terms of **section 124** of the Evidence Act, no corroboration was required, and that in any case, apart from the complainant's evidence, there was direct evidence from other eye witnesses supported by medical evidence. Learned counsel, however, found fault in the learned Judge acting without jurisdiction by imposing a sentence on a party whose appeal had been withdrawn and drew a parallel with the Indian Supreme Court decision in **Hotel Queen Road Ltd** v **Ram Parshotam Mittal and others**, Civil Appeal No.5499 of 2013 where it was held that once a party withdraws his appeal the court has no jurisdiction to make any orders regarding it because upon withdrawal the court becomes *functus officio.*

Although as a second appellate court we are only, by the provisions of section 361 of the Criminal Procedure Code, concerned with issues of law, it is imperative to set out briefly the background from which we shall consider the grounds of law raised in the appeal.As we consider those grounds we are enjoined, as was stated in the case of **M'Riungu** v **R** (1983) KLR 455; …

> ***"…to resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and 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 the decision is bad in law"***

The complainant whose age was given as 76 years lived in Lamu where she owned 10 acres of land. Two of her daughters, (PW1 and PW4) who are grown up lived separately some 70 metres from her house. The daughters appear to have been engaged in the business of selling traditional brew, *mnazi*. On the material day at 12 noon, the two alleged that the appellant and two other men went to take *mnazi* at their home. The appellant had come on a bicycle. At some point as the night fell the three men sneaked out but the bicycle remained at the home. PW1 and PW4 were attracted by and became curious at the incessant barking of the dogs at their mother's home. They went to the home but the door was locked from outside. They then heard some noisy commotion from behind the house and upon getting close, noticed three men who had been drinking in their home raping their mother. The appellant and the 2nd appellant in the High Court were known to them prior to this day. The appellant had even been employed by PW1 on casual basis. When the trio realized that they had been discovered, and as PW1 and PW4 screamed for help, they ran away. The appellant was however not very lucky. He attempted to go back to PW1's home to collect his bicycle and was confronted by PW1 who held on to him and restrained him until the villagers and the police came and arrested him.

The complainant was examined by a clinical officer who confirmed that indeed she had had penetrative sex culminating with ejaculation and her genital organs were bruised. Although not relevant to the charge of rape, the clinical officer noted that the complainant was under the influence of alcohol at the time of examination. The appellant and the second appellant in the High Court were charged as explained earlier while the third suspect was not traced. The appellant denied the charge insisting that he was arrested over a grudge arising from the complainant's failure to pay his wages.

The learned trial Magistrate was persuaded by the prosecution evidence that the appellant and two others gang, in concert, raped the complainant and upon conviction sentenced them, as explained earlier, to 10 years imprisonment, thereby rejecting the defence.

The points of law raised in this appeal relate to the legality of the enhancement of the sentence, the proof of the offence of gang rape and the identity of those who committed the offence. Starting with the latter the two courts below made concurrent finding of fact that the appellant was known to the complainant and her two daughters. This finding was based on evidence by both the prosecution witnesses that the appellant had been employed by PW1, and was therefore well-known to the complainant. Apart from this fact, on the material day the appellant had earlier on been to the complainant's home. In addition he, in the company of two others had been to PW1's home where he left his bicycle.

The complainant recalled how the appellant and his accomplices went to her house, carried her outside the house and took her behind the house where the appellant with two others defiled her. She explained the role of each one of them. In particular the appellant removed her underwear and, against her will, had sex with her as the rest held and gagged her. PW1 and PW2 got to the scene and with the aid of a torch and light from a full moon witnessed the painful and horrific experience their aged mother was going through. They both described in detail how the complainant was struggling from the ground where she was lying, with three men, all of whom were known to them, sexually assaulting her. They confirmed that it was the appellant who was raping the complainant while the rest were assisting him by restraining and gagging her. We find, for our part this evidence overwhelming and proved the participation of the appellant in the commission of the crime charged.

It is gang rape under **section 10** of the Sexual Offences Act where a person committing the offence of rape or defilement does so in association with another or others, or where a person is in the company of another and share a common intention to commit rape or defilement. The evidence before the court proved beyond any reasonable doubt that the appellant and two others set out, with a common intention, and without shame, to rape the complainant, a lady old enough to be their grandmother. Even though

there is evidence that only the appellant did the act, his companion, as accomplices, were just as guilty of the actual offence of rape for their active role in assisting the appellant in the act. An aider or abettor of a crime is just as guilty as the actual perpetrator. See **Dracaku S/o Afia and Another** v **R** (1963) EA 363.

A person found guilty and convicted of the offence of gang rape is liable to imprisonment for a term of not less than fifteen years which can be enhanced to life imprisonment depending on the circumstances. The learned Judge in exercise of the revisionary powers conferred by **section 363** of the Criminal Procedure Code merely corrected the obvious error by setting aside the illegal sentence and substituted it with the lawful and correct one. We find no substance in this ground of appeal. Corroboration in the circumstances of this case as well as under the proviso to **section 124** of the Evidence Act, is not a requirement. But we emphasise that, apart from the complainant, there was direct evidence of PWI and PW4, with the medical evidence sealing the appellant's fate. This ground similarly lacks merit as does the ground on DNA testing.

The offence of rape, as was held in **Andrew Apiyo Dunga and Another** v **R,** Cr.Appeal No.202 of 2009:

> ***"...is complete once there is penetration of the female's genital organ with the male's penis. It is not necessary that spermatozoa be released."***

DNA testing to ascertain whose spermatozoa was in the complainant's private parts was unnecessary so long as there was evidence that it was the appellant who did the act of penetration.

Finally, we think the learned Judge acted without jurisdiction by making orders to correct a sentence in an appeal that had been withdrawn. That order was a nullity *abinitio*. The appellant was lucky to have been given the minimum sentence.

This appeal, for the reasons we have given, lacks substance. It is dismissed.

Dated and delivered at Mombasa this 11th day of March, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR