REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CRIMINAL APPEAL NO. 319 OF 2015

DOMINIC MULI OMBOGA........................APPELLANT

-VERSUS-

REPUBLIC..RESPONDENT

(From the original conviction and sentence delivered before Hon. J.N. Nthuku - SRM

on 27th June 2013 in Criminal Case No. 24 of 2011 Cm's Court Nakuru)

JUDGMENT

The Appellant Dominic Muli Omboga was on the 27th June 2013 convicted for the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2005 and sentenced to serve 15 years imprisonment.

He has appealed for reduction of the sentence in his petition of appeal.

He submits that he is a first offender that he has already served a total of six years in custody and has reformed through the spiritual transformation and vocational training.

He indeed produced to the court several certificates of trainings while in prison – being certificate in grade three motor vehicle mechanic, Diploma from Discover Bible School and baptism certificate.

The appeal is opposed on grounds that the sentence is lawful and the minimum under Section 10 of the Act.

The appellant committed the offence at a young age.

The officer in charge of the Nakuru G.K. prison by his letter dated 11th March 2019 and his progress report confirms that the appellant's conduct and character has been above average.

The principles of sentencing are stated in the Judiciary's Guidelines on Sentencing. Among them that call for consideration are the

> ***a) Age of the offender***
>
> ***b) Being a first offender***
>
> ***c) Whether offender pleaded guilty***
>
> ***d) Character and record of the offenders.***
>
> ***e) Commission of the offence in response to gender – based violence***
>
> ***f) Remorsefulness of the offender***
>
> ***g) Reform and social re-adaption of the offender***

h) Any other factor that the court may consider relevant.

As stated in the case **Republic –vs- Johana Munyao Mweni(2018) e KLR**, the above guidelines do not replace judicial discretion but are only advisory.

It appears that the appellant has conformed to the purpose and objectives of sentencing being retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation.

-See **Nakuru Criminal Case (Murder) No. 46 of 2012 Republic –vs- Joseph Kibet Kirui (2019) e KLR**.

Section 10 of the Sexual Offences Act provides the sentence upon conviction for the offence of gang rape as

"---Imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life." It is a minimum sentence.

However, under the current Constitutional justice dispensation minimum sentences are frowned upon as taking away judicial discretion and independence.

Numerous judicial pronouncements have been made on this issue. The court ought to consider what a fair and appropriate sentence should be meted to an individual based on the circumstances thereto. Thus a prescribed minimum sentence takes away the court's discretion and ties its hands, despite circumstances that may demand a lesser sentence than the minimum – **S –v- Mofokeng 1999(1) SACR(W) at 506 (d) cited in Criminal Appeal No. 8 of 2015 Daniel Otieno Yugi -vs- R(2018) e KLR;**

See also **Criminal Appeal No. 93 of 2017 (Kiambu) Eliud Muchonde -vs- Republic (2019) e KLR** where the minimum sentence was reduced to three years imprisonment.

The offence committed by the appellant is serious. The victim was a young girl of 13 years.

In my view provisions of any legislation that was in force before the 2010 Constitution including the Sexual Offences Act No. 3/2006 that prescribes a minimum sentence ought to be interpreted in a manner that gives the court discretion to interrogate circumstances and character of an offence.

In the case **S-vs- Mofokeng 1999(Supra)** the court held

> ***"For the legislature to have imposed minimum sentences severely curtails the discretion of the courts offends against the fundamental Constitutional Principles of Separation of powers of the Legislature and the Judiciary.***
>
> ***It tends to undermine the independence of the courts and to make them mere cat's paws for the implementation by the legislature of its own inflexible penal policy that it is not capable of operating with serious injustice in particular cases."***

For the foregoing I come to the conclusion that the fifteen years sentence imposed on the appellant to have been excessive in the circumstances. I reduce the sentence to imprisonment for a period of seven years to run from the date of the trial court's sentence, the 27th June 2013.

Dated, delivered and signed at Nakuru this 20th Day of June 2019.

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J.N. MULWA

<u>JUDGE</u>