

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 282 OF 2008

DAVID OGOLA ASWANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein **David Ogola Aswani** has filed this appeal against his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts. The appellant had been charged with the offence of **Rape Contrary to Section 3(1)(A) as read with Section 3(3) of the Sexual Offences Act, 2006**. The particulars of the charge were that:-

“On the 20th day of July 2007 at [particulars withheld] Estate in Nakuru District of the Rift Valley Province intentionally and unlawfully had sexual intercourse with M W G without her consent.”

The appellant entered a plea of ‘**Not Guilty**’ to the charge. His trial commenced on 17/9/2007. The prosecution led by **Inspector Okello** called a total of four (4) witnesses in support of their case.

The complainant **M W G** told the court that on 20/7/2007 at about 6.00 pm she was inside her house at [particulars withheld] Estate in Nakuru. She was lying on the bed suckling her 1½ month old baby. The appellant whom the complainant knew very well as the son of her former landlord silently entered her house. he was armed with a knife. The appellant tied her mouth and punched her. He over powered her. He removed his trouser and forced his penis into her anus thereby sodomising her. The appellant also tabbed her on the buttock with the knife that he had. A 5 year old son of the complainant came into the room but the complainant chased him away. After the rape the appellant ran out. The complainant raised an alarm. **PW4, Rukia Dudu** responded to the alarm, she met the appellant running out of the plot. **PW4** told the court that she found the complainant lying on her bed bleeding profusely from the anus. People rushed the complainant to the nearby Umoja Clinic.

The matter was later reported to Bondeni Police Station. **PW3, Dr. Daniel Wainaina** is the doctor who attached to Nakuru Provincial General Hospital who produced the P3 form (PEX.1). He stated that the medical examination confirmed that the complainant had been sodomised and injured with a sharp object.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied having raped the complainant. On 30/10/2008, the learned trial magistrate delivered his judgment in which he convicted the appellant of the offence of rape. After allowing the appellant an opportunity to mitigate the court sentenced him to a term of twenty (20) years imprisonment. Being aggrieved the appellant filed this appeal.

In his petition of appeal filed on 2/11/2008 the appellant submitted grounds that his conviction was erroneous. However when the matter came up for hearing before me on 28/10/2015, the appellant stated that he did not wish to contest his conviction. He told the court that he only wished to appeal against his sentence which he found to be excessive. As such the appellant’s appeal against conviction is hereby marked as ‘**abandoned.**’

The state represented by learned state counsel **Ms Ngovi** opposed the appeal against sentence.

I have carefully considered the submissions made in respect of this appeal. I have perused the record of the trial. I find that this rape was particularly brutal. The appellant burst into the complainant's house and found her feeding her baby. He proceeded to forcibly sodomise the complainant at knife point with the baby still lying on the bed. After the act the appellant left the complainant bleeding profusely from the anus and had it not been for the quick action of her neighbour **PW4** the complainant may well have lost her life.

Section 3(3) of the Sexual Offences Act provides that:-

“(3) A person guilty of an offence under this section 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.”

Thus Section 3(3) provides for a minimum sentence of ten (10) years upon conviction and a maximum of life imprisonment. As such the twenty (20) years term imposed by the trial court was legal. In view of the aggravated nature of the rape I find that the sentence imposed was both legal and appropriate. I am not inclined to interfere with the same. I therefore dismiss this appeal against sentence.

Read in open court this 23rd day of November 2015.

MAUREEN A. ODERO

JUDGE