REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 67 OF 2010

DOMINIC MUTINDA ……APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

(Being an appeal from the original conviction and sentence in Makueni Principal Magistrate's Court, Criminal Case No. 255 of 2008 by Hon. F.M. Nyakundi, Ag. Principal Magistrate on 14th October, 2008)

J U D G M E N T

The appellant herein **Dominic Mutinda** together with one **Titus Nzangi** were charged with the offence of Rape contrary to **Section 3(1)** as read with **Sub-Section 3** of the **Sexual Offences Act No. 3 of 2006**.

The particulars were that the appellant (*Dominic Mutinda)* on the 6th day of July, 2008 at Ngiluni sub-location Kiteta location in Makueni District within the Eastern province intentionally and unlawfully had carnal knowledge of **P S** without her consent.

He was also charged with an alternative charge of Indecent Act of a female contrary to **Section 6** of the **Sexual Offences Act.**

The particulars of which were that on the 6th day of July, 2008 at Ngiluni sub-location, Kiteta Location in Makueni District within the Eastern province intentionally and unlawfully did an Indecent Act to **P S** by touching her private parts.

The appellant's co-accused in the lower court but is not a co-appellant in this appeal was also charged with the offence of rape contrary to **Section 3(1)** as read with **sub-section 3** of the **Sexual Offences Act 2006.**

The particulars were that on the 6th day of July, 2008 at Ngiluni sub-location Kiteta location in Makueni District within the Eastern province intentionally and unlawfully had carnal knowledge of **P S** without her consent.

He also faced an alternative count of Indecent Act of a female contrary to **Section 6** of the **Sexual Offences Act 2006.**

The particulars were that on the 6th day of July, 2008 at Ngiluni sub-location Kiteta location in Makueni District within the Eastern province intentionally and unlawfully had carnal knowledge of **P S** without her

consent.

He also faced an alternative count of Indecent Act of a female contrary to **Section 6** of the **Sexual Offences Act 2006.**

The particulars of the alternative charge were that on the 6th day of July, 2008 at Ngiluni sub-location Kiteta location in Makueni District within the Eastern province intentionally and unlawfully did an Indecent Act to **P S** by touching her private parts.

The appellant herein pleaded guilty to the main charge of rape and he was convicted on his own plea of guilty and sentenced to serve 15*(fifteen years)* imprisonment.

The co-accused in the lower court pleaded not guilty to the charges and the case proceeded for hearing and he was found not guilty on the main charge but was convicted on the alternative charge and sentenced to serve five (5) years imprisonment. He appealed against the sentence in Criminal Appeal Number 217 of 2008 (Titus Nzangi vs Republic) which was heard by Honourable Justice H.P.G. Waweru and he allowed the appeal on the ground that the charge was fatally defective in that the particulars of the offence did not disclose the offence charged. This, however, only related to the alternative charge as he was acquitted on the main charge and the Judge did not make any finding on the charge in respect of the main charge because it was not subject of Appeal in respect to the appellant's co-accused in his appeal. I thought it was important for me to bring out that history in this appeal for purposes of bringing out the distinction.

The appellant in this appeal pleaded guilty to the main charge of rape and no finding was made on the alternative count as per the requirements of the law. He was charged under **Section 3(1)** as read with **Sub-Section 3** of the **Sexual Offences Act 2006.**

Section 3(1) aforesaid provides:

A person commits the offence termed rape if

> ***a) He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs.***
>
> ***b) The other person does not consent to the penetration; or***
>
> ***c) The consent is obtained by force or by means of threats or intimidation of any kind.***

The court finds that there is nothing wrong with the charge sheet with regard to the main count for which he was charged and to which he pleaded guilty to. As Honourable Justice Waweru rightly found, the alternative charge was defective but not the main charge. The appeal herein relates to the main charge and not the alternative.

Having made a finding that the charge was not defective, I now turn to whether the sentence was excessive or not. **Section 3(3)** of the **Sexual Offences Act 2006** provides for the sentence to be imposed upon conviction of a person charged with the offence of rape which should not be less than ten (10) years but which may be enhanced to imprisonment for life. The appellant herein was sentenced to serve fifteen (15) years imprisonment. My finding on this is that the sentence is not excessive and its within the law. The same is not illegal.

The court has looked at **Section 348** of the **Criminal Procedure Act.** The Section provides as follows;

> ***"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence"***

This therefore means that I can only interfere with the sentence if the same is excessive or if its illegal. The law does not allow me to interfere with the conviction whatsoever.

Consequently, I dismiss the appeal and affirm the sentence imposed by the trial court.It is so ordered.

Dated and **Signed** at **Machakos** this **18th** day of **August, 2015**

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LUCY NJUGUNA

JUDGE

Delivered at **Machakos** this **21st** day of **September, 2015**

……

PAULINE NYAMWEYA

JUDGE