



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPEAL NO.340 OF 2011
DAVID KINGORI MUCHEMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Hon. C. Oluoch (Mrs.) Principal

Magistrate) in Kiambu Chief Magistrate's Criminal Case No.1839 of 2010

delivered on 08/12/2011)

JUDGMENT

In count I, the appellant was charged with rape contrary to Section 3(1) as read with Section 3(3) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence were that on the 8th day of December 2010 at *[particulars withheld]* area in Kiambu District within Central Province, unlawfully and intentionally committed an act which caused the penetration with his genital organ (penis) into the genital organ (vagina) of V N.

In count II he was charged with assault causing actual bodily harm contrary to Section 251 of the Penal code in that on the 8th day of December, 2010 at *[particulars withheld]* area in Kiambu district within Central Province unlawfully assaulted V N thereby occasioning her actual bodily harm.

He also faced an alternative charge of indecent act contrary to Section 11 (A) of the Sexual Offences Act No. 3 of 2006 in that on the 8th day of December, 2010 at *[particulars withheld]* area in Kiambu District within Central Province unlawfully and indecently assaulted V N by touching her private part (vagina).

The appellant was found guilty in the two main counts and was sentenced to serve fifteen and two years imprisonment respectively.

In a petition of appeal filed on 22nd December, 2011, the appellant appealed against both the conviction and sentence. However, at the time of hearing, he submitted that he would only appeal against the sentence. In this respect, he submitted that the sentence imposed was excessive.

Under Section 3(3) of the Sexual Offences Act, a person found guilty of the offence of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

Again under Section 251 of the Penal code a person who commits an assault causing actual bodily harm is guilty of misdemeanour and is liable to imprisonment for five years.

Thus in the case of rape, the law only sets the minimum sentence that the court should impose whereas in the case of assault causing actual bodily harm, the maximum sentence has been set. In sentencing therefore, the court must look at the circumstances and facts of each individual case. Specifically then, sentencing is in the discretion of the trial court but such discretion must be exercised judicially. See **Shadrack Kipkoeh Kogo –Vs- Republic Criminal Appeal No.253 of 2003 (unreported) (Court of Appeal sitting in Eldoret (Omolo, O’kubasu and Onyango Otieno JJA)**, the court 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 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 was so harsh and excessive that an error in principle must be inferred.”

Further, this court under Section 354(3) (b) of Criminal Procedure code is empowered to alter the sentence when the appeal before it is against the sentence. The same provides as follows:-

“In an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence.”

Rape is no doubt a serious offence. There can never be any justification for committing the offence. The appellant accosted the complainant in the most crude and scary manner, having entered into her house at night while she was asleep. He was armed with a knife. He ordered her to undress in his presence. The complainant resisted and managed to flee outside but the appellant ran after her in pursuit. When he caught up with her, he gagged her mouth and then raped her. He had also tried to cut her breast with the knife. In the commotion, he inflicted a cut on her right palm, left hand and mouth.

In sentencing, the trial court took into account all these factors and noted that the offence was serious and required a deterrent sentence. The record also shows that the appellant did not appear remorseful with what he had done. When he was given an opportunity to mitigate before sentence, he reiterated that he had been framed up and was being tormented by the complainant’s family. These are issues he had raised in the defence and were dismissed as lacking in merit and could not have been considered as mitigating factors against a stiff sentence.

Having said so, it is my view that the trial court took into account all relevant factors and principles in sentencing. Indeed, the appellant ought to be happy that he escaped only with a fifteen year jail term for rape whereas he could have been jailed for life. This applies with the charge for assault in which only a two year jail term was imposed against a possible five year jail term. Although the offence was very serious, it is the hope of this court that for the period he will serve the sentence, he will amend his behavior. And since a sentence ought to be a deterrent measure I find no reason to vary what was imposed by the trial court.

In the result, this appeal is dismissed. The appellant shall continue to serve the sentences unless he is otherwise lawfully set free.

DATED and DELIVERED in NAIROBI this 23rd day of April 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

1. The appellant in person.

2. Mr. Mureithi for the Respondent.