



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL NO. 42 OF 2013**

***(Appeal arising from original conviction and sentencing of the Principal Magistrate court at Bondo – Hon. P.W. Mutua – Principal Magistrate)***

**SOLOMON OTIENO RADIER .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

This is an appeal from the judgment of the Principal Magistrate Bondo whereby the appellant was convicted for the offence of rape contrary to Section 3(1) 9a) (b) (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to 20 years imprisonment.

The issues for determination in this appeal are whether the offence was proved beyond reasonable doubt and secondly whether the sentence of 20 years imprisonment ought to be reviewed. The finding of this court is that the appeal on conviction has no merit but the sentence needs to be interfered with.

**BACKGROUND**

The appellant was charged with the offence of rape contrary to Section 3(a) (a)(b) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 22/7/2012 at [particulars withheld] Bondo District, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of E M A a woman aged 50 years without her consent.

In the alternative the appellant was charged with committing an indecent act with an adult contrary to Section 11A of the Sexual Offences Act No. 3 of 2006. The prosecution called 5 witnesses to support the charge.

**PROSECUTION CASE**

E M A (PW1) was the complainant. She was in her house sleeping on 22/7/2012 at 1.30am when a man dressed in white clothes forcefully entered her house and raped her by penetrating her vagina using force. She then tricked the man to let her go for a short call but when the man released her she locked him from outside and she went to report to mama F who called F to come out. When Pw1 and F went to the PW1's house, they found the appellant inside and arrested him. The appellant is their neighbour.

The PW1 went to the hospital the following morning and also reported to the police where she was issued

with a P3. The appellant left his black shoe and a white cap in the PW1's house. During the rape the PW1 bled and her clothes were torn.

F O (PW2) was asleep on 22/7/2012 at 1.50am when her mother A awoke him up accompanied by N. They told him that somebody had entered into the PW1's house and raped her. When he went to check who the perpetrator was, PW2 saw somebody in white clothes coming from the PW1's house and entered the maize plantation. When challenged to identify himself the appellant mentioned his name and said he was drunk. He refused to be escorted home. PW2 saw the PW1 with blood stained clothes called neighbours. He knew the appellant since childhood because they were neighbours. He saw blood stains on the appellant clothes.

Sammy Ombaro (PW3) is the clinical officer who examined the PW1 and filled a P3 for her. He stated that the Pw1 had blood stained clothes. Her neck was bruised with finger markings. Her thigh and chest were tender and her hip joint had a restricted movement. He labia majora and the vaginal wall had bruises leading to the conclusion that there was a forceful penetration. PW3 also examined the appellant on 17/10/2012 and filled his P3. He did not find an injury on the appellant.

A O O (PW4) was asleep on 22/1/2013 at 1.30 am when he was awoken by Mrs. N. PW4 then went out and found N holding the appellant hand. He saw blood stains on the appellants clothes using a flash light from a torch but he never checked the PW1 because it was a taboo.

Raphael Mulindi (PW5) is the investigating officer who issued a P3 to the PW1 and visited the scene of the crime. He produced a black shoes and a white cap which were allegedly left at the scene by the appellant. After considering the above evidence the trial court found that the appellant had a case to answer and put him to his defence.

### **DEFENCE CASE**

The appellant gave an unsworn defence in which he alleged that he had a love affair with the PW1. On 22/7/2012 he had a date with the PW1 to go for some money before he left for Nairobi. He arrived at the PW1's house at 9.00pm and she opened the door for him. She grabbed him and took him to her bedroom and made love. When the appellant tried to leave the PW1 resisted. As he was leaving, she went towards the road. When the appellant reached home, he saw somebody come flashing a spotlight and after enquiry the appellant denied that he was from PW1's house. When people wanted to beat the appellant, PW1 stopped them and requested them to take the matter to the police.

The following day he went to Nairobi only to be arrested on 14/10/2012 and charged before the trial court. He denied offence and blamed it for his debt which ought to have paid him. After evaluating the evidence, the court convicted the appellant and sentenced him to serve 20 years imprisonment.

The appellant was aggrieved and filed this appeal challenging both the conviction and sentence.

### **GROUND OF APPEAL**

1. THAT the learned trial magistrate erred in both law and facts when relied and based his conviction on sole evidence.
2. THAT the learned trial magistrate erred in both law and facts when he failed to evaluate the context of information raised by both parties.
3. THAT the learned trial magistrate erred in both law and facts when failed to scrutinize forensic examination report tabled before court.
4. THAT the court failed to comply with Section 324 as read with Section 329 CPC

### **APPELLANTS SUBMISSIONS**

The appellant filed written submission in which he seemed to urge that there was no sufficient evidence to support a conviction. In addition he argued that the sentence awarded to him of 20 years imprisonment

was harsh in the circumstances and prayed for the same to be reviewed. In his oral submissions during the hearing of the appeal, the appellant admitted that he raped the PW1 but remorsefully prayed for leniency.

### **THE RESPONDENTS' SUBMISSION**

Mr. Magoma learned counsel for the state opposed the appeal. He submitted that penetration was not in dispute because the appellant admitted the same in his evidence. He further submitted that the penetration was not consented to but done forcefully as was evidenced by the injuries suffered by the PW1 including finger markings around the neck and bruises on the libia majora and vaginal wall.

The learned state counsel however didn't respond to the prayer for a less sentence.

### **ANALYSIS AND DETERMINATION**

The appellant admitted the offence during his submission and prayed for a lenient sentence. The only issue for determination in this appeal is whether the sentence awarded to the appellant was harsh and ought to be interfered with. The appellant was sentenced to 20 years imprisonment. Section 3(3) of the Sexual Offences Act provides for a minimum sentence of 10 years imprisonment and a maximum of life imprisonment. In view of the foregoing provision 20 years was not excessive.

The question that arises is why didn't the trial court award the minimum sentence after considering the fact that the appellant was a first offender. The only reason given was that the offence was serious and needed a deterrent sentence. The respondent did not defend the sentence.

It is trite that for an appellate court to interfere with a sentence it must be proved that the trial court considered irrelevant factors or failed to consider relevant factors while assessing the magnitude of the offence to award. In addition an appellate court can interfere with an illegal sentence or one which is manifestly harsh and excessive.

The purpose of the sentence must always be the guiding principle while sentencing. In the present case the purpose of condemning the appellant to jail was to remove him from the free society in order to give him time to reform before releasing him back to the society.

The court's interpretation of the minimum sentence provided by the Legislature under Section 3(3) of the Sexual Offences Act was considered to be enough for a rape convict to reform unless there were compelling reasons for enhancement. In this case the trial court did not identify the reason(s) why the statutorily prescribed sentence had to be doubled. Consequently this court finds that the trial court fell into error by imposing double the statutorily prescribed prison sentence without any justifiable reason. Stating that the offence was serious was not a good reason for an enhanced sentence because the Legislature knew that the offence was serious even when it provided for 10 years prison term. Even if the trial court has discretion in sentencing, such discretion must be exercised judiciously. In the present case the discretion was exercised whimsically and not judiciously. The sentence imposed was manifestly excessive and harsh in circumstances, it must be reviewed.

### **DISPOSITION**

in view of the admissions made by the appellant and the finding of the court above, the appeal partially succeeds to the extent that the 20 years prison sentence is reviewed downwards to the statutory minimum prison term of 10 years. The court believes that the said prison term of 10 years will be sufficient for the appellant to reform before rejoining the free society.

Signed dated and delivered this 22<sup>nd</sup> day of November 2012

**ONESMUS MAKAU**

**JUDGE**