



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 64 OF 2018 [SO]

EMMANUEL ODHIAMBO OGWEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from judgment, conviction and sentence delivered on 9.11.2018 in Ukwala S.RM.C.C [S.O.] No. 36 of 2018 by Hon. G. Adhiambo – S.RM.)

JUDGMENT

1. The appellant herein **Emmanuel Odhiambo Ogwel** was convicted of the **Offence of Rape Contrary to Section 3(1) (a) (c) (3) of the Sexual Offence Act vide Judgment in Ukwala Senior Resident Magistrate (Sexual Offence) case No. 36 of 2018**. He was sentenced to serve Ten (10) years imprisonment vide judgment delivered on 9.11.2018 by Hon. G. Adhiambo, Senior Resident Magistrate.
2. Aggrieved by the said judgment, conviction and sentence, the appellant filed this appeal on 16.11.2018 challenging both conviction and sentence. This appeal was admitted to hearing on 12.6.2019. The delay in hearing and determination of this appeal was occasioned by the delay in submitting the certified original trial court record to this court as the trial court initially submitted only handwritten record of proceedings without a typed certified copy to enable this court serve the parties.
3. It was not until 2.12.2020 when the certified trial court record was confirmed availed to the High Court, and this court fixed the appeal for mention on 19.1.2021 to confirm the Filing of written submissions and fix a judgment date. When the matter came up for mention on 19.1.2021, the appellant appeared physically and in court. He informed the court that he only wished to challenge sentence and not conviction. He applied and the court allowed his application to withdraw the appeal against conviction.
4. Parties then submitted on sentence reduction alone with Mr. Kakoi Principal Prosecution Counsel opposing sentence reduction on account that the same was deserved considering the seriousness of the offence, circumstances under which it was committed, bordering on gang rape and the character of the appellant, according to PW3, who described him as very violent and that there were threats of violence against the complainant.
5. The appellant readily accepted in his submissions that he committed the offence which was a first offence and submitted that he was very remorseful and will not repeat the offence. He submitted that he has since his imprisonment learnt his lesson in prison. That he has studied religious Education, Carpentry and joinery and that if he met the complainant he would ask her for forgiveness and he is ready to tell other people out there that they should never commit offences and would implore them to be law abiding citizens.
6. I have considered the appeal herein against sentence alone and the submissions for and against sentence reduction. Sentencing is in the discretion of the trial court. However, the **Sexual Offences Act** provides for minimum sentences upon conviction of a **Sexual Offender**. **Under Section 3(3) of the Sexual Offences Act No. 3 of 2006**, a person guilty of an offence Under the Section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.
7. From the trial court record, it is clear that the prosecution did not urge the court to impose sentence that is enhanced and therefore albeit the prosecution submits that the offence bordered on gang rape, the appellant was charged with rape. The complainant was aged 18 years.
8. The appellant having abandoned his appeal against conviction, this court cannot substitute the charge from rape to gang rape.
9. I have considered the evidence on record and especially the Medical Evidence adduced by the Clinical Officer on the extend of the injury to the complainant following the rape.
10. I have equally considered the fact that the appellant has withdrawn his appeal against conviction and saved this court time to delve into the merits and demerits of the appeal which involves re-assessing the long winding evidence adduced before the trial court.

11. The appellant was a first offender and albeit **Section 3(3) of the Sexual Offences Act** provides for minimum prison term of 10 years which may be enhanced to life imprisonment, there is no material placed before this court or the trial court to justify enhancement of the minimum sentence. Furthermore, the Supreme Court in **Francis Karioko Muruatetu V Republic [2017] eKLR** has developed a principle which has been echoed in many decisions of the Court of Appeal on the unconstitutionality of Mandatory sentences save where the situation calls for such sentences to be imposed.

12. In this case, the trial court meted out mandatory minimum prison term of 10 years. In **Jared Koita Injuri VS. R. [2019] the Court of Appeal** applying the principle, and spirit in **Francis Karuoko Muruatetu** reduced Mandatory Minimum Sentence imposed on the appellant in a Sexual Offence matter. In that regard, and applying above principles to this appeal, I hereby exercise discretion and set aside the minimum mandatory sentence of 10 years imprisonment imposed on the appellant and substitute it with a prison term of six years imprisonment, to be calculated from the date of the appellant's arrest on 2.9.2018 as per the charge sheet dated 6.9.2018.

13. Accordingly, as the appeal against conviction was withdrawn, the appeal against sentence is hereby allowed to the extent stated hereinabove.

14. File closed.

15. Orders accordingly.

Dated, Signed and Delivered at Siaya this 20th day of January, 2021

R. E. ABURILI

JUDGE

In the presence of:

Appellant in person

Mr. Kakoi Principal Prosecution Counsel for the State

CA: Modestar and Mboya