



REPUBLIC OF KENYA



KENYA LAW
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**Muiruri v Republic (Criminal Appeal 27 of 2019)
[2023] KEHC 3007 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 27 OF 2019
SC CHIRCHIR, J
MARCH 29, 2023**

BETWEEN

JULIUS NDUATI MUIRURI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Original Conviction and Sentence in Sexual
Offence Case No. 44 Of 2016 Of Principal Magistrate's Court at
Kandara Delivered On 27th June 2022 By Hon. M. Kinyanjui SRM))*

JUDGMENT

1. The appellant was charged with the offence of rape contrary to section 3(1)(a)(b)(3) of the [sexual offences Act](#) No 3 of 2006.(The Act)
2. The particulars are that on the May 21, 2016 in Kandara sub –county of Murangá County intentionally and unlawfully caused his penis to penetrate the vagina of MMK without her consent.
3. He faced an alternative charge of committing an indecent act with an Adult contrary to section 11(4) of the same Act. He was convicted of the first charge and sentenced to 10 years in prison. This appeal is against the said conviction and sentence.

Grounds of appeal.

4. The appellant has set out 6 grounds of Appeal which I have summarized as follows: -
 1. That the prosecution failed to establish that he was the perpetrator of the crime
 2. That the case was not proved beyond reasonable doubt



3. That the learned magistrate erred in failing to set out points for determination and by failing to give reasons for the judgment
4. That the learned magistrate contravened section 169(2) of the [Criminal Procedure Code](#) when delivering judgment.
5. That the learned Magistrate erred by failing to follow the rules and policy guidelines on sentencing.

Appellant's submissions

5. On the submission's the Appellant indicates that he has abandoned the appeal on conviction and only wish to pursue the appeal against sentencing. He has therefore confined his submission to the issue of sentencing only.
6. The Appellant urges the court to review the sentence imposed pursuant to the decisions of the supreme court in [Francis K Muruatetu - Supreme Court Petitions No 15 of 2015 and No 16 of 2017](#), and Machakos High Court Petition No E017/2021 between [Philip Mueke Maingi & others vs Republic](#).
7. The Appellant submits that he is a first offender and that he has since reformed. He further submits that the trial court meted out the sentence of 10 years as being the minimum mandatory sentence as the magistrate's hands were tied.

Respondent's submission

8. The Respondent's urges the court to be guided by the Judiciary sentencing policy guidelines. It is further submitted that the victim in this case was a vulnerable person within the context said guidelines. The Respondent further submits that the aggravating circumstances in this case out weighted the mitigating circumstances and hence the sentence was fair.

Determination

9. The record shows that upon convicting the Appellant, the court called for a pre-sentencing report. The report gave a negative view of the Appellant, in the eyes of the community. His family on the other hand, while regretting the conduct of their kin, hoped for a less Severe punishment due to the 'Appellant's ill health'. There was no medical report that has been submitted to show that the Appellant was or is now ailing. On mitigation the accused simply stated 'I plead for leniency'. The prosecution told the court that the Appellant was a first offender.
10. The report also indicate that the victim has become traumatized, sickly and now stays with his daughter. while sentencing the trial court took into consideration the unfavourable report and the mitigation and handed down the minimum sentence prescribed.
11. The issue of the minimum mandatory sentences in sexual offence which the lower court was clearly a live to has now been settled following the decisions of the high court in the case of [Edwin wachira & 12 others vs DPP Mombasa High Court Petition No 97/2001](#) and Philip Muneke Mwangi & others vs Mombasa E017/2021. This declaration however did not take away the court's discretion to prescribe a mandatory sentence if the situation calls for it.
12. In the above two decisions the courts held that the minimum mandatory sentences are unconstitutional. It follows that the minimum mandatory sentences provided in the [Sexual Offences](#)



Act are no longer binding on the courts. Sentencing is however an act of discretion and this court has to have a reason to interfere with the lower court's discretion.

13. The sentencing policy guidelines, gives guidance on both the aggravating and mitigating circumstance while sentencing. While the Appellant, it is noted, is a first offender and hence a mitigating factor, the victim was a vulnerable 73 years old lady. She lived alone. The appellant lived in the neighborhood, and must have been aware that the complainant lived alone. The offence was committed, one would correctly state, conveniently at 7pm. One cannot help but come to the irresistible conclusion that the Appellant schemed well and took advantage of the victim's vulnerability.
14. Can the sentence meted out be said to be excessive in the circumstances ? I think not. Taking into account the above aggravating factors I find that he sentences of 10 years was fair and reasonable. I will not interfere with it.
15. The upshot of the foregoing is that, this appeal is unmerited. It is hereby dismissed.

Dated, signed and delivered virtually at Kakamega this 29th March, 2023

S. CHIRCHIR

JUDGE

In the presence of ;

Court Assistant;- Susan

Appellant present

Ms. Muvuu for the Respondent

