REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 275 of 2007

SIMON NDUNGU MURAGE……..... APPELLANT

VERSUS

REPUBLIC…..... RESPONDENT

(Appeal from original Conviction and Sentence in the Chief Magistrate's Court at Nyeri in Criminal Case No. 5118 of 2005 by R.N. NYAKUNDI – CM)

J U D G M E N T

This appeal is against sentence only. The appellant, **Simon Ndungu Murage** was charged in the Chief Magistrate's Court, Nyeri with one count of rape contrary to *section 140* of the Penal Code and in the alternative indecent assault on a female contrary to *section 144 (1)* of the Penal Code. The appellant was further charged with the second count of creating disturbance in a manner likely to cause a breach of peace contrary to *section 95(1)* of the Penal Code.

Upon arraignment in court on 8th December, 2005 and the charge having been read to him, the appellant pleaded not guilty to the same and his trial ensued. At the conclusion thereof, the appellant was convicted on the main count of rape. Upon conviction he was sentenced to life imprisonment. The appellant was aggrieved by the conviction and sentence and hence lodged the instant appeal.

In his petition of appeal dated 28th September, 2007 the appellant claims that he was not allowed by court to cross-examine the complainant (PW1) and her mother (PW2), that rape was not proved as there was no collaboration, that the age of the appellant was not ascertained, that the charge was a frame up and finally that the learned Chief Magistrate erred in law and fact in failing to appreciate that the complainant and the mother (PW2) were familiar with the appellant thus rendering the identification parade of no consequence thereby occasioning miscarriage of justice.

When the appeal came up for hearing before me on 21st July, 2008, the appellant opted to abandon the appeal on conviction and elected to pursue the appeal on sentence only. He argued that the sentence imposed was harsh and excessive. That he was aged 21 years and during his stint in prison he had trained as a carpenter.

Ms Ngalyuka, learned state counsel was not a verse to the decision of the appellant to abandon the appeal on conviction. Indeed she welcomed the decision. With regard to appeal on sentence the learned state counsel neither opposed nor supported same. Instead she opted to leave the issue to the good sense of the court.

The decision taken by the appellant is not binding on me. As a first appellate court I am required to reconsider the evidence and satisfy myself as to the guilt or otherwise of the appellant. The appellant in his grounds of appeal has raised two fundamental issues that has caused me some anxiety. One is the issue of his failure to cross-examine the complainant and his mother and two, his age at the time of the commission of the offence. With regard to the first issue, I was prepared to go along with the appellant's complaint that he was not allowed by court to cross-examine the complainant and her mother. The typed record of proceedings would seem to support the appellant's position. However when I checked the typed

proceedings as against the original record, it became clearer to me that the appellant's complaint is without merit. The original record clearly shows that the appellant was indeed given opportunity to cross-examine the two witnesses and he declined. He cannot now purport to blame the learned Magistrate for his own failures. As to age the charge sheet clearly shows that at the time he was arraigned in court his apparent age was an adult. Further during the trial, he never raised with the court the question of his age. Further in his submissions before me he claimed that he was aged 21 years. The offence was committed on 15th October, 2005. He was therefore aged 18 or so years. He was thus an adult and not a minor. Thus that complaint against has no merit.

On my own exhaustive evaluation of the evidence tendered, I have no doubt at all in my mind that the appellant's conviction cannot be faulted. The appellant was thus right in abandoning the appeal on conviction and instead concentrate his energies on appeal on sentence.

Sentencing is generally a matter for the discretion of the trial court. The discretion must however, be exercised judicially and not capriciously. The trial court must be guided by evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is illegal or is so harsh and excessive as to amount to a miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously. See generally, **OGALO S/O OWUORA VS REPUBLIC (1954) 19 EACA 270, JAMES VS REPUBLIC (1950) 10 EACA 147, NILSON VS REPUBLIC (1970) EA 599 and WANJEMA VS REPUBLIC (1971) EA 493.**

The trial court's notes on sentence in this matter are sketchy. They do not justify the sentence of life imprisonment imposed. That is the maximum sentence allowed under the statute for that kind of offence. Maximum sentences in my view should be left to serial criminals and as in this case serial rapists. In this case the appellant had no record of previous conviction meaning that he was a first offender. I appreciate that the appellant said nothing in mitigation that would have assisted the court to arrive at an appropriate and suitable sentence. However that omission cannot justify the obviously harsh and excessive sentence imposed. As it is I am not sure whether the trial court in imposing the sentence acted capriciously, took into account irrelevant considerations and or failed to take into account relevant factors. That being the case, I am prepared to give the benefit of doubt to the appellant.

I note that the appellant was convicted and sentenced on 28th November, 2006. He has therefore served about two years of the imprisonment term imposed. Taking all the foregoing into account I will interfere with the sentence imposed to the extent that I will substitute the life imprisonment imposed with imprisonment for a term of five years effective from the date of conviction and sentence in the subordinate court. Those shall be the orders of the court in this appeal.

Dated and delivered at Nyeri this 22nd day of September, 2008.

M.S.A MAKHANDIA

JUDGE