



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO. 114 OF 2011**

**MULWA NDUWA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an Appeal from the original conviction and sentence in Makindu Principal Magistrate's Court  
Criminal Case No. 865/2009 by Hon. Ochieng ,PM on 7/6/09)*

**JUDGMENT**

1. **Mulwa Nduva** (*appellant*) was charged with two (2) counts.
  - i. Robbery contrary to section 296 (1) of the Penal Code.
  - ii. Rape contrary to section 3(1) (3) of the Sexual Offences Act No. 3 of 2006.
2. He admitted the charges and was convicted on his own plea of guilty. On count 1 he was sentenced to five (5) years imprisonment. On count 2 he was sentenced to ten (10) years imprisonment.
3. Being aggrieved by the sentences imposed he now mitigates to this court on sentence. He states that he committed the offence due to drunkenness. Seeking the courts leniency, he stated that he has been ailing while in prison. He tendered evidence in an endeavour to establish that fact.
4. The learned State Counsel, **Mrs Abuga** opposed the appeal. She stated that when the charges were read to the appellant he pleaded guilty. An unequivocal plea was entered against him. The facts were presented and he admitted the same. The facts presented proved the charges and the sentences imposed were within the law.
5. Further, she submitted that the treatment chits produced by the appellant clearly showed that the appellant was being treated while in prison. She asked the court to uphold the conviction and sentence.
6. This being the first appeal, I do remind myself of the duty to re-evaluate the facts and evidence presented before the Lower Court in order to reach an independent decision as to whether the sentence meted out was in accordance with the law.
7. In count 1 the appellant was sentenced to 5 years imprisonment for an offence of robbery contrary to section 296(1) of the Penal Code. The section provides thus:-

***“Any person who commits the felony of robbery is liable to imprisonment for fourteen (14) years”.***

8. In the second count the charge was rape contrary to Section 3(1) (a) & (3) of the Sexual Offences Act No. 3 of 2006, which provides as follows :-

***“A person who commits the offence termed rape if-***

***He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs.***

***(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 10 years but which may be enhanced to imprisonment for life.”***

9. The facts in support of the charges indicated that the appellant used a knife which was a weapon to threaten the complainant. He pulled her into the bush and penetrated her at knife point. On completion of the act he fell asleep and that is how she escaped from him. She was examined. The medical examination report (P3) indicated she had been raped. To-date the appellant does not dispute these facts.
10. It is not in dispute that the appellant has undergone treatment while serving sentence. According to the report of the radiographer, the liver has normal endo-pattern. The spleen, pancreas and both kidneys were found normal in size and texture. There was no abdominal mass lesion seen. There was nothing abnormal detected. This being the case, there is nothing unusual to persuade this court to exercise a moral duty as opposed to a legal duty that is within its mandate.
11. That notwithstanding as clearly pointed out by the learned state counsel, in case he ails, there is accessibility of medical facility at the institution. In case of a referral case, he will be referred to Kenyatta National Hospital where he was treated previously.
12. In count 1 the maximum sentence provided for in law is 15 years imprisonment. The 5 years (sentence) imposed was on the lower side considering the weapon used to threaten the complainant.
13. In the second count the law provides for a minimum sentence of 10 years which could be enhanced to life imprisonment. The court opted to impose the mandatory minimum custodial sentence provided by the law.
14. It was the court's order that the sentences run concurrently. There was no misdirection in the circumstances. I therefore decline to interfere with the lawful sentence imposed. The sentences in both counts are confirmed.
15. Accordingly, the appeal on sentences is dismissed.

**DATED, SIGNED and DELIVERED at MACHAKOS this 17<sup>TH</sup> day of OCTOBER, 2013.**

**L.N. MUTENDE**

**JUDGE**