



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 86 OF 2019

**MWAKAMSHA KAZUNGU KINANGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the original sentence in the Chief Magistrate Court at Mombasa Criminal Case No. 35 of 2015 by Hon. E.M. Kagoni (SRM) dated 8<sup>th</sup> August 2020**

**Coram: Hon. R Nyakundi**

**Mr. Mwangeka for the Respondent**

**Appellant in Person**

**JUDGEMENT**

The Appellant was charged with rape contrary to section 3(1)(a)(b) as read with section 3(3) of the Sexual Offences Act. The particulars of the offence were that on the 5<sup>th</sup> day of October 2015 in Likoni Sub County within Mombasa County unlawfully and intentionally caused his penis to penetrate the vagina of SB a person with disability.

The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offence Act. The particulars of the offence were that on the 5<sup>th</sup> day of October 2015 in Likoni Sub County within Mombasa County unlawfully and intentionally did an indecent act by touching the vagina of SB with your penis, a person with disability.

The Appellant pleaded not guilty and after hearing, he was found guilty on the main charge and was convicted and sentenced to 15 years imprisonment

Aggrieved by the said sentence, the Appellant filed his amended grounds of appeal reproduced verbatim that: -

- 1. That the learned trial Magistrate erred in both law and fact by giving me an excessive sentence.**
- 2. That the learned trial Magistrate erred in both the law and fact by failing to consider my mitigation.**
- 3. That the learned trial Magistrate erred in law and fact by failing to consider the period spent in remand prior to conviction and sentence.**

The Appellant filed his written submissions on 27<sup>th</sup> July 2020 in support of his appeal. He submitted that the sentence was harsh and excessive as section 3(1)(3) of the section prescribed a minimum sentence of 10 years. He contended that the Supreme Court held that mandatory sentences were unconstitutional and that the opinion of the Supreme Court applied with equal force to minimum sentences or non-optional sentences. He urged that under Article 50(2)(p) of the Constitution, he should have benefited from the least severe sentence prescribed in law.

The Appellant further submitted that the trial Magistrate failed to consider the time he spent in custody under section 333(2) of the Criminal Procedure Code.

The Appellant relied on **Kichajelele s/o Ndamungu vs Republic (1949) EACA 64; Opoya vs Uganda (1967) E.A 752, Eliud Muchonde**

vs Republic HCCR APP No. 93 of 2017 and Evan Wanjala Wanyonyi v Rep (2019) eKLR in support of his submissions.

Ms. Mwangeka advocate for the Respondent filed her submissions dated 29<sup>th</sup> July 2020 on 3<sup>rd</sup> August 2020 opposing the appeal. She submitted that the Appellant took debase the victim who was visually impaired and attempted to minimize his gross act by offering to marry the complainant. Learned counsel cited the case of **Charles Ndirangu Kibue v Republic [2016] eKLR** where the court held sentencing was at the discretion of the court and she urged the court not to disturb the sentence as the trial court did not act on any immaterial or erroneous fact in arriving at the sentence but applied the correct legal principles.

### **Analysis and determination**

I have considered the submissions by both parties. It is clear that the appeal is against the sentence only.

It is well established that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances as was emphasized by the Court of Appeal in **Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR** where it stated: -

**“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No. 188 of 2000 this Court stated thus:**

It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

**(See also Wanjema v. Republic [1971] E.A 493.)”**

In the case of **Ogolla s/o Owuor v R {1954} EACA 270** where the Court stated inter alia that:

**“The Court does not alter sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”**

The Appellant was convicted of committing rape under section 3(3) of the Sexual Offences Act, which states that: -

**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 imprisonment for life.**

The trial Magistrate sentenced the Appellant to 15 years which was lawful and within the discretion of the court. The only question is whether the sentence was excessive and manifestly harsh taking into consideration of the facts before the court.

It is trite that the court in sentencing should taking into consideration the mitigating factors as well as aggravating factors. The Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** pronounced itself thus: -

**To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:**

- (a) age of the offender;**
- (b) being a first offender;**
- (c) whether the offender pleaded guilty;**
- (d) character and record of the offender;**
- (e) commission of the offence in response to gender-based violence;**
- (f) remorsefulness of the offender;**
- (g) the possibility of reform and social re-adaptation of the offender;**
- (h) any other factor that the Court considers relevant.**

The Judiciary's Sentencing Policy Guidelines 2016 sets out a list of aggravating and mitigating factors in paragraphs 23.7 and 23.8 respectively while paragraph 23.9.4 of the guidelines directs the court to weigh the mitigating and aggravating circumstances while passing sentence.

The trial court in passing its sentence stated that: -

**“Rape is a serious offence. Conducting the offence on a person with disability compounds the offence. For his action the accused is sentenced to serve 15 years...”**

I have perused the record of the trial court. The Appellant was a first offender however; he took advantage of the complainant who is disabled being partially blind and when confronted had proposed to conceal the offence by offering to marry the complainant. The trial Magistrate in passing sentence was not constrained by the minimum mandatory sentence as prescribed but weighed the seriousness of the offence and exercised her judicial discretion. I find no reason to interfere with the sentence of the trial Magistrate. The appeal is hereby dismissed in its entirety.

Orders accordingly.

Right to appeal 14 days.

**Judgment delivered, dated and signed at Malindi this 18<sup>th</sup> day of December, 2020.**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

**The Appellant in person**

Mr. Onyango for the State