

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 9 OF 2018

(From original Conviction and Sentence in Nanyuki CM Sexual Offence Case No 17 of 2016 – W J Gichimu, PM)

PATRICK GITONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein, **PATRICK GITONGA**, was convicted after trial of the main charge of **rape** contrary to **section 7** of the **Sexual Offences Act, 2006**. On 16/03/2017 he was sentenced to serve ten (10) years imprisonment. Inexplicably, the Appellant was also convicted of the **alternative** charge of **committing an indecent act with a mentally disabled person** contrary to **section 11(1)** of the same Act and sentenced to five (5) years imprisonment (to run concurrently with the sentence in the main count).

2. The conviction and sentence for the alternative charge are patently illegal and must be set aside. Once a court has convicted on the main count, it cannot also convict on the alternative charge! It is alternative to the main count! That conviction and sentence on the alternative count are hereby set aside for illegality.

3. The Appellant's appeal is against the sentence only. There was an aggravating factor in the offence committed by the Appellant in that the complainant was a mentally challenged young woman whom he took advantage of instead of protecting her. He got the minimum sentence of ten (10) years imprisonment after the trial court settled on a custodial sentence. Although the **Supreme Court of Kenya**, in effect, outlawed the mandatory nature of sentences in this country, in its judgment dated 14/12/2017 in **Petition No 15 of 2015 (Consolidated with Petition No 16 of 2015), Francis Karioko Muruatetu & Another –VS- Republic (2017) eKLR**, meaning therefore that courts can now impose a sentence less than the one declared in mandatory terms by the law, I hold that the ten (10) years imprisonment meted out to the Appellant was richly deserved, given the circumstances of this offence already outlined above.

3. I find no merit at all in the appeal against sentence in the main count. The appeal is hereby dismissed. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 2ND DAY OF DECEMBER 2020

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 17TH DAY OF DECEMBER 2020