



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CRIMINAL APPEAL NO. 87 OF 2015

(Being an Appeal from Original Conviction and Sentence in

Criminal Case No.1306 of 2013 of the Chief Magistrate's

Court at Naivasha before E. Kimilu - SRM)

JEMISO LEBUYELE ALIAS NADAISHA.....APPELLANT

-VERSUS-

REPUBLIC.....PROSECUTOR

J U D G M E N T

1. The Appellant was charged with Rape contrary to Section 3 of the Sexual Offences Act. In that on the 17th day of June, 2013 at [particulars withheld] village in Kongoni area of Naivasha municipality within Nakuru County, he intentionally and unlawfully caused his penis to penetrate the vagina of **J.C.K.** without her consent.
2. The second count was Assault causing bodily harm contrary to Section 251 of the Penal Code. The particulars state that on the 17th day of June, 2013 at [particulars withheld] village in Kongoni area of Naivasha municipality within Nakuru County, he willyfully assaulted **J C K** thereby occasioning her actual bodily harm.
3. He denied the charges but was found guilty and sentenced to 10 years and one year imprisonment respectively.
4. He was aggrieved with the outcome and filed this appeal on 3rd October, 2017. He amended his petition of appeal to an appeal against sentence only. He raised 5 grounds as follows:

“1. THAT the Appellant herein was a first offender.

2. THAT the Appellant is very remorseful and repentant.

3. THAT the sentence imposed is excessively harsh and severe thus the Appellant prays for leniency from this honourable court.

4. THAT the Appellant is an orphan and has no siblings who can cater for family affairs on his behalf

5. THAT the Appellant humbly prays and believes that this honourable court will exercise its discretion by either pronouncing a non-custodial sentence or substituting the current sentence with a lighter one. “ (sic)

5. He filed written submissions in support of the grounds, citing the fact that he was young and ignorant and was a first offender. Moreover that he was an orphan and had no siblings. He urges the court, despite the mandatory minimum penalty prescribed for the offence of Rape, to consider a less severe sentence, preferably non-custodial. In his view the sentence was harsh and excessive.

6. The DPP opposed the appeal as if it was against conviction, despite the Appellant's submissions and reply.

7. As stated in **Wanjema -Vs- Republic [1971] EA 494:-**

“An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

8. The appellate court therefore cannot interfere with a sentence on the sole ground that it was severe unless it was also manifestly excessive - See **Griffin-Vs- Republic [1981] KLR 121**

9. The case before however must be distinguished from ordinary cases where no minimum sentence is provided. In such a case the appellate court would only rightly interfere where the sentence is over and above the provided minimum. The novel argument proffered by the Appellant that this court may well alter his sentence into a non-custodial one is not supported by any law.

10. Section 3 of the Sexual Offences Act provides as follows:-

“(1) A person commits the offence termed rape if-

- a. he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;**
- b. the other person does not consent to the penetration; or**
- c. the consent is obtained by force or by means of threats or intimidation of any kind.**

(2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.

(3) 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 above law prescribes a mandatory minimum sentence of 10 years imprisonment which could be enhanced to imprisonment for life. It does not matter that the Appellant is young, orphaned or ignorant. I am of course aware of the recent decision by the Supreme Court in **Francis Kanyoko Muruatetu & Others -Vs- Republic [2018] eKLR** where the court stated that the death penalty prescribed for the offence of murder though legal is not mandatory.

12. Further observing that mandatory sentences tend to take away the sentencing discretion of the trial court. Sexual offences received special mention being GBV crimes which the trial court must pay keen attention to while sentencing. I am not persuaded that it was the intention of the Supreme Court to banish all mandatory sentences in respect of all offences.

13. Until the court determines otherwise, the minimum sentences in respect of Sexual offences are legal and the trial and appellate court have no discretion in the matter, save in so far as the sentence awarded fall above the minimum sentence provided. Therefore, the sentence of 10 years imprisonment in this case is legal and proper.

14. In my own view, considering the circumstances of the offence, the Appellant deserved a more severe sentence but the DPP did not address this court in that regard. Suffice to say that the appeal before me is without merit, lacking as it does, any legal basis for attacking the legality of the sentence imposed. The appeal is dismissed.

Dated and signed at Kiambu, this 26th day of June, 2018.

C. MEOLI

JUDGE

Delivered and signed at Naivasha, this 26th day of July, 2018.

R. MWONGO

JUDGE

In the presence of:-

For the DPP : Mr. Koima

Appellant : Jemiso Lebuyele alias Nadaisha

Court Assistant - : Quinter Ogutu