REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

APPELLATE SIDE

CRIMINAL APPEAL NO. 14 OF 2017

DENNIS KUNE ORONE.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(Being an appeal from the original conviction and sentence

in Eldoret Chief Magistrate's Criminal Case No. 1754 of 2010

by Hon. D.K. Kemei, CM, dated 18 March 2010)

JUDGMENT

[1] This appeal arises from the conviction and sentence passed against the Appellant herein, **Dennis Kune Orone**, by the Chief Magistrate's Court, **Eldoret in Eldoret CMCC No. 1754 of 2010**. The Appellant had been charged before the lower court with two substantive counts and one alternative charge. In the first substantive count, he was charged with the offence of rape, contrary to **Section 3(1)** as read with **Section 3(2)** of the **Sexual Offences Act, No. 3 of 2006**. It was alleged that on the 28 February 2010 at [Particulars withheld] Village in Uasin Gishu District within Rift Valley Province he intentionally and unlawfully caused penetration of his genital organ (penis) into the genital organ (vagina) of **CIF** without her consent.

[2] In the alternative, the Appellant was charged with indecent assault contrary to **Section 11(1)** of the **Sexual Offences Act, No. 3 of 2006.** In this respect, it was alleged that on the **28th February 2010** at [particulars withheld] in Uasin Gishu District within the Rift Valley Province, he intentionally and unlawfully committed an indecent act by touching the genital organ (vagina) of **CIF** without her consent. And, in the second count, the Appellant was charged with assault causing actual bodily harm contrary to **Section 251** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. It was alleged that on **28 February 2010** at [particulars withheld] Village in Uasin Gishu District within the Rift Valley Province, he unlawfully assaulted **CIF** thereby occasioning her actual body harm.

[3] The Appellant was arraigned before the court of the Chief Magistrate on **18 March 2010** and the record of the lower court shows that the charges were read over to him in Kiswahili language, whereupon he admitted the two substantive counts and was, accordingly, convicted on his own guilty plea and sentenced to serve 20 years imprisonment in respect of Count I and 2 years imprisonment for Count II. Being aggrieved by his conviction and sentence, the Appellant filed this appeal with the leave of the Court **3 February 2017** on the following grounds:

[a] that he be considered as a first offender;

[b] That the incident occurred due to his drunkenness;

[c] That he is very remorseful and regrets what he did on that day;

[d] That before the incident he was a hardworking man who supported his family

[e] That his siblings depend on him as the first born and that the sentence of 20 years has deprived them of their breadwinner.

[4] Consequently, it was the Appellant's prayer that the sentence imposed on him by the lower court be reduced. In urging his appeal, he

relied entirely on his so called Grounds of Mitigation and added that he has learnt a lesson during the period he has been in custody. He accordingly pleaded for leniency.

[5] The appeal was opposed by Learned Counsel for the State, **Ms. Mokua,** whose submission it was that the sentence passed by the lower court was lenient, granted that the provision in issue allows for enhancement of sentence to life imprisonment. She therefore prayed for the dismissal of the appeal.

[6] Thus, having carefully perused the record of the lower court in the light of the appeal, it is manifest that, although the appeal purports to be against both conviction and sentence, the Appellant's intention, as manifested from the Grounds of Mitigation aforementioned, was to appeal the sentence only. Indeed, **Section 348** of the **Criminal Procedure Code, Chapter 75** of **the Laws of Kenya** is explicit that:

> **"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence."**

[7] Hence, in **Olel vs. Republic [1989] KLR 444**, a two-judge bench of the High Court expressed the view, which I entirely agree with, that:

> **"Having considered the submissions by both learned counsel on the interpretation of section 348 ... we have come to the conclusion that where the plea is clearly an unequivocal plea of guilty, an appeal against conviction cannot lie. The section itself is quite clear on that and permits of no confusion or difficulty in its interpretation. It does not merely limit the right of appeal but bars it completely in cases of an unequivocal plea of guilt. That is the fact of what the marginal note also states..."**

[8] It is therefore imperative that the Court be satisfied that the Appellant's guilty plea was entirely unequivocal; hence the need to satisfy myself that, in taking plea, the plea court fully compliance with the provisions **Section 207** of the **Criminal Procedure Code** as explicated in ***Adan vs. Republic*** **[1973] EA 446** by **Spry, V.P**. Those steps are:

> ***"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."***

[9] A scrutiny of the lower court record confirms that the court complied with the aforementioned steps in having the charge read over to the Appellant in Kiswahili language, and that this was a language understood by the Appellant. The facts were then stated by the Prosecutor; and those facts clearly set out the key ingredients of the offence of rape as set out in the Main Count, including the fact that the Appellant was found in the act by members of the public who responded to the Complainant's screams. The Appellant admitted those facts, whereupon the he was convicted on his own guilty plea. The Appellant was then afforded an opportunity to make his remarks in mitigation and he is recorded to have asked for pardon. Thus, it is manifest from the record that the trial magistrate complied with the requirements of **Section 207** and the guidelines in **Adan vs. Republic**. The Appellant's plea was therefore unequivocal; and indeed, his appeal is only confined to the legality and extent of his sentence.

[10] The penalty for the offence of rape is provided for in **Section 3(3)** of the **Sexual Offences Act** thus:

> **"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."**

[11] The accused was sentenced to 20 years imprisonment and therefore his sentence for Count I is not only lawful but also reasonable, noting that the Learned Trial Magistrate took into account the relevant mitigating factors. As it is, the sentence for Count II has been served and not much can be said in respect of that Count, save that **Section 251** of the **Penal Code** provides for up to five years imprisonment. Hence, the sentence of two years cannot be said to be illegal or excessive.

[12] Thus, I find no merit in the appeal against sentence and would accordingly dismiss the same.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF JULY 2019

OLGA SEWE

JUDGE