



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.14 OF 2016**

*(An Appeal arising out of the conviction and sentence of Hon. J. Wanjala (Mrs.) - CM delivered on 9<sup>th</sup> April 2015 in Kibera CMC. S.O.Case No.70 of 2014)*

**ALEX JENGO**

**MUKHATIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Alex Jengo Mukhatia was charged with the offence of **Rape** contrary to **Section 3 (1) (a) (b)** as read with **Section 3** of the **Sexual Offences Act**. The particulars of the offence were that on 7<sup>th</sup> July 2014 at [particulars withheld] in Langata within Nairobi County, the Appellant intentionally and unlawfully caused his male genital organ (penis) into the female genital organ (vagina) of E A. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to serve twenty (20) years imprisonment on the charge. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that there was no sufficient and trustworthy evidence to base his conviction. He was also aggrieved that the prosecution failed to prove its case to the required standard of proof beyond any reasonable doubt. Finally, the Appellant complained that the trial court failed to comply with the requirements of **Section 169** of the **Criminal Procedure Code**. In the premises therefore, he urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

Although the Appellant filed an appeal challenging his conviction and sentence, during the hearing of the appeal, he abandoned his appeal against conviction. He however pleaded with the court for a reduction of the sentence. He submitted that he had children who depended on him and urged the court to accordingly consider reducing the custodial sentence that was imposed on him. In response, Ms. Atina for the State submitted that the minimum custodial sentence for the offence was ten (10) years imprisonment but that the same could be enhanced to imprisonment for life. She submitted that although the trial court took into consideration the Appellant's mitigation during sentencing, it found that the offence was serious and therefore sentenced him to twenty (20) years imprisonment. She was however of the view that the sentence was harsh. She therefore urged the court to exercise its judicial discretion to reduce the sentence to the minimum sentence provided under the law.

This court has considered the Appellant's appeal and the arguments made by both the Appellant and the State. When the trial court sentenced the Appellant to serve the custodial sentence, it was exercising its judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. This court will also interfere with the imposition of the custodial sentence if it is established that the trial court applied the wrong principles of law in sentencing the Appellant or that the sentence was illegal. Under **Section 8(3)** of the **Sexual Offences Act**, any person convicted of rape is liable upon conviction to serve a term of imprisonment of not less than ten (10) years but which may be enhanced to imprisonment for life.

The Appellant urged the court to exercise leniency on him and accordingly consider reducing the custodial sentence that was imposed on him. Ms. Atina for the State was of the view that the custodial sentence imposed on the Appellant was harsh taking into consideration that the minimum sentence under law prescribed for the offence is ten (10) years. Although sentence is the discretion of the court hearing the criminal appeal, this court is of the considered opinion that the sentence imposed on the Appellant was harsh, taking into account that he was a first offender. Having perused the proceedings of the trial court this court has also noted that although the Appellant was granted bail pending trial, he was unable to raise it. He was therefore in remand custody during the entire period of the trial. For these reasons, the court finds the Appellant's plea for reduction of custodial sentence has merit.

In the premises therefore, the sentence of twenty (20) years imprisonment which was imposed upon him by the trial court on 9<sup>th</sup> April 2015 is hereby set aside and substituted by a sentence of this court sentencing the Appellant to serve ten (10) years imprisonment with effect from 9<sup>th</sup> April 2015 when he was convicted and sentenced by the trial court. It is so ordered.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY 2017**

**L. KIMARU**

**JUDGE**