



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 47 OF 2015

PAUL MWANGI WANJIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal case number 228 of 2012, R vs. Paul Mwangi Wanjira at Othaya Law Courts on 9.9.2013 by Hon. R.K. Langat).

JUDGEMENT

The appellant was charged, tried and convicted of the offence of attempted rape contrary to Section 4 of the Sexual Offences Act^[1] and was sentenced to serve 17 years imprisonment.

At the hearing of this appeal, the appellant informed the court that he wished only to proceed against the sentence and urged the court to reduce the sentence.

Counsel for the state opposed the reduction of the sentence, and submitted that the offence carries a minimum sentence of 5 years, that the victim was an elderly lady aged over 80 years, that the appellant was not remorseful and that the sentence was justified.

Section 4 of the Sexual Offences Act^[2] provides as follows:-

“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”

Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.^[3] In *Shadrack Kipchoge Kogo vs Republic*,^[4] the court of appeal stated:-

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

The Supreme Court of India in *State of M.P. vs Bablu Natt*^[5] stated that ‘*the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.*’ The offence in this case affects the morale of the society and worse still the victim is said to have been aged over 80 years old.

In *Alister Anthony Pareiravs State of Maharashtra*,^[6] the court held that:-

“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 straightjacket 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 offence and all other attendant circumstances”

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, mitigating and aggravating factors should also be considered.^[7]

I have carefully considered the facts of this case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the mitigating and aggravating factors, and the scar the incidence left in the life of the victim. I have also considered the purpose of sentencing and the principles of sentencing under the common law^[8] which are:-

- i. To ensure that the offender is adequately punished;
- ii. To prevent crime by deterring the offender and other persons from committing similar offences;
- iii. To protect the community from the offender;
- iv. To promote the rehabilitation of the offender;
- v. To make the offender accountable for his or her actions;
- vi. To denounce the conduct of the offender
- vii. To recognize the harm done to the victim of the crime and the community prevent

I note that the minimum sentence provided under the law is **five years** but can be enhanced to life imprisonment where there are aggravating circumstances.

I have carefully considered the peculiar facts of this case, the law and the purpose of sentencing as enumerated above and the social status of the appellant as at the time of sentencing as reported in the Community Service Officer's Report which at the time depicted the appellant as a person known to create disturbance to the community and family and my own assessment after the appellant appeared before me (for he appeared to be subdued by prison life and remorseful) and taking all the foregoing into account, I take the view that the interests of justice will be met if I reduce the sentence from **17 years to 7 years**.

Accordingly I hereby reduce the sentence imposed upon the appellant from 17 years to 7 years.

Dated at Nairobi this 21st day of March 2016

John M. Mativo

Judge

[1] Act No. 3 of 2006

[2] Ibid

[3] See Makhandia J (as he then was in Simon Ndungu Murage vs Republic, Criminal appeal no. 275 of 2007, Nyeri.

[4] Criminal Appeal No. 253 of 2003 (Eldoret), Omolo, O'kubasu & Onyango JJA)

[5] {2009} 2 S.C.C 272 Para 13

[6] {2012} 2 S.C.C 648 Para 69

[7] See Soman vs Kerala {2013} 11 SC.C 382 Para 13, Supreme Court of India

[8] Regina vs MA {2004} 145A