



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 167 OF 2017

KIPKONGA KIPLIMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence in

Kabarnet Principal Magistrate's Court No. 717 of 2014

delivered on the 26th day of August, 2014

by Hon. E. Kigen, RM]

JUDGMENT

Introduction

1. The appellant pleaded guilty to the offence of rape contrary to section 3(1) as read with section 3 (3) of the Sexual Offences Act no. 3 of 2006. The particulars were that he on the 22nd day of August, 2014 at [particulars withheld] location in Kabarnet division within Baringo County did unlawfully and intentionally cause his penis to penetrate the anus of K. K. without her consent in contravention of the said Act. The trial court imposed a sentence of imprisonment for 16 years from the date of sentence on 26th August, 2014.

The Appeal

2. In his Petition of Appeal, the appellant listed under the following points:

1. That I pleaded guilty at trial
2. That I am remorseful and apologetic for the above offence and I promise to shun it.
3. That, I am a first offender and I beg the Honourable court to grant me leniency.
4. That the commission was under influence of alcohol and I reiterate to shun it.
5. That the sentence imposed upon me is too harsh and excessive, despite the fact that I was a first

offender.

6. That, I beg the Honourable court to grant me leniency or review the sentence to favour a non-custodial sentence.

7. That I pray to be present in person during the hearing of my appeal.

3. The appellant elaborated his Petition of Appeal by what he called Mitigation Grounds as follows:

1. That your Lordship, I pleaded guilty at trial because the crime I committed was not good and realized it after I had committed it, your honour I therefore humble before this Honourable court and pray for leniency and forgiveness from this court.

2. That your Lordship, after I committed the offence I am remorseful and apologetic for it and I promise not to repeat in future such crime.

3. *That your Lordship, the offence I committed was instant and did not plan for, it was due to the influence of alcohol. Your honour I promise not to drink alcohol again because it caused me into this crime.*

4. That your Lordship for the time I have stayed in prison I have already regretted the offence. Your honour I have gained the skill of carpentry and therefore I promise that I am fully reformed and ready to join back into the community and live in harmony and order.

4. The appellant further filed supporting written submissions as follows:

“Your Lordship **I pleaded guilty at trial because the crime I committed was not good and I realized it after I had committed it, your honour I was under influence of alcohol and I regret it fully.** Your honour for the time I have stayed in prison I have already reformed and promise not to repeat again such a crime. Your Lordship the offence I committed was instant and impulse and didn’t plan for and also it happened while I was drunk so, your honour I humble before this Honourable court to believe my plea of guilty for the offence and grant me leniency or review the sentence to favour of non-custodial sentence for I have learnt a lesson already which I will never forget or dare to repeat in my normal conscience.”

5. In convicting and sentencing the appellant, the trial court considered the facts of the case which the appellant accepted in his plea - following a certificate of fitness to plead - and the appellant’s mitigation as follows:

“26/8/14

Coram: Before – E. Kigen (RM)

Court Prosecutor; C.I Jeruto

Court Clerk – Joan

Accused – Present

Medical Report

Medical report dated 26.8.14 prepared by Stanley Kitele District Psychiatric Nurse.

Conclusion

The accused is of sound mind and fit to stand trial.

Court: charges read over and explained to the accused in a language he understands who on being asked states:

Accused: Main Charge – It is True

Plea of guilty entered.

E KIGEN, RM

FACTS

On the 22nd day of August, 2014 AT Kabasis Location in Kabarnet. The Complainant K. K. aged 86 years was sleeping in her house at around 1.00 am she heard a knock on her door and opened to see who it was. When she opened the door the accused grabbed the grandmother and placed her on the bed the accused who was armed with a knife started struggling with the complainant the accused raped the grandmother using anus of the grandmother the complainant who felt pain started screaming. L C who is her grandson heard the screams he immediately opened the grandmother's house and found the accused still raping the grandmother.

L C locked the door from outside and raised the alarm other villagers came to the rescue, they locked the door and took the accused to Kabarnet Police Station for action.

The complainant was rushed to Kabarnet District Hospital that night and was treated by the doctor and thereafter a P3 was issued and remarks by the doctor showed there was penetration at the anus. The knife was recovered by the villagers and the knife to be produced as exhibit.

Accused was arrested and charged before court with the present offence.

Accused: it is true

Court: the accused is hereby arrested on his own plea of guilty.

E. KEGEN, RM

Court prosecutor: No previous records

Although he is a first offender I am asking the court to give a harsher sentence for bestiality act so that it can be a lesson to other men.

Mitigation

I was drunk and I am praying for leniency.

Court- The said offence is very serious and the fact that it was committed to an elderly woman about 86 years old and who had no means of defending herself, and even used force knowing that the said elderly woman could not fight her back.

The minimum sentence for this offence is 10 years old but the accused deserved a largest sentence.

I hereby sentence the accused to serve sixteen (16) years imprisonment.

E. KIGEN, RM

Right of appeal within 14 days

E. KIGEN, RM

26/8/14”

The conviction

6. There was no appeal from the conviction. However, the appellant was found *in flagerante delicto* in the act of raping the complainant. The charge is shown to have been stated to the accused on two occasions – before and after the appellant had been assessed for fitness to plead - on both which he pleaded guilty with language being shown as **Interpretation: Kiswahili** on the record. The plea was taken in accordance with the leading case of *Adan v. R* (1973) EA 445, and his plea of guilty must be accepted as unequivocal. Indeed, the appellant no doubt with assistance of his legal advisors did not challenge his conviction on the plea of guilty because section 348 of the Criminal Procedure Code provides as follows:

“348. No appeal on plea of guilty, nor in petty cases 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 or legality of the sentence.

[Act No. 17 of 1967, s. 31.]”

The Sentence

7. As regards the sentence, an Appellate Court may only interfere with the sentence of a trial court in certain circumstances set out in *Wanjema v. Republic* [1971] KLR 493, 494 as follows:

“A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this court’s interference with it on each of these grounds. **No account was taken, as it should have been of the fact that the appellant pleaded guilty:** Skone [1967], 51 Cr. App. R. 165 and *Geoffrey* (1967, Cr. App. R. 449.”

8. The trial court did not take into account that the appellant was a first offender who had pleaded guilty to the charge and who in mitigation said he had been drunk at the time he committed the offence, a plea that he has repeated before this court. In these circumstances, this Court, while equally repulsed as the trial court with the abhorrent act of the appellant, considers the mitigating factors as warranting the imposition of the minimum sentence only.

Orders

9. Accordingly, the sentence imposed by the trial court shall be reviewed to one of imprisonment for a period of ten (10) years from the date of conviction and sentence in the trial court.

Order accordingly.

DATED AND DELIVERED THIS 20TH DAY OF JUNE, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

The applicant in person.

Ms. Macharia Ass. DPP for the Respondent.