

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 185 of 2006

KAMARO WANYINGI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of the Chief Magistrate’s Court at Nyeri in Criminal Case No. 200 of 2006 dated 27th September 2006 by E. J. Osoro – SRM)

J U D G M E N T

Kamaro Wanyingi hereinafter referred to as the Appellant was arraigned before the Chief Magistrate’s Court at Nyeri on one count of rape contrary to section 140 of the Penal Code. It was alleged that the Appellant on 4th, 12th and 19th August 2005 at Nyeri District within Central Province had unlawful carnal knowledge of J W W. When the plea was taken on 2nd February 2006 the Appellant opted to enter a plea of not guilty and his trial ensued. At the conclusion thereof the appellant was found guilty of defilement contrary to section 8(4) of the Sexual Offence Act and sentenced to serve 20 years imprisonment. Being aggrieved by the conviction and sentence imposed the Appellant lodged the instant Appeal. When the appeal came up for hearing the appellant elected to abandon the appeal on conviction. Instead he elected to pursue the appeal on sentence only. In the main the appellant laments that the sentence imposed by the learned trial magistrate was inordinately harsh and severe considering that he was an old man aged 67 years and was first offender. The appellant further submitted that he had reformed and was undergoing adult education. He was remorseful and pleaded for leniency.

Mr. Orinda, learned Principal State Counsel who appeared for the State neither opposed or supported the appeal on sentence. Instead he elected to leave the issue to the good sense of the court.

Let me say from the outset that the learned magistrate erred in invoking the sexual offences Act in convicting and sentencing the appellant. The appellant having been charged for a sexual offence under the Penal Code he ought to have been convicted and sentenced under same act for the said offence. Indeed section 3 of the first schedule of the sexual offences Act specifically provide that “..... Any proceedings commenced under written law or part thereof repealed by this Act shall continue to their logical conclusion under those written laws.....”

In sentencing, Courts should have regard to the nature of the crime. The sentence must serve to remedy the wrong in the most appropriate way, while not losing track of human dignity and respect. A former Chief Justice of Kenya; Mwendwa CJ once remarked:-

“For my part, I am of the persuasion that all things being equal, it is in the very nature of things that Courts in Kenya should find themselves laying more emphasis on deterrence, and on the protection of the public than on retribution and reformation. This is in my view what is likely to produce best results in the fight against the Criminal element.”

(See the administration of justice in Kenya, 1970). Bearing the foregoing in mind, one is tempted to think that when imposing the sentence in the instant case the trial magistrate had in mind retribution rather than deterrence. A sentence of 20 years for an old man of 67 years and a first offender at that and offence which carries a minimum sentence of 15 years under the sexual offence act would appear to be harsh and excessive. I am aware that an “Appellate Court should not interfere with the discretion which a trial court exercised as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case” (See Wanjema v/s Republic (1971) E.A. 494).

It is obvious in the circumstances of this case that the sentence imposed of 20 years imprisonment on the appellant is inordinately harsh and manifestly excessive and calls for my intervention. Accordingly I would allow the appeal on sentence. I would substitute the sentence of 20 years imprisonment on the appellant with the term so far served with the result that the Appellant shall forthwith be set at liberty unless he is otherwise lawfully held.

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

M. S. A. MAKHANDIA

JUDGE