



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 35 OF 2014**

**JOHN MUSUNGU LUBONGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 6054 of 2010 Republic v John Musungu Lubonga in the Principal Magistrates Court at Eldoret by D. K. Kemei Principal Magistrate dated 13<sup>th</sup> July 2011.)*

**JUDGMENT**

1. The appellant was convicted for rape contrary to section 3 of the Sexual Offences Act. He was sentenced to ten years imprisonment. The particulars were that on 9<sup>th</sup> October 2010 at Tumeiyo Sub-Location in Keiyo South District within the Rift Valley Province, he had carnal knowledge of M. M. [name withheld] without her consent.
2. The appellant is only aggrieved by the sentence. His petition of appeal is a plea for mercy. It urges five grounds: first, that he is remorseful and a first offender; secondly, that he has a family that looks up to him for upkeep; thirdly, that he has served a third of his sentence; fourthly, that he undertakes to be a law abiding citizen; and, fifthly, that that he has learnt some useful trades in prison. At the hearing of the appeal, the appellant stated that his children have encountered problems of school fees since his incarceration in the year 2011. He said that the lady who had been employed to look after them broke her leg in an accident. In a synopsis, the entire appeal is a plea for *clemency*.
3. The State contests the appeal. In a nutshell, the case for the State is that the victim was an old lady of eighty two; that the law provides for a minimum sentence of ten years; that the lower court took into account the mitigation tendered; and, that there are no grounds to disturb the sentence. I was accordingly urged to dismiss the appeal.
4. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw my own conclusions. In doing so, I have been very cautious because I neither saw nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
5. The complainant was aged seventy. The appellant entered her house, locked the door, threw her onto the bed and inserted his penis into her vagina. The complainant pinched the assailant's penis; he took off. She knew the appellant as a casual labourer in the area. The complainant informed PW2 and PW3 of the incident. The latter went into the complainant's house where they recovered a cap and yellow plastic tin belonging to the appellant. The appellant was apprehended by the public and escorted to Fourspar Patrol

base. He was later charged with the offence.

6. PW5, Florence Jaguka, is a medical doctor. She examined the complainant on 10<sup>th</sup> October 2010 at Moi Teaching and Referral Hospital, Eldoret. She produced a P3 form (exhibit 2). She formed the opinion that the vagina of the complainant had been penetrated. The neck of the complainant was tender.

7. From that evidence, it is obvious that the complainant knew the appellant as a casual labourer in her area. She identified him positively. In addition, a cap and a yellow plastic tin belonging to the appellant were found at the *locus in quo*. I thus find that the appellant was positively identified. See Wamunga v Republic [1989] KLR 424, Republic v Turnbull & others [1976] 3 All ER 549, Obwana & Others v Uganda [2009] 2 EA 333. The injuries to the complainant were *corroborated* by the doctor. The medical evidence left no doubt that the complainant had *non-consensual* intercourse.

8. Like I stated, the appellant is no longer challenging his conviction. The only live matter in this appeal is whether the sentence of ten years imprisonment was proper. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

*“The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may.....(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or..... ”*

9. In Macharia v Republic [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

*“The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. ...The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence.”*

10. Under section 3(3) of the Sexual Offences Act, the *minimum* sentence for rape is *ten* years but which may be enhanced to *life*. I have noted that the appellant pleaded for *leniency* in the lower court. The prosecutor had informed the court that the appellant was a *first offender*. Despite the fresh clamour for clemency, I remain alive that rape is a *serious* felony. As stated in Macharia v Republic [2003] 2 E.A 559, the sentence imposed on an accused person must be *commensurate* with the *moral blameworthiness* of the offender. Considering the savage attack and the violence meted out on a *seventy year old woman*, the sentence of ten years was *lenient*. It matters little that the appellant is the bread winner for his family; or, that his children are prejudiced by his continued incarceration. Choices have consequences. I cannot say in this case that the learned trial magistrate *acted upon some wrong principles or overlooked some material factors*. I thus decline the invitation to review the sentence.

11. In the result, I find that the appeal is devoid of merit. I uphold the conviction and sentence handed down by the learned trial Magistrate. The entire appeal is dismissed.

It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 24<sup>th</sup> day of September 2015**

**GEORGE KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of**

The appellant (in person).

Mr.....for the State.

Mr. J. Kemboi, Court Clerk.