



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO 23 OF 2020

COSMAS MUCHUI MBURAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Sentence in Nanyuki CM Sexual Offence Case No 26 of 2017 – N Thuku, PM)

J U D G M E N T

1. The Appellant herein, **COSMAS MUCHUI MBURAKA**, was convicted after trial of **attempted rape** contrary to **section 4** of the **Sexual Offences Act, No 3 of 2006**. The complainant was the Appellant's step-niece. On 13/09/2018 the Appellant was sentenced to 10 years imprisonment. He has appealed only against that sentence; he stated that he was satisfied with the conviction.

2. I have considered the Appellant's submissions as well as those of the learned counsel for the Respondent. Section 4 of the Sexual Offences acts states:-

“Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape, and is liable upon conviction to imprisonment for a term which shall not be less than five years, but which may be enhanced to imprisonment for life.”

The use of the term “...is liable upon conviction for imprisonment...” means that the trial court has the discretion to award a non-custodial sentence; but once the court decides that the offender deserves a custodial sentence, it must award a term of imprisonment of not less than 5 years, and may enhance the punishment to life imprisonment, no doubt depending on the particular circumstances of the crime and the offender.

3. In the present case there is no doubt that the Appellant deserved a custodial sentence. In his mitigation however, he told the trial court that he was a single parent of two children then aged 3 and 6 years.

4. The Appellant also informed this court that the trial court did not take into account the period that he had remained in custody during his trial. I have perused the record of the trial court. The Appellant was in custody from 27/03/2017 until 13/09/2018 when he was sentenced, a period of one (1) year and six (6) months. It is clear from the record that the trial court did not take into account this period when sentencing him.

5. The reasons for the trial court enhancing the sentence to 10 years were two –

- (i) That violence against women across the country was on the rise.
- (ii) That the Appellant attempted to rape his own relative.

There was no mention in the trial court's notes on sentencing that the Appellant was a first offender, or that he was a single parent of 2 young children.

6. In the circumstances of this case I hold that the enhancement of the sentence to 10 years imprisonment resulted in a sentence that was manifestly harsh and excessive. I will therefore interfere with the sentence as follows –

- (i) The sentence of ten (10) years imprisonment is set aside and instead the Appellant is sentenced to the mandatory**

minimum sentence of five (5) years imprisonment.

(ii) That sentence of five (5) years imprisonment shall take effect from 27th March, 2017 in order to take into account the period that the Appellant remained in custody during his trial.

It is so ordered. To that limited extent only does the Appellant's appeal against the sentence succeed.

DATED AND SIGNED AT NANYUKI THIS 31ST DAY OF JANUARY 2022

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 24TH DAY OF FEBRUARY 2022