



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEAL NO.58 OF 2015

NDOLO MWANGANGIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the Sentence of Chief Magistrate's Court

at Machakos delivered by Honourable L. Simiyu , (Senior

Resident Magistrate) on 8th April, 2015 in MACHAKOS

C.M.CR CASE NO. 1198 OF 2014)

JUDGMENT OF THE COURT

1. The Appellant herein has filed a mitigation on appeal seeking that the sentence meted out on him on the 8th day of April 2015 at the Chief Magistrate's Court at Machakos by Hon L. Simiyu be reviewed. The memorandum raised the following issues for this court's consideration.

- a. That after being convicted and sentenced to serve custodial sentence, the Appellant has undergone thorough rehabilitation process both spiritually and technically that can assist him in re-intergrading with the society harmoniously.*
- b. That the Appellant is ailing with complicated terminal deceases which the prison authorities have been unable to cure due to unavailability of medicine.*
- c. The Appellant is a father of a very young family who are in need of his support since he was the only sole breadwinner of his extended family.*
- d. That the court review the sentence and substitute it to a non-custodial sentence so as to enable the Appellant cater for his medication and also exploit his acquired skills and assist in nation building.*
- e. The Appellant does not dispute the judgment of the subordinate court and sentence be renewed since he is a first offender.*

2. The Appellant's case seems to be that he seeks for review of sentence of the lower court on the

grounds, inter alia that he is a first offender, that he has undergone some rehabilitation while serving sentence, that he is suffering a disease which the prison authorities have been unable to cure and finally that he is the sole breadwinner for his family.

3. The Appellant's appeal on review of sentence is opposed by the Respondent. Learned Counsel for the Respondent made some oral submissions. It was submitted for the Respondent that there was no error made by the trial court and sentence was not unlawful and neither excessive. It was further submitted that the Appellant's circumstances are not sufficient ground to invoke the powers of this court to interfere with the sentence and therefore the same should be upheld.

4. I have considered the Appellants appeal on mitigation and the Respondent's submissions. The Appellant herein had been charged with a principal charge of attempted rape contrary to Section 4 of the Sexual offences Act 3 of 2006. The particulars of the offence were that on the 24th day of July, 2014 at [particulars withheld] village in Makueni District of the Makueni County attempted to unlawfully and intentionally cause his penis to penetrate the vagina of **IMM** without her consent. The Appellant was tried and found guilty. He was sentenced to serve five (5) years imprisonment. The Appellant has indicated that he does not intend to challenge the conviction and sentence but pleads with this court to impose a non-custodial sentence since he has reformed and he be given a second chance to take care of his family and participate in nation building.

5. The record of the lower court reveals that the Appellant's mitigation was duly received and that the court noted that the offence has a minimum sentence and indeed the Appellant was sentenced to serve five (5) years imprisonment. It is noted that the offence for which the Appellant was charged carries a minimum sentence of five (5) years. I find the sentence meted out was not excessive at all and that his mitigation was considered. The Appellant's circumstances such as lack of medical facilities at the prison facility can still be addressed by the prison authority as he could be referred to suitable referral hospitals where his medical condition could be attended to. As regards the Appellant's circumstances and obligations, I find the same does not override the fact that he had been taken through a criminal trial where he was able to defend himself adequately and was subsequently found guilty, convicted and sentenced. The sentence meted out was lawful in all respects. Indeed the Appellant has confirmed that he does not dispute and neither is he appealing the judgment, conviction and sentence of the court. Hence the Appellant's family circumstances are matters which are inevitable due to operation of the law i.e. Appellant having committed an offence and taken through a full trial and convicted and sentenced in accordance with the law.

6. In the result, I decline to interfere with the sentence of the lower court and find the Appellant's request for review of sentence not merited. The Appeal against the sentence is dismissed. The lower court's sentence is upheld and the Appellant's is ordered to continue to serve the sentence passed by the trial Court.

It is so ordered.

Dated, signed and delivered at Machakos this 30th day of **MAY** 2017.

D. K. KEMEI

JUDGE

In the presence of:

Ndolo Mwangangi - Appellant in person

Saoli for Respondent

C/A: Kituva