



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE APPEAL NO. 43 OF 2017**

**PAUL MAINA WANGECHI .....APPELLANT**

*Versus*

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon. E.BETT. Senior Resident Magistrate dated 9<sup>th</sup> October 2015 in Nanyuki Chief Magistrate Court Criminal Case*

*No. 531 of 2015)*

**JUDGMENT**

**1. PAUL MAINA WANGECHI** was charged and convicted before the Nanyuki Chief Magistrate's Court with the offence of attempted rape **Contrary to Section 4 of the Sexual Offences Act No. 3 of 2006**, and the offence of assault causing actual bodily harm **Contrary to Section 251 of the Penal Code**. The trial court sentenced the appellant to imprisonment of 5 years on the first count and 1 year for the 2<sup>nd</sup> count, both sentences running concurrently. Appellant has filed this present appeal against the sentence of the trial court.

2. In his submissions, which is more like mitigation, the appellant stated that he was a first time offender, that he has reformed and had received counselling in prison.

3. The appeal against sentence was opposed by the Principal Prosecuting Counsel Mr Tanui. In his submissions Learned Counsel stated that the sentence of the trial court was too lenient and that the sentence for attempted rape is not less than 10 years and therefore the trial court erred.

**ANALYSIS AND DETERMINATION**

4. I wish to begin by correcting Principal Prosecution Counsel on his submission on the trial court's sentence. The appellant was charged with attempted rape Contrary to Section 4 of the Sexual Offences Act Section 4 is in the following terms:

***4. Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life***

It will be seen from the above that the sentence under that the Section is provided to be not less than 5 years. It follows that although the trial court sentenced appellant to the bear minimum sentence under that

Section it did not err in so sentencing the appellant.

4. It is important to bear in mind the facts of the case before the trial court as I consider the appellant's appeal against sentence.

5. **J W M**, an 83 year old woman, was on 3<sup>rd</sup> June, 2015 asleep in her house. At around 3am she heard her bedroom door being opened. She shone her torch and noticed it was the appellant who lived in the same village as she did. **J W M** screamed but the appellant over powered her by grabbing her by her neck. The appellant dragged her and as a consequence she injured her face close to her eye and on her ribs. The appellant ordered her to remove her under wear. He himself had no trousers or under pants. In that struggle the appellant fell down and **J W M** took that opportunity to grab his penis. It was then her neighbour came to her rescue and the appellant ran away. It is important to note that the appellant did not cross examine **J W M** and instead said:

***"I do not have any questions. I only ask her***

***(J W M) to forgive me"***.

**J W M** said that following that attack by the appellant she developed high blood pressure.

6. Sentencing is always at the discretion of the trial court. What is the purpose for sentencing? It is to punish the offender, to be deterrent and for the purpose of retribution amongst many other. In the case **REPUBLIC – V - JAGAN & ANOTHER [2001] KLR** it was held:

***"The purpose of a sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter the offender from committing the offence, to separate offenders from society if necessary to assist in rehabilitation of offenders, and in retribution by providing for reparation for harm done to victims in particular to society in general. It is also seen as promoting a source of responsibility in offenders"***.

Justice John Mativo on sentencing in the case: **ARTHUR MUYA MURIUKI V REPUBLIC [2015] eKLR** had this to say:

***The Supreme Court of India in State of M.P. vs BabluNatt (2009) 2 S.C.C. para 13 state that "the principle governing imposition of punishment would depend upon the facts and circumstances of each case. In Alister Anthony Pareira vs State of Maharashtra, (2012) S.C.C. 648 para 69 the court held that:the***

***"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstance"***.

***Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigation and aggravating factors should also be considered.***

7. There are principles upon which the appellant can interfere with trial court's sentence. Those principles are where the sentence is manifestly excessive in the circumstances of the case; if the trial court overlooked some material factor, if the trial court took into account some wrong material or it acted on the wrong principles: see **SUSAN ASIYO –V- REPUBLIC [2016] eKLR**.

8. Bearing the main facts of case and the principles discussed above it cannot be said that the sentence

meted out to the appellant can attract interference by this court. The offence the appellant committed against J W M, an 83 years old Lady, was indeed heinous. Sexual offence is always a devastating crime to the victim and no wonder J W M said that after the attack she developed high blood pressure. **There is no basis for interfering with the trial court's sentence. The appellant's appeal against sentence is dismissed the trial court's sentence is confirmed.**

**Dated and Delivered at Nanyuki this 2<sup>nd</sup> August 2017**

**MARY KASANGO**

**JUDGE**

**Coram**

Before Justice Mary Kasango

Court Assistant: Njue

Appellant: Paul Maina Wangeci

For state: .....

Language .....

**COURT**

Judgment delivered in open court

**MARY KASANGO**

**JUDGE**