REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

CORAM: VISRAM, KOOME & MARAGA, JJ.A.

CRIMINAL APPEAL NO. 33 OF 2007

BETWEEN

DANIEL KIPNGETICH SANG.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kericho (Kimaru, J) dated 25th July, 2006

in

H.C.CR.A. NO. 55 OF 2004)
****

JUDGMENT OF THE COURT

1. This Court differently constituted made an order on 29th March, 2011, by which the appellant was given leave to adduce further evidence in line with the provisions of ***section 361(1)(b) of the Criminal Procedure Code***. Consequently, the appellant adduced documentary evidence by producing his birth certificate which shows that he was born on 8th October, 1988. This is a second appeal which only turns on points of law and the legality of the sentence handed down to the appellant being an issue.

2. The appellant, ***DANIEL KIPNGETICH SANG*** was charged with the offence of rape contrary to ***Section 140 of the Penal Code***. The particulars of the charge that stated on 13th August, 2002 at [*particulars withheld*] of the Rift Valley, jointly with others not before court, he unlawfully had carnal knowledge of **E C** without her consent. The appellant was also charged with an alternative charge of indecent assault but after the trial, he was convicted of the main charge, and upon conviction he was on 24th June, 2004, sentenced to life imprisonment. On the High Court judge arriving at a concurrent finding with the learned trial magistrate, the appellant's appeal to the High Court was dismissed and the life sentence meted against the appellant was confirmed.

3. The appellant has now appealed to this Court and in the memorandum of appeal there are a total of seventeen grounds raised in support of the appeal. During the hearing of this appeal, ***Mr. Katwa***, learned counsel for the appellant, argued all the grounds together. On the issue of sentence, he submitted that the appellant was a minor at the time he was charged; he was fourteen [14] years, and when he was convicted

he was sixteen [16] years. Being a minor, a life sentence imposed on the appellant is not provided for by the law.

4. The credibility of the prosecution's evidence was also challenged. This is because the charge sheet indicated that the appellant was charged with the offence of rape jointly with others who were not before the court. As gang rape had not become an offence at that time, he argued that the charge was defective as the offence of rape cannot be committed jointly. Moreover, the medical report shows the offence was committed on 14th August, 2002; the medical report showed the complainant had not sustained any tears or blood stains in her private parts, which is inconsistent with the evidence of the complainant and her grandmother that she was raped by a group of about seven men; the medical evidence also confirmed there was no penetration although the complainants grandmother (PW2) said in her evidence that the complainant's clothes were smeared with sperms.

5. On the part of the State, ***Mr. Omwega*** concurred with ***Mr. Katwa*** that the sentence meted against the appellant was illegal, due to the age of the appellant. However, he maintained that the alternative count of indecent assault was proved and both courts below should have convicted the appellant accordingly. The minor discrepancies in the medical report regarding the date of the offence did not affect the weight of the evidence especially the evidence of the complainant regarding the charge of indecent assault.

6. The guiding principles in regard to the determination of a second appeal such as this are well settled.

"The Court will not lightly disturb the concurrent findings of facts of the trial court and the first appellate court, particularly where, as here, it is evident that the minds of both were directed to essential issues. (See the case of PASCAL WASIKE OKHWATENE VS R, CR. C. NO. 96 OF 1990 (Unreported)."

It is common ground that the appellant was a minor, aged 14 years and 16 years when he was arraigned in court and when he was convicted respectively. The appellant ought to have been tried as a minor and sentenced according to the provisions of the Children Act. Under ***Section 190(1) of the Children's Act***, "***No child shall be ordered to imprisonment or to be placed in a detention camp***".

7. ***Section 191*** makes provisions on how a minor offender should be dealt with. This is in line with the overriding objective; that when a court is dealing with a minor who is charged with a criminal offence, the paramount consideration that guides the court is the best interest of the minor which must be preserved during the trial and sentencing. The life of a minor should be preserved, so that he or she can be guided and rehabilitated to help the minor realize his full potential. A minor who is sentenced to life imprisonment cannot realize his full potential therefore it is not in the best interest of the minor.

8. It was also common ground that the charge was defective because the offence of rape cannot be committed jointly by more than one person. (See the case of ***PAUL MWANGI MURUNGA VS. R, CR NO. 35 OF 2006***, where this Court differently constituted, their lordships expressed themselves thus:

"This Court has repeatedly said that two or three men or whatever may be their number cannot jointly at the same time rape one woman. Each one of the men commits the act of rape individually and is followed by the next man. We are unable to appreciate how two or three men can at the same time "jointly" enter or try to enter her genital organ. The act is committed by each one of them alone and if there be two, three or four of them each must be charged on a separate count of rape."

9. Mr. Omwega urged us to set aside the judgment on the grounds that it was wrong in law, and substitute it with a conviction and sentence of the appellant on the charge of indecent assault.

This now leads us to a further re-examination of whether there was available evidence that supports the alternative charge of indecent assault. The complainant's evidence confirms that she identified the appellant as one of the people who indecently attacked her. According to her evidence, she identified other assailants who apparently negotiated with her parents and they were forgiven; and thus they were not charged with the appellant.

10. The evidence-in-chief by the complainant is captured on page 11 of the record of appeal:

"It is David Kipkemoi who got hold of me. William Kipyegon was also present together with Daniel Kipngetich Sang, Charles, another Kimweno. In total there were seven people. David Kipkemoi and William Kipyegon were 1st one to do it. I do not know where the others are. Accused raped me. David Kipkemoi was the 1st one to rape me. Accused was present. It was at 7.00 p.m. I saw accused clearly. I saw all of them. Accused did it. David Kipkemoi and William Kipyegon are the ones who removed the pants. Accused did not do it..... I got injured in the hips. The others were not arrested because they came home and talked with my parents. They were not arrested. I got injured in my private parts. I did not bleed..."

11. We are concerned with the quality of the evidence as the offence took place at 7.00 p.m. There were many assailants and there was no identification parade that was carried out. The evidence by the complainant or the arresting officer did not show how the complainant was able to identify the appellant; no description was given. For this reason, we find this evidence unsafe to sustain a conviction; more so because the same evidence that supported the main count has been discounted. Also for reasons that the appellant, a minor was convicted on 29th June 2004, has by now served a total of eight [8] years. We find that sentence is more than adequate even if he were found guilty of the offence of indecent assault.

12. That being our finding, we allow the appeal, quash the conviction and set aside the life sentence, and order the appellant be released from prison forthwith unless he is otherwise lawfully held.

Dated and delivered at Nakuru this 27th day of September, 2012.

ALNASHIR VISRAM

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

D. K. MARAGA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR