



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 12 OF 2019

BETWEEN

KATII KAKWO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence dated 9.10.2019 by Hon. S. K. Mutai, PM in Kapenguria PMCC Cr. Case no. 35 of 2018)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein was arraigned before the Principal Magistrate's Court here at Kapenguria on two counts. In count I, he was charged with ***rape contrary to section 3(1)(a)(c) and 3 of the Sexual Offences Act No. 3 of 2006***, the particulars thereof being that on the 12th day of August 2018 at around 8.00pm within West Pokot County, he intentionally and unlawfully caused his penis to penetrate the vagina of AC by use of force.
2. In the alternative count, he was charged with committing an ***indecent act with an adult contrary to section 11(A) of the Sexual Offences Act, No. 3 of 2006***, the particulars thereof being that, on the 12th day of August 2018 within West Pokot County, he intentionally touched the breasts and buttocks and vagina of AC with his penis against her will.
3. In Count II, the appellant was charged with ***assault causing actual bodily harm contrary to section 251 of the Penal Code***, the particulars thereof being that on the 12th August 2018 within West Pokot County, he willfully and unlawfully assaulted Alice Chanangat Kiptoo thereby occasioning her actual bodily harm.
4. The appellant denied the charges when he appeared before the court for plea. The case thus went to full hearing during which the prosecution called 4 (four) witnesses. At the close of the prosecution case, the appellant was put on his defence. He gave sworn evidence and called one witness.
5. At the conclusion of the hearing the learned trial court found the appellant guilty as charged on each of the two counts, convicted him and sentenced him to 10 years on count I and 3 years on count II. The sentences were to run concurrently. The learned trial court ordered that the period spent in custody pending trial would be taken into account in computing the sentences.
6. It is the trial court's conviction and sentence that gave rise to the present appeal.

The Appeal

7. The Petition of Appeal, filed in court on 14th October 2019 raises the following grounds as gleaned from what appears to be against statements in mitigation:

- a. That the learned trial magistrate erred in law and fact by failing to consider the appellant's mitigation.**

b. That the sentence imposed upon the appellant was excessive in the circumstances.

8. The appellant prays that the sentence imposed upon him by the learned trial magistrate be reduced to enable him go back to his wife and child.

9. This is a first appeal. In this regard, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter, only remembering that it has no opportunity of seeing and hearing the witnesses who gave evidence during the trial, and to make an allowance for the same. Generally, see *Mark Oiruri versus Republic [2013] eKLR* and *Okeno versus Republic [1972] EA 32*.

10. Since it is clear from the grounds of appeal that the appellant is only appealing against sentence, I shall confine this judgement to the said issue.

When can an appellate court interfere with sentence?

11. **Section 354(3)(b)** clothes the High Court as a first appellate court hearing an appeal on sentence to increase or reduce the sentence or alter the nature of the sentence depending on the circumstances of the case. This court has therefore to consider whether the sentence imposed by the learned trial court is excessive in the circumstances as submitted by the appellant, and thus subject to downward revision.

Analysis and Determination

12. The offence of rape as defined under **section 3 of the Sexual Offences Act no. 3 of 2006** carries a minimum sentence of ten years; but such sentence may be enhanced to imprisonment for life. **Sub-section 3 of Section 3** reads:-

“(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to life imprisonment.”

13. In his written submissions filed in court on 7th May 2020, the appellant beseeches this court to reduce the sentences, especially in view of the fact that he was a first offender at time of conviction and further that he had asked the learned trial court for leniency during sentencing. I note from the record that the learned trial court considered the fact that the appellant was a first offender and also took into account the appellant’s mitigation before sentencing him to 10 years’ imprisonment on count I. The respondent in his written submissions filed in court on 4th July 2020 supports the sentence.

14. The Supreme Court decision in *Muruatetu & another versus Republic [2017] eKLR* has changed the local sentencing landscape especially as regards minimum sentences such as death in murder cases. The Court of Appeal has followed suit with a number of decisions to the effect that minimum sentences are no longer tenable under the **Sexual Offences Act no. 3 of 2006**, just as they are not tenable for capital offences; unless the circumstances warrant. See the case of *Evans Wanjala Wanyonyi versus Republic [2019] Eklr*. In *Daniel Onyango Omoto versus Republic [2019] eKLR*, the Court of Appeal sitting in Kisumu over the judgment of R. N. Sitati J dated 29th September 2015 in *Kakamega HCCR Case no. 2 of 2012* declined to exercise its discretion as provided for in the *Muruatetu Case* (above) for the reasons that

“the manner in which the deceased died was heinous. The appellant mercilessly chopped off the deceased’s right hand and strangled her. Thereafter, he went for her genital organs which he mutilated. No human being deserves to die in this manner.”

15. In the instant case, the complainant testified that as she walked home from the nearby shopping Centre at around 8.00pm, the appellant whom she recognized as a neighbour caught up with her and asked her if she knew him. As the two were near the Katikimor Primary School where there were security lights, the complainant told the court that she clearly identified the appellant. Then suddenly, appellant grabbed her by the neck, strangled her until she lost consciousness. By the time she came to, she was in much pain and her clothes were torn. She screamed for help and a neighbor PW2, came to her rescue. On the following morning, she went to the scene in the presence of her husband and APs where they found a used condom.

16. It is my finding that the appellant’s attack on the complainant was so beastly that he deserves no mercy from this court. He was determined to rape the complainant at whatever cost. He also showed no remorse at whatever cost. When he asked the trial court for leniency during sentencing. And in this appeal, all he wants is to be set free so that he can go back home to his wife and child. In my considered view, and though I have the discretion to reduce the sentence, on count I, I decline to do so for the reasons that the attack on the complainant was inhuman and beastly and the appellant has shown no remorse for his offence.

17. As regards count II, I concur with the submissions by the State that the assault visited upon the complainant by the appellant was in furtherance of his intention to rape the complainant. This being the case, I would quash the conviction on count II and set aside the sentence of 3 years’ imprisonment.

Conclusion

18. In conclusion, I make the following final orders:-

a. The appeal on sentence on count I be and is hereby dismissed.

b. The appeal on both conviction and sentence on count II be and is hereby allowed. The conviction is quashed and the

sentence of 3 years' imprisonment be and is hereby set aside.

c. The appellant has a right of appeal to the Court of Appeal within 14 days from the date of this judgment.

19. Orders accordingly

Judgment delivered, dated and signed in open court at Kapenguria on this 30th day of June, 2020.

RUTH N. SITATI

JUDGE

In the Presence of

.....**Present in person** for Appellant

.....**M/s. Kiptoo**..... for Respondent

.....**M/s.Juma**..... Court Assistant