



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 72 OF 2012**

*(An appeal against the sentence of the Senior Resident Magistrate's court at Butere in Criminal Case No. 172 of 2010 [G. O. OYUGI, RM] delivered on 30<sup>th</sup> March, 2010 )*

**CHARLES OCHIENG ODERA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant was charged with simple robbery contrary to **Section 296 (1)** of the **penal Code**. The particulars of charge were that on 9/3/10 in Butere District of Western Province robbed R N of one bag of 50 kg DAP fertilizer, 4 packets of maize seeds, radio make Soniteck model ST-5400 and cash kshs.330/- all valued at kshs.6,300/= and at the time of such robbery threatened to use actual violence to the said R N. He was charged with a second charge of rape contrary to **Section 3 (1) (a), (c) (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the same day and place intentionally and unlawfully caused his penis to penetrate the vagina of R N by use of threats.

Initially, when he was taken to court, he pleaded not guilty to the two charges. On 29/3/2010 however, he informed the magistrate that he wanted to change his plea. He pleaded guilty to both counts. He was convicted. He was sentenced to serve five (5) years imprisonment on count I and 30 years imprisonment on count II. The sentences were to run concurrently.

He has now appealed to this court against sentence only. At the hearing of appeal, he was represented by Mr. Wekesa.

Mr. Wekesa learned counsel for the appellant, relied on the petition of appeal filed by the appellant. Counsel submitted that the appellant pleaded guilty to both counts. He was however a first offender. The court did not consider the fact that the appellant was a first offender, as well as his mitigation. In counsel's view, the appellant should have been treated more leniently. Counsel argued that the sentence should be reduced.

Ms Opiyo, learned Prosecuting Counsel opposed the appeal. Counsel submitted that though the appellant pleaded guilty, the court considered the mitigation. In counsel's view, the appellant was faced with a capital offence and the sentence imposed was lawful.

This is an appeal on sentence. Sentencing is the discretion of the trial court. An appellate court will be slow to interfere with the exercises of such discretion unless it is exercised on a wrong principle. The appellant pleaded guilty. He did not waste the court's time. He was a first offender. In mitigation he stated that he wanted leniency. The learned magistrate stated that she considered the mitigation. It is therefore not true that the mitigation of the appellant was not considered.

The maximum sentence provided by the law for an offence or robbery under **Section 296 (1)** of the Penal Code is 14 years. On the other hand, the sentence provided for an offence of rape under **Section 3 (3)** of the **Sexual Offences Act** is a term of not less than 10 years, but which may be enhanced to life imprisonment.

The appellant was sentenced to serve 5 imprisonment for the offence of robbery and 30 years imprisonment for the offence of rape. In my view, the sentence imposed for robbery was within understandable limits for a first offender and the circumstances of the case. As for the sentence for rape, in my view, the magistrate should have given reasons for the sentence which was three times the minimum sentence of 10 years. She did not give any reasons for doing so.

The circumstances of the commission of the offence of rape do not appear to have aggravated factors. Though the offence is a serious offence, in my view, the minimum sentence of 10 years imprisonment would be adequate punishments for a first offender, taking into account the circumstances of the offence. That sentence of 30 years imprisonment in my view is a very severe and excessive sentence for a first offender. I will therefore interfere with the learned magistrate's sentence for the offence of rape.

In conclusion, I find merits in the appeal on the sentence for rape. I uphold the sentence of 5 years imprisonment for the offence of robbery. I set aside the sentence imposed for the offence of rape and substitute therefore a sentence of 10 years imprisonment from the date the appellant was sentenced by the trial court. The two sentences will still run concurrently.

*Dated and delivered at Kakamega this 3<sup>rd</sup> day of April, 2014*

**George Dulu**

**J U D G E**