



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 97 OF 2018

PAUL MWAJOTO RAI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the sentence meted out by Hon. P.K. Mutai, Resident Magistrate, on 20th March, 2015 in Kwale Chief Magistrate's Court Criminal Case No. 962 of 2014).

JUDGMENT

1. The appellant was convicted for the offence of rape contrary to Section 3(1) (a)(b) of the Sexual Offence Act No. 3 of 2006. The particulars of the charge were that on the 20th day of August, 2014 in Kwale County within Coast region intentionally and unlawfully caused his penis to penetrate the vagina of NK [name withheld] without her consent. He was sentenced to serve 30 years imprisonment.
2. On 29th April, 2019 the appellant filed his petition of appeal. On 27th January, 2020 he filed mitigation grounds of appeal. They state that the sentence imposed on him was harsh and excessive. He prayed for leniency and said that he was misadvised by the area chief that the matter would be finalized.
3. In his written submissions, the appellant stated that the offence of rape carries a minimum sentence of 10 years which may be enhanced to life imprisonment. He submitted that the sentence of 30 years imposed on him was harsh and excessive. He prayed for forgiveness and for leniency and stated that he was 28 years old. He relied on the case of **Alister Anthony Pereira v State of Maharashtra**. He also relied on **Kichanjele s/o Ndamungu v Republic** [1941] 8 EACA 64 and **Shadrack Kipchoge Kogo v Republic** Eldoret Criminal Appeal No.253 of 2003 and **Thomas Mwambu Wenyi v Republic** [2017] eKLR, on the court's duty in sentencing.
4. The appellant indicated that he had been in custody for 4 years and he had reformed. He relied on the case of **Republic v Thomas Patrick Gilbert Cholmondeley** [2009] eKLR where the accused person was sentenced to 8 months imprisonment for the offence of manslaughter. The appellant submitted that the offence therein was more serious as a life was lost unlike in this case.
5. Ms Mwangeka, Prosecution Counsel, filed her written submissions on 12th March, 2020 on behalf of the Director of Public Prosecutions. She relied on the case of **Charles Kibue v Republic** [2016] eKLR on the principles of sentencing.
6. The Prosecution Counsel submitted that the Trial Court when imposing the sentence of 30 years imprisonment took into consideration the appellant's mitigation and the fact that he was a 1st offender. That the said court also took into account the beastly act done by the appellant which called for a deterrent sentence.
7. She pointed out that the victim was an 81 year old woman and at the said age, was vulnerable and was entitled to live in dignity and respect free from abuse by virtue of the provisions of Article 57(c) of the Constitution of Kenya. Ms Mwangeka prayed for the sentence to be upheld.
8. The appellant herein appeals only against sentence as he pleaded guilty to the offence of rape. In the interest of justice, this court has looked at the manner in which the plea was taken and established that the guidelines laid out in **Adan v Republic** [1973] EA 445, on the procedure to be followed when taking pleas, was adhered to.
9. This court notes that the appellant was given an opportunity to mitigate by the Trial Court and he did so. The said Court considered the said mitigation and sentenced the appellant to 30 years imprisonment. He has proffered the same mitigation on appeal and states that he does not see how at the age of 28 years he will spend 30 years in prison. That might be so, but he should have thought of the consequences of his actions before attacking an old woman of 81 years of age and raping her.

10. The lower court proceedings do not reveal if the appellant was a 1st offender or not. In this appeal, he has stated that he is a 1st offender. Irrespective of the said fact, the appellant raped a woman who was old enough to be his grandmother. He should have left a woman of that age to enjoy her sunset years in peace without fear of sexual abuse. The said offence must have traumatized her.

11. This court notes that the appellant pleaded guilty to the offence of rape which was an acknowledgment of his own mistake. In so doing, he saved the court's time from having to undertake a full trial. At 28 years of age, there is still hope that he can be reformed by the custodial sentence imposed on him and that by the time he will be released from prison, he will have changed his wayward ways.

12. Bearing in mind that the foregoing fact and at the same time taking into account the age of the victim, I set aside the sentence of 30 years imprisonment and substitute it with a sentence of 25 years imprisonment. In line with the provisions of Section 333(2) of the Criminal Procedure Code, the sentence will be effective from 22nd August, 2014 being the date when he was first arraigned in the lower court. The appeal succeeds only to the above extent.

NJOKI MWANGI

JUDGE

DELIVERED, DATED and SIGNED at MOMBASA via Teams online platform on this 30th day of June, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.

In the presence of:-

Appellant present in person

Mr. Muthomi, Prosecution Counsel - for the DPP

Mr. Oliver Musundi - Court Assistant.