

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 53 OF 2011

D K T.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 866 of 2009 Republic vs David KemoiTurungi in the Resident Magistrate's Court at Kabarnet by H.M. Nyaga Principal Magistrate on 15th March 2011)

JUDGMENT

1. The appellant was convicted for the offence of rape contrary to section 3(1) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to 10 years imprisonment. The appellant initially appealed against his conviction and sentence. At the hearing of the appeal on 14th October 2013, he withdrew his original petition. He opted instead to proceed with the amended appeal dated 30th April 2012. The State had no objection. Leave was granted by the Court after explaining to the appellant the consequences of the course he was taking. The net effect was that the appellant *abandoned* his appeal on the *conviction* and is now contesting the sentence only.
2. The appellant has filed written submissions. I granted him a further opportunity to highlight his key arguments. He stated that he is a first offender. After self-introspection, he is remorseful and admits he went astray. He undertakes to stay on the right side of the law in the future. He pleaded for leniency arguing that he is the eldest son in the family. He said his family continues to suffer. During his absence, thieves took advantage and stole his two cows. His wife and his aging mother are vulnerable. His father is deceased. Lastly, he stated that he and the complainant have a child. He has learnt some carpentry in prison. He thus pleaded with the court to release him from jail.
3. The appeal on sentence is contested by the State. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been careful because I have neither seen nor heard the witnesses. See *Njoroje v Republic* [1987] KLR 99, *Okeno v Republic* [1972] EA 32, *KariukiKaranja v Republic* [1986] KLR 190.
4. The appellant raped his mother-in-law on 27th September 2009. He threatened her with a knife. The complainant (PW 1) testified that the appellant is married to her step daughter. The complainant informed her husband about her ordeal. She then reported the matter to the police the next day. The appellant was arrested. I thus find it odd when the appellant says that he and his mother-in-law have a child. The appellant, like I stated, does not challenge his conviction.
5. The learned trial Magistrate considered that the appellant was a first offender. He also took into account the mitigation offered by the appellant. The learned Magistrate was of the opinion that it was taboo for the appellant to have sexual relations with the complainant. I look at the matter a little differently. Rape is a violent and degrading offence. The appellant was armed with a knife. He threatened to kill the complainant. Such despicable moral depravation calls for a deterrent sentence.
6. I also find that my hands are tied by the law. Under section 3(3) of the Sexual Offences Act, the offence of rape attracts imprisonment for a term *not less* than 10 years. The sentence can be enhanced to life imprisonment. The learned trial Magistrate was quite lenient in the circumstances by sentencing the appellant to ten years in jail. In the interests of justice I decline to disturb the sentence. In the end, the entire appeal is hereby dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 25th day of October 2013

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mr..... the appellant (in person).

Mr.....for the State.

Mr. P. Ekitela, Court Clerk.