REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 72 of 2007

MWANGI NGUNJIRI ……….…......………APPELLANT

VERSUS

REPUBLIC …………..……………….…….. RESPONDENT

(Appeal from original Conviction and Sentence of the Chief Magistrate's Court at Nyeri

in Criminal Case No.1013 of 2006 by R. NYAKUNDI – CM)

J U D G M E N T

The appellant was after a full trial convicted for the offence of attempted rape contrary to *section 141* of the Penal code. Upon conviction he was sentenced to serve 20 years imprisonment. The appellant was aggrieved by the conviction and sentence and hence preferred the instant appeal.

In his petition of appeal, the appellant states;

"1. That I pleaded not guilty to the charge.

2. That the learned trial magistrate failed in points of law and facts in failing to evaluate and analyse the entry (sic) evidence in record adequately.

3. That the learned trial magistrate erred in points of law and fact in failing to observe that girls or women can or do sometimes talks (sic) lies.

4. That the learned trial magistrate failed in points of law and fail (sic) in weighing the evidence in record in isolation and thus become (sic) obliged to reject my defence that remains truth illustrative and cogent."

When the appeal came up for hearing, the appellant applied to abandon the appeal on conviction and instead prosecute the appeal on sentence only. Mr. Makura, learned senior state counsel not objecting the appellant's wish was granted. In support of his appeal on sentence, the appellant handed in written submissions which I have carefully read and considered.

The appeal on sentence was not opposed by the state. Mr. Makura, submitted that the sentence of 20 years for the offence of attempted rape was manifestly harsh and excessive. The appellant was afterall a first offender and remorseful.

As stated by the court of appeal in the case of Republic V Batista Ligoni Beni C.A. No.65 of 2004 (UR) sentencing is a matter for the discretion of the trial court. The discretion must however, be exercised judicially and not capricirasly. The trial court must be guided by evidence and sound legal principles. It must take into account all relevant factors and exclude all extraneous and irrelevant factors.

I have no doubt in my mind that the sentence imposed as aforesaid was manifestly harsh and excessive. Of course the maximum sentence then for that kind of offence was life imprisonment with hard labour. The appellant was a first offender and not a serial rapist. The sentence imposed was certainly legal. However it was harsh considering all the circumstances of the case. As stated earlier, sentencing is discretionary. I have to reconsider the facts and the circumstances of the case. This I have done. However when the circumstances are considered as aforesaid, I am of the view that the learned Magistrate did grossly misdirect himself on the sentence he came to and did err in principle. He took into account irrelevant considerations and thus arrived at a sentence that did not meet the ends of justice. I have every reason to interfere with that discretion exercised by the learned magistrate in sentencing the appellant.

Accordingly I set aside the sentence of 20 years imprisonment imposed on the appellant, and substitute therefor a sentence of 5 years imprisonment with hard labour from date of conviction. That is my order.

Dated and delivered at Nyeri this 31st day of July, 2009.

M.S.A. MAKHANDIA

JUDGE