



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 37 OF 2011.

AS CONSOLIDATED WITH CRIMINAL APPEAL NO 38 OF 2011

LESIT, J

MWENDA IRAMBU.....1ST APPELLANT

ANTHONY MURIITHI MBAKA.....2ND APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT.

(From the original conviction and sentence in Criminal Case No. 609 of 2011 in the Principal Magistrates Court at Chuka by Hon. P. Ngare PM.)

JUDGEMENT

1. The Appellants Mwenda Irambu hereinafter 1st Appellant and Anthony Murithi the 2nd Appellant were jointly charged with another person of six counts of offences. In count 1 all 3 were charged of Abduction in order to murder contrary to section 258 of the Penal Code. In count 2 they all faced extortion contrary to section 300(1) of the Penal Code. In count 3 all three faced assault causing actual bodily harm contrary to section 251 of the Penal Code. In counts four, five and six each accused faced one count of attempted rape contrary to section 4 of the Sexual Offences Act No. 3 of 2006.
2. After hearing the case the learned trial magistrate acquitted the 3rd accused in the case in all counts and both Appellants in counts 2. The learned trial magistrate convicted the 1st Appellant in counts 1, 3 and 4 and 2nd Appellant in counts 1, 3 and 5. He sentenced each appellant to 7 years imprisonment in count 1 2 years imprisonment in count 3 and 10 years imprisonment each in counts 4 and 5 respectively. The sentence was ordered to run consecutively.
3. The Appellants were aggrieved by the conviction and sentence and therefore filed these appeals. Both Appellants filed Petition of Appeal. The grounds of appeal are exactly the same and are as follows:
 1. **Following the judgment that was passed across by Chuka-Resident Magistrate's court on 17th December, 2010, I am content that the judgment was justified according to law; I hereby feel remorseful and seek leniency as I cite the following personal grievances which I**

- greatly feel will create an impact of logical consideration.
2. **I regretfully confess that it was my first time to commit such an offence and my first time to be arraigned before a court of law charged with such a serious offence.**
 3. **I am 23 years old. I am in my days of youth with a lot of productivity. I am positive about life. I hope and wish to bring a good family law abiding children and wife. I am afraid I had no premonition of doom pertaining to this matter.**
 4. **I am regretful that someone experienced around 45 years took advantage of my inexperienced mind and through ignorance of the law, he made me commit an offence whose repercussions were unfamiliar to me.**
 5. **I am always wishing I knew what a snare it was. My father is deceased and my mother is disabled. Am the second born in a family of five children. I and my elder brother took the responsibility of taking care of our mother and the three siblings. We are the duo breadwinners of our family through wages of hard work as laborers. I greatly yearn for your leniency.**
 6. **For the period I have been incarcerated, I have leant the hard way and known the bitter consequences of crime and transgressing against the law. I am already a reformed person and law abiding. I will pledge my loyalty to my country through community policing that no crime will occur unreported within my vicinity and know-how.**
 7. **I wish to struggle in all my endeavors to make my country a better place to live in; better than I met it.**
 8. **Considering the abuse grievances, I pray that you will consider my application and redeem me by reducing my sentence a first offender. With a lot of regrets I am so remorseful.**
4. The Appellant in their submissions before the court have clearly stated that they do not wish to challenge their conviction and that they were appealing only against the sentence. As indicated earlier each of them was sentenced to seven years imprisonment of an abduction charge, two years imprisonment for the assault charge and 10 years imprisonment for the attempted rape charge. The learned trial magistrate then ordered that the sentences should run consecutively which means that each of the Appellants would serve 19 years imprisonment.
 5. Miss Murithi learned state counsel opposed the appeal and urged that for the attempted rape charge. The appellants faced not less than 5 years imprisonment which sentence could also be enhanced to life imprisonment and that in the circumstances the sentence of 10 years imprisonment was not excessive.
 6. The Appellant urged the court to interfere with the sentence and in particular to set aside the order that the sentences should run consecutively and order them to run concurrently. Each appellant urged that they had reformed and had also been counseled and trained and assured the court that once released they will live peacefully and be able to work to earn a living.
 7. I have considered the sentiments of the appellant and also considered their ages the 1st appellant is 27 years old and the 2nd appellant is 25 years old. I consider the grounds raised in the petition. They have said that they regret this offence and also state that they were counseled by a man of 45 years old and they all claim that he took advantage of their inexperienced mind their ignorance of the law, their personal finance needs due to their home circumstances and also their ignorance of the law. I also looked at their demeanor and they impressed the court as people who regret their action and who were remorseful for what they had done.
 8. Even though sentencing is the discretion of a trial court, an appellate court can disturb that sentence where it is shown that the learned trial magistrate either misdirected himself or applied the wrong principles and passed either an excessive or high sentence. In this case the learned trial magistrate did not state what he considered before passing sentence and making the order that the sentences should run consecutively. Consecutive sentences are only automatic where fines have been imposed in more than one count of offence. It is not an automatic sentence where an

accused person has been given an imprisonment term without the option of a fine. It was therefore important for the learned trial magistrate to justify why he considered that the sentences should run consecutively. Without that justification that order appears to me to have been arbitral. Consequently I find that as a result of the order the effect was that the sentences imposed against the appellants were harsh and excessive.

9. I have come to the conclusion that the Appellants appeal against sentence should succeed to the extent that the terms of imprisonment entered in each count will not be disturbed. However the order that the sentences should run consecutively is hereby set aside and the sentences are hereby ordered to run concurrently to each other.

10. Those are my orders.

DATED, SIGNED AND DELIVERED AT MERU THIS 13TH DAY OF NOVEMBER, 2013.

J. LESIIT

JUDGE