



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 38 OF 2017

ZACHARY CHEGE WANJIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. E. NGIGI – SENIOR RESIDENT MAGISTRATE dated 27/1/2017 in Nanyuki Chief Magistrate’s Court Criminal Case No. 662 of 2015)

JUDGMENT

1. **ZACHARY CHEGE WANJIRU** was convicted before the Nanyuki Chief Magistrate’s Courts, and sentenced to serve ten years imprisonment, for the **offence of Rape contrary to section 3(1)(a) as read with section 3(1)(c) of the Sexual Offences Act**. He was also convicted, and sentenced to serve 18 months imprisonment, for the offence of escape from lawful custody contrary to **section 123** of the Penal Code. Those two sentences were ordered, by the trial court, to run consecutively.

2. The appellant was dissatisfied with the trial court’s sentence and has accordingly filed this appeal against his sentence.

3. The facts of the case are that CE, a 90 years old woman was living with her brother. On 4th July 2015 she was alone in the homestead. At 11.00 a.m. while she stood by the door of the house, she saw the accused (appellant). The appellants took away her walking stick and threw it away. The appellant engaged CE in conversation, then he grabbed her by her shoulders and slapped her with a panga (Simis) on her face. After dropping her down the appellant raped her for what CE said was three hours. The appellant on 5th July 2015 was arrested and on the appellant being placed in custody at Wiyumiririe Police Patrol Base, he escaped from lawful custody.

4. In advancing his appeal against sentence the appellant did not deny having committed the offence. In his submission the appellant stated:-

“I am sorry about the offence I committed.”

5. This therefore is an appeal against sentence. Justice F. Tuiyot in the case **Susan Asiyo v Republic [2016]eKLR** in considering an appeal against sentence stated:-

“This is an appeal against sentence only. The principles upon which an appellate court can interfere with the sentence of a trial court are settled. They are:-

i. If sentence is manifestly excessive in the circumstances or the case, or

ii. If the trial court overlooked some material factor, or

iii. Took into account, some wrong material, or

iv. Acted on a wrong principle: (see Bernard Kimani Gacheru vs Republic [2002] eKLR).”

6. The above are the principles to guide this court in considering the appeal against sentence.

7. The appellant was charged with the offence of rape as provided under section 3(1)(a) as read with section 3(1)(c) of the Sexual Offences Act. **Section 3(3)** of that Act provides:-

“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.”

8. The trial court in sentencing the appellant noted that he was a first time offender.

9. In his appeal before this court the appellant has presented what may be termed as mitigation. He reiterated that he was a first time offender. That he desired to go back to school since, on completion of Kenya Certificate of Primary Education Examination, he had been offered a place in Muranga Elite boys High School. Further that he had learnt a trade while in prison. And that he was remorseful of the offence he committed.

10. By the time the trial court pronounced its judgement and sentence the appellant had been in remand for 18 months. The trial court gave the appellant credit for the period he was in custody which meant that he, at sentencing, had served his sentence for the offence of escape from lawful custody. The sentence which the appellant is serving is the sentence for the offence of rape.

11. Section 3(3) of the Sexual Offences Act, as stated above, provides for a minimum sentence that will be imposed when a person is convicted of the offence of rape. The Court of Appeal in the case **MK v REPUBLIC [2015] eKLR** discussed the provision of minimum sentence under the sexual offences Act and stated:-

“Readings of the diverse provisions of the Sexual Offences Act reveal that in most sections, a minimum sentence is provided for. For example, under section 3(3), a person guilty of the offence of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years; Section 4 of the Act stipulates that a person convicted of attempted rape is liable upon conviction for imprisonment for a term which shall not be less than five years Section 8 (3) of the Act provides that a person convicted of defilement when the child is between the ages of twelve and fifteen years shall be liable to imprisonment for a term of not less than twenty years.

Our reading of the Sexual Offences Act shows that whenever a minimum sentence is imposed, the phrase not less than is used.”

12. The appellant by being sentenced to 10 years imprisonment for the offence of rape, was sentenced to the bare minimum sentence under section 3 of the Sexual Offences Act. It follows that this court cannot reduce his sentence for to do so will be against the law.

13. It is for the above reasons that the **appellant’s appeal against sentence is rejected. The trial court’s sentence is confirmed.**

DATED and DELIVERED at NANYUKI THIS 27TH day of FEBRUARY 2018.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Appellant: Zachary Chege Wanjiru

For the State:

Language:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE