REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL CASE NO. 15 OF 2017

GEORGE CHARO GONA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 235 of 2013 of the Senior Principal Magistrate's Court at Kilifi – D.W. Nyambu, SPM)

JUDGEMENT

1. The Appellant, George Charo Gona, was in count 1 charged with attempted rape contrary to Section 4 of the Sexual Offences Act, 2006. The particulars being that on 17th June, 2013 within Kilifi County the Appellant intentionally and unlawfully attempted to cause his penis to penetrate the vagina of M.M. without her consent.

2. In count 2, the Appellant was charged with stealing contrary to Section 275 of the Penal Code. The allegation being that on the date and place mentioned in count 1 the Appellant stole one mobile phone make Nokia 1110 valued at Kshs. 4000 the property of M.M.

3. On 19th March, 2015 the prosecution applied and was granted leave to amend the charges. After the fresh charges were read to him, the Appellant pleaded guilty to count 2. He was convicted and sentenced to one year imprisonment. The trial magistrate then recused herself from the matter. Four witnesses had already testified.

4. On 23rd February, 2016 the matter commenced *de novo* before another magistrate and the complainant testified afresh as PW1. Upon conclusion of the complainant's examination-in-chief, the Appellant indicated that he wished to admit the charge.

5. The charge was read afresh to the Appellant and he admitted count 1. The facts were read to him and he stated that the facts were correct. The trial court then proceeded to convict the Appellant on his own plea of guilty on count 1. After hearing from the prosecution about the Appellant's previous records and upon hearing the Appellant in mitigation, the trial court sentenced the Appellant to ten years imprisonment.

6. The Appellant aggrieved by both conviction and sentence has appealed to this court on the grounds that:

> **"1. That the learned trial magistrate erred both in law and facts by failing to consider the prosecution's adduced evidence was inconsistent and contrary to Section 163(1) (c) of the Evidence Act.**
>
> **2. That the learned trial magistrate erred in law and facts by relying on the incredible evidence of a single witness which was insufficient to sustain a safe conviction.**
>
> **3. That the pundit trial magistrate erred in both law and facts by failing to consider the prosecution failed to prove their case beyond reasonable doubt contrary to sections 109 and 110 of the Evidence Act.**
>
> **4. That the learned trial magistrate erred in law and facts by failing to adequately consider my defence which was firm and rebutted the prosecution case.**
>
> **5. That the learned trial magistrate erred in law and facts by failing to consider the conviction was against the merits of the entire case."**

7. In light of the grounds of appeal presented before this court by the Appellant I looked and re-looked at the record and the conclusion I reached is that the Appellant's appeal is misplaced. The grounds of appeal gives the impression that the conviction was arrived at upon a full trial but the truth of the matter is that the Appellant was convicted upon his own plea of guilty.

8. I will nevertheless consider whether his plea of guilty was taken down in compliance with the law.

9. This matter proceeded by way of written submissions. Apparently the Appellant being aware of the state of affairs reduced his submissions to mitigation only. He submits that he was a first offender and a peasant farmer. He urges the court to have mercy on him and either place him on probation for the remainder of his sentence or put him on community service. According to him, he has fully reformed.

10. Opposing the appeal, the Director of Public Prosecutions for the Respondent pointed out that the Appellant was convicted on his own plea of guilty and as per Section 348 of the Criminal Procedure Code, the right of appeal was not available to him except as to the extent or legality of the sentence.

11. In **John Muendo Musau v Republic [2013] eKLR,** the Court of Appeal reiterated the law on plea taking as follows:-

> **"The legal principles to be applied in plea taking in all criminal cases were well enunciated in the *locus classicus* case of Adan vs Republic [1973] EA 445 where the Court held:-**
>
> > **"(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.**
> >
> > **(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.**
> >
> > **(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.**
> >
> > **(iv) If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.**
> >
> > **(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."**
>
> **We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and has been convicted for, the court must enter a plea of not guilty. That is to say that, an accused can change his plea at any time before sentence. The procedure laid out in Adan vs Republic (supra) is also provided for under section 207 of the Criminal Procedure Code."**

12. Applying the said principles to the facts of this case, I find that the trial magistrates fully complied with the law in recording the Appellant's plea of guilty on both counts. I cannot fault any of the trial magistrates for the manner in which they recorded the Appellant's plea of guilty on each of the two counts. The Appellant's appeal against conviction therefore fails.

13. On sentence, it is noted that sentencing is entirely a matter of discretion by the trial court. An appellate court can only interfere with sentence where it is demonstrated that the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that the sentence itself is so excessive and therefore an error of principle must be inferred – see Court of Appeal decision in **Peter Mbugua Kabui v Republic [2016] eKLR; Criminal Appeal No. 66 of 2015 (Nairobi).**

14. Section 4 of the Sexual Offences Act, 2006 provides that a person convicted of attempted rape is liable to imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life. In passing sentence on count 1, the trial magistrate observed that the offence was committed during daylight and had children not intervened the Appellant could have raped the complainant. The magistrate concluded that a deterrent sentence was required in the circumstances of the case.

15. The magistrate gave reasons as to why she imposed a sentence higher than the minimum sentence. She cannot be faulted for what she did.

16. A perusal of the record shows that the Appellant was in custody between the time of his arrest on 25th June, 2013 and the time of his sentencing for count 1 on 23rd February, 2016. This was a period of about 2 years and 7 months. I am aware that this period includes the one year the Appellant served for count 2. However count 1 and count 2 were committed in the same transaction and the sentences for both counts should have run concurrently had they been served at the same time.

17. It is not clear from the record that the trial magistrate took into account the period spent in remand, as required by Section 333(2) of the Criminal Procedure Code, in passing sentence. In the circumstances I will subtract 2 years and 7 months from the 10 years imprisonment imposed upon the Appellant. The sentence of 10 years imprisonment is therefore replaced with one of imprisonment for 7 years and 5 months to run from 23rd February, 2016 being the date the Appellant was sentenced for count 1. Otherwise, the appeal fails in other aspects.

Dated, signed and delivered at Malindi this 22nd day of November, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT