

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.271 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. D. Mulekyo - SRM

delivered on 19th September 2012 in Kikuyu SPM. CR.C. Case No.13 of 2008)

GEOFFREY WAWERU NDUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Geoffrey Waweru Ndungu was charged with three (3) others with several offences under the **Penal Code** and the **Sexual Offences Act**. He was acquitted of the offence under the **Penal Code** but was convicted of two (2) counts of **gang rape of girls** contrary to **Section 10** of the **Sexual Offences Act**. The particulars of the offences were that on 9th August 2008 at *[particulars withheld]* Village in Kiambu West District, Kiambu County, the Appellant, jointly with others not before court gang raped and defiled E N and M W N both girls under the age of 18 years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. However, after full trial, he was convicted of the two (2) counts and sentenced to serve fifteen (15) years imprisonment on each count. The sentences were ordered to run concurrently. The Appellant was aggrieved by the sentence meted on him. He has filed an appeal to this court.

In his petition of appeal, the Appellant stated that he was not appealing against conviction but was rather seeking the court's intervention to reduce the custodial sentence that was imposed on him. He stated that he was a first offender and has learnt his lesson in the period that he had been in prison. In particular, he stated that the trial court did not take into account the four (4) years that he had served in remand custody before he was convicted. He was remorseful and prayed that the court grants him another chance at life. He pleaded with the court to exercise leniency on him and sentence him to serve a non-custodial sentence. The Appellant stated that he had reformed and had learned several skills while in prison which will be of use to him when he returns back to the society. The Appellant reiterated the contents of his petition of appeal in the oral submission that he made in court. He reiterated that he was in remand custody for a period of four (4) years and two (2) months from the time he was arrested on 10th August 2008 to 23rd October 2012 when he was convicted by the trial court. He urged the court to allow the appeal. Mr. Mureithi for the State left the issue of sentence to the court.

When the trial magistrate sentenced the Appellant to serve the custodial sentence, she was exercising 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. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Appellant or that the sentence was illegal. In the present appeal, it was clear to this court that the trial court sentenced the Appellant to serve a legal custodial sentence. Under **Section 10** of the **Sexual Offences Act**, the Appellant was sentenced to serve the minimum sentence provided therein. However, the Appellant's complaint to the effect that the trial court did not take into account the period that he had been in remand custody before sentencing him to serve the said custodial sentence is valid. At the time the Appellant was in remand custody, he was presumed to be

innocent. He was in remand custody because at the time, one of the charges that he was facing was **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** which was a non-bailable offence at the time.

Taking into consideration the entire circumstances of this case, this court is of the view that the period that the Appellant was in remand custody should have been taken into account when determining the period that he is to serve in prison. In the premises therefore, the custodial sentence of fifteen (15) years imprisonment imposed by the trial magistrate is varied to the extent that the four (4) years that the Appellant was in remand custody shall be taken into account. The custodial sentence of fifteen (15) years imprisonment imposed by the trial magistrate is therefore set aside and substituted by a sentence of this court sentencing the Appellant to serve eleven (11) years imprisonment with effect from 23rd October 2012 when he was convicted and sentenced by the trial magistrate. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF JUNE 2016

L. KIMARU

JUDGE