REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO 145 OF 2011

KEN MUCHIRI NDUNG'U.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Appeal from the judgement of Ogembo D.O PM in Nyeri CMCR S.O NO.35 OF 2009

On 5th of July 2011 the appellant here was found guilty and convicted of the offence of rape contrary to section 3(1) of the Sexual Offences Act number 3 of 2006. He was sentenced to 15 years' imprisonment.

He filed a petition of appeal to which the respondent replied by submissions filed on 25 January 2018. When the appeal came for hearing on 14th of February 2018, the appellant withdrew his appeal substituting it with what he called 'mitigation' against sentence.

He submitted that his only prayer now was for the review of his sentence on the ground that he had learnt his lessons while in prison, and in addition had acquired various certificates which would assist him if only he would be freed, that he was now ready to return to society, and only this court could facilitate that by understanding his situation and reducing his sentence.

At some point in his oral submissions the appellant blamed his ignorance of the law for his conviction, stating that perhaps he would have fared better during the trial in the lower court had he been knowledgeable of the law. In the same breath he told this court that he had no problem with the conviction, only that his jail term was harsh and too long." ***I just need to be helped to go home".***

In her oral submissions the prosecuting counsel Ms. Jebet was of the view that the trial magistrate gave the appellant 15 years' imprisonment because of the evidence in the case, and used his discretion to sentence him. That his mitigation was considered by the lower court, and the 15 years' imprisonment was appropriate.

The issue for determination is whether this court can interfere with the discretionary decision of the trial magistrate.

In **Bernard Kimani Gacheru v Republic [2002] eKLR** the Court of appeal set down the applicable principles thus;

> **"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."**
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> **The questions then that I must pose to myself are:**
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> 1. **Can the sentence given to the appellant be considered to be manifestly excessive? Or,**
> 2. **Is there evidence that the trial magistrate overlooked any material factor in arriving at the same? or,**
> 3. **Did the trial magistrate act on a wrong principle?**

In Dalmas Omboko Ongaro v Republic [2016] eKLR Justice W Korir while allowing an appeal against the sentence cited from

Judiciary Bench Book for Magistrates in Criminal Proceedings (published by the Kenyan Judiciary in 2004) page 86 paragraph B where the principles of sentencing are set out as follows;

> **"In determining what is the appropriate sentence to mete out, the Court has to consider such factors as the nature of the offence, the attitude of the accused person, prevalence of the type of offence, the seriousness of the offence, the circumstances under which the offence was committed, the effect of the sentence on the accused person, the fact that the maximum sentence is intended for the worst offenders of the class for which the punishment is provided, etc. (*Makanga v R. Criminal Appeal* No. 972 of 1983 (unreported)). The Court may also consider the value of the subject matter of the charge (*Mathai v R* [1983] KLR 442) and whether there has been restitution of the property by the accused (*Hezekiah Mwaura Kibe v R* [1976] KLR 118)."**

The antecedents of an accused person also come into play when the Court is considering the appropriate sentence. If an accused person is a first offender the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivism." (emphasis added**)**

These are the same principles replicated in the Sentencing Policy Guidelines published by the Judiciary.

The record of appeal indicates that the appellant was a first offender, at the time of sentencing on 5th July 2011, he had been in custody since 4th December 2009. While rape is a very serious offence that requires a deterrent sentence, and carries the minimum sentence of 10 years' imprisonment, in this case there was no evidence of aggravating circumstances, there was no weapon used against the victim, no additional violence or threat of additional violence. As a first offender the appellant deserved that benefit taking into consideration the circumstances of the offence. The trial court ought to have at least taken into consideration the period the appellant had spent in custody pending the hearing and determination of his case. In my humble view, while the trial magistrate considered the seriousness of the offence, he appears to have overlooked these two material factors, the appellant having been a first offender, and the period spent in custody.

I have considered the above factors.

I have also considered that the appellant has been in custody now for close to 9 years. Surely he must have learnt that whatever it is he did is wrong and society has put in very strong laws against it, with punishment intended to be deterrent.

Exercising the powers donated to me by s. 354(3) (a) (ii) of the Criminal Procedure Code, I set aside the sentence of 15years imprisonment and substitute it with 12 years' imprisonment for the offence of rape contrary to s. 3(1) of the Sexual Offences Act no 3 of 2006 to run from 4th December 2009, the date the appellant was placed in custody.

Dated, delivered and signed in open court at Nyeri this 30th Day of April 2018.

Mumbua T. Matheka

Judge

In the presence of: Appellant

Court Assistant: Mr. Atelu

Prosecuting Counsel: Mr. Murang'a