



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 74 OF 2014**

**ERICK OTIENO DUDI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 136 of 2012 in the Chief Magistrate's Court at Makadara delivered by Hon. E. K. Nyutu, Ag. PM on 6<sup>th</sup> June, 2014)*

**JUDGMENT**

Erick Otieno Dudi was charged with attempted rape contrary to **Section 4 of Sexual Offences Act No. 3 of 2006**. It was alleged that on 8<sup>th</sup> January, 2012 at Nairobi Railway Yard within Nairobi Area in association with others not before court, unlawfully and intentionally attempted to cause his penis to penetrate the vagina of W S M without her consent. After the trial, the Appellant was found guilty and convicted accordingly. He was sentenced to 10 years imprisonment. Initially, the Appellant appealed against both the conviction and sentence. At the hearing of the appeal on 23<sup>rd</sup> March, 2016, the Appellant changed his mind and submitted that he would only be appealing against the sentence. He presented to the court what he referred to as Supplementary Grounds of Mitigation of Appeal which basically spelt out mitigating factors on why the sentence should be reduced.

In brief, he stated that he was ailing and required correctional surgery from injuries he sustained during his arrest. He further informed the court that he had undergone reform programs in the prison which would benefit him in earning a worthy while living after leaving the prison. In addition, he told the court that he was a bread winner to his family who entirely depended on him.

Learned state counsel Miss Atina opposed the appeal, submitting that the sentence imposed was lenient since the law provided for a minimum penalty of 5 years which can be enhanced to life imprisonment. She however left the court to exercise its discretion in considering the appeal.

Under Section 4 of the Sexual Offences Act, any person who attempts to unlawfully and intentional commits an act which causes penetration with his/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 life imprisonment.

Sentencing is an exercise of discretion of the trial court. But in so exercising the discretion, the court must act judicially and judiciously. Each case must however be treated individually given the prevailing circumstances. The court must take into consideration such factors as the nature of the offence, the prevalence of the offence, the penalty imposed by the law and of course the mitigation the accused offers. To borrow words from the Court of Appeal, in the case of **Shadrack Kipkoech Kogo vs Republic, Cr. Appeal No. 253 of 2003 (unreported)**, Omollo, O'Kubasu and Onyango Otieno, JJA, stated as follows:

***“Sentence is essentially an exercise of discretion of 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 failed to take into account a relevant factor or that a wrong***

***principle was applied or short of those the sentence itself is so harsh and excessive that an error in principle must be inferred.”***

The facts of this case were that the complainant who testified as PW2 had gone to relieve herself behind some rail wagons. That is when the Appellant together with two others confronted her and informed her that they would rape her. The Appellant then grabbed her and together with another lifted her skirt and held her pant. She pushed them off and her pant got torn. In the commotion, one of them said that they had spotted someone and two of the attackers ran away leaving the Appellant still struggling with the complainant. The complainant then saw a man who she referred to as a Maasai coming towards her. On seeing the Maasai man, the Appellant ran away but the Maasai gave a chase and apprehended him. He was dragged back to the scene and the complainant easily identified him. From those facts, it is correct to state that, had the Maasai man not turned at the scene, the Appellant, together with his accomplices would have easily gang raped the complainant. In mitigation, the Appellant only stated that he was praying for leniency. The trial court on the other hand did not give reasons why it enhanced the minimum sentence to 10 years imprisonment. On the part of this court, considering that save for the good samaritan, the Maasai man, the Appellant would have executed his mission of raping the complainant. That, of itself, is an aggravating factor which would necessitate an enhancement of the sentence. Given the seriousness of the offence, and its ultimate prevalence in the country, a deterrent sentence was necessary. In that regard, I find that the trial magistrate did not apply the wrong principles or take into account any irrelevant factor in arriving at the sentence she imposed.

In the result, I find that the appeal has no merit and the same is dismissed. The Appellant shall continue to serve the sentence. It is so ordered.

**DATED and DELIVERED this 31<sup>st</sup> day of MARCH, 2016**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

- 1. Appellant in person***
- 2. M/s Aluda for the Respondent.***