REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRA NO. 216 OF 2017

BENEDICT FWAMBA WAKWABUBI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court

at Eldama Ravine Cr. Case no. 1084 of 2012 delivered on the 10th day of December, 2012

by Hon. M. Kasera, PM]

JUDGMENT

1. The DPP did not oppose this appeal from the conviction and sentence of imprisonment for 20 years for the offence of rape contrary to section 3 (1) (3) of the Sexual Offences Act to which the appellant pleaded guilty and was sentenced on 10/12/2012. The appellant has therefore been in custody for 6 years and 4 months.

2. In urging this Court to quash the conviction, Ass. DPP Esther Macharia submitted as follows:

> *"DPP*
>
> *Appeal is not opposed.*
>
> *Appellant convicted on rape contrary to section 3 of the Sexual Offence Act and sentenced to serve 20 years imprisonment. The appellant pleaded guilty at the time of plea.*
>
> *Offence of rape has a minimum sentence of 10 years and maximum of life imprisonment.*
>
> *Due to the gravity of the offence the Court ought to have explained to the appellant the consequences of a pela of guilty.*
>
> *The Court failed to execute its duty to warn the accused. I refer to case Caleb Wawire v. R. HCCRA No. 74 of 2016 at Kisumu.*
>
> *Appellant's right to fair trial were denied. Appellant convicted on 10/12/12 and has been in custody for 7 years. Ordering a retrial may be prejudicial considering the time he has been in*

custody and due to the time the prosecution may not be able to get prosecution witnesses. The time in custody is sufficient for correction of the appellant. I urge the Court to quash the conviction.

3. In sentencing the appellant, the trial Court had said:

"Considers mitigation. Notes that this is mere disrespect for senior members of the society that needs to be dealt with. Accused to serve 20 years imprisonment."

4. This Court agrees with the DPP that in accepting the plea of guilty for the serious offence of rape, the trial Court ought to have warned the accused of the consequences of a conviction for rape, and, to satisfy itself that the accused's plea was unequivocal. See Judiciary Bench Book on Criminal Procedure 2018, at paragraph 29 – 40.

Retrial?

See Opicho v. R (2009) KLR 369

5. I further agree with the DPP that as the appellant has been in custody for 7 years, there is no justification for an Order in the interests of justice for a retrial. If the appellant had been sentenced to 10 years imprisonment, the minimum sentence for the offence of rape contrary to section 3 (1) (3) of the Sexual Offences, he would now have been due for release upon completing 6 years 7 months, with remission of $^{1}/_{3}$ of the sentence.

Conclusion

6. Accordingly, while quashing the conviction for the offence of rape contrary to section 3 (1) (3) of the Sexual Offences Act for the reason that the plea of guilty was not unequivocal, and setting aside the sentence therefor, the Court does not order a retrial because the appellant has served the $^{2}/_{3}$ of the minimum sentence of the offence. As explained in ***Arissol v. R*** (1957) EA 447, it is unusual for a first offender to be sentenced to the maximum penalty for a given offence, and the imprisonment for 20 years was clearly excessive.

Orders

7. There shall, therefore, be an order for the release of the appellant from custody forthwith, unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 10TH DAY OF APRIL 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.