REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 20 OF 2006

(From original conviction and sentence of the Principal Magistrate's Court at Nyahururu in Criminal Case No. 4387 of 2005 [H. M. Nyaberi { R.M}])

SAMUEL MWANGI NDERITU……...……...APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGEMENT

The appellant, Samuel Mwangi Nderitu was charged with the offence of attempted rape contrary to Section 141 of the Penal Code. The particulars of the offence were that on the 15th September 2005 at Laikipia District, the appellant attempted to have carnal knowledge of DN Wwithout her consent. The appellant pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve five years imprisonment. He was aggrieved by his conviction and sentence and has appealed to this court.

Although in his petition of appeal the appellant raised grounds of appeal against his conviction and sentence, at the hearing of the appeal, the appellant abandoned his appeal against conviction. He instead pleaded with the court to exercise leniency on him and reduce the custodial sentence that was imposed on him. He told the court that he was remorseful for what he had done. Miss Opati for the State opposed the appeal. She submitted that the sentence of five years imprisonment was extremely lenient in view of the offence that the appellant had committed. He urged this court not to interfere with the sentence.

I have considered the submission made by the appellant and by Miss Opati for the State. The issue for determination by this court is whether the appellant has established sufficient grounds to enable this court interfere with the exercise of discretion by the trial magistrate when she sentenced the appellant to serve the said term of imprisonment. The principles to be considered by this court when determining whether or not to interfere with the exercise of discretion by the trial magistrate when sentencing a convict are well settled. The Court of Appeal in **Samuel Githua Njoroge vs Republic CA Criminal Appeal No.53 of 2006 (Nakuru) (***Unreported*) held at page 2 as follows;

"***The principles upon which an appellate court can interfere with the discretion of a trial [Magistrate] as regards sentence are well settled. The appellate court can only interfere where the trial [Magistrate] in assessing the sentence has acted on wrong principles or imposed a sentence which is manifestly inadequate or manifestly excessive. (****See* ***Diego vs Republic [1985] KLR 621).***"

In the present appeal, the appellant was convicted of attempted rape. He was sentenced to serve five years imprisonment. The maximum sentence which was then provided by **Section 141** of the **Penal Code** was life imprisonment. The appellant attempted to rape the complainant who was at her place of business outside the Laikipia Campus of the Egerton University. The appellant accosted the complainant when there was a lull in her business and wrestled her to the ground while attempting to rape her. The complainant was rescued by passengers in a motor vehicle which was passing by. It was evident that the appellant could have succeeded in his unlawful mission if the complainant had not been saved by passengers in a passing motor vehicle. I agree with Miss Opati that the sentence imposed on the appellant was therefore lenient in the circumstances. The appellant has not placed any grounds before this court

that would fault the discretion of the trial magistrate when he sentenced the appellant. The trial magistrate took into account all the relevant circumstances of the case before sentencing the appellant to serve the said custodial sentence.

The upshot of the above reasons is that I will disallow the appeal. The appeal on sentence is hereby dismissed. The conviction and the sentence of the appellant by the trial magistrate is hereby upheld. The appellant shall serve the sentence which was imposed by the trial magistrate.

It is so ordered.

DATED at NAKURU this 13th day of December 2007.

L. KIMARU

JUDGE