



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL APPEAL NO. 36 OF 2018**

**CHARLES MUTUKU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal against the sentence by Hon. G. O. Shikwe (SRM) in Kithimani**

**SRMC S.O.A. No. 6 of 2017 on 8<sup>th</sup> February, 2017)**

**JUDGEMENT**

1. The appellant was charged with the offence of rape contrary to section 3 (1) (a) (b) and (c) of the Sexual Offences Act No. 3 of 2006. He pleaded guilty to the charge and was sentenced to ten years imprisonment.

2. The Appellant expressed that he is remorseful and for leniency. He stated that he is a first-time offender. That his conviction and imprisonment is a blow to the family since he is the sole breadwinner. That he has gone through prison rehabilitation programs and has changed both mentally and spiritually. He sought revision of the sentence to a lesser term or to a non-custodial sentence. In that regard the appellant relied on Articles 2 (1) (5), 20 (1) (3) (b), 21 (1) (4) 22 (1) 23 (1) 27 (1) 28 29 (c) (d) (e) (f) 47 (2) and 51 (1) of the Constitution.

3. The respondent submitted that in order for this court to interfere with the sentence, specific issues must be considered such as whether sentence is excessive or crucial factors were not considered. That the appellant has failed to meet the said requirements and the appeal lacks merit.

4. The principles upon which an appellate Court will act in exercising its discretion to interfere with a sentence imposed by the trial court are now well settled. The Court of Appeal in the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, pronounced itself on this issue as follows:

*"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-*

*sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka -vs- R. (1989 KLR 306)"*

5. Section 3 (2) of the Sexual Offences Act provides that a person charged with the offence of rape 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. The appellant after presenting his mitigation was given the minimum sentence available in law and the trial court did not err in so doing. In the end, this appeal lacks merit and is dismissed.

Orders accordingly.

**Dated and delivered at Machakos this 29<sup>th</sup> day of November, 2018.**

**D.K. KEMEI**

**JUDGE**