

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 562 of 2003

RICHARD MARINDANY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Richard Marindany was charged with **rape contrary to Section 140 of the Penal Code**. The particulars of the offence were that on the 28th of October 2002 [particulars withheld] Molo, the appellant unlawfully had carnal knowledge of M C B without her consent. The appellant pleaded not guilty to the charge and after a full trial he was convicted. He was sentenced to serve ten years imprisonment with hard labour. Being aggrieved by his sentence the appellant has appealed to this court.

In his petition of appeal the appellant has raised several grounds pleading with this court to exercise leniency on him with a view of reducing the term of the imprisonment imposed. He stated that he was a first offender and further that he was married with three children. He said he suffered from acute bronchitis and his health had deteriorated while he was in prison. He stated that he was remorseful for having committed the offence which he was convicted and in his view, he had learnt his lesson. At the hearing of the appeal the appellant reiterated the contents of petition of appeal. He further added that during his incarceration his mother had died. He told the court that while in prison he had achieved grade test II in carpentry. He pleaded with this court to consider his mitigation and reduce the sentence imposed by the trial magistrate. Mr Gumo, Learned Counsel for the State left the issue of sentence to the court.

I have considered the grounds of appeal put forward by the appellant. I have also considered the submissions made before me in this appeal. The appellant is basically pleading with this court to exercise mercy on him. In criminal cases justice has always to be tampered with mercy. In the circumstances of this case the appellant raped the complainant, a sick woman who was going to the hospital. The complainant was rescued by the brother of the appellant. The appellant assaulted the complainant in the course of raping her. The appellant does not deny that these events took place. He now pleads that this court considers his plight and reduce the term of imprisonment imposed.

Now if justice was to be tampered with mercy in this case, what would be the appropriate sentence of the appellant? I have considered the circumstances of the case and the fact that the appellant assaulted and injured the complainant during the rape incident: I find that the sentence of ten years imprisonment with hard labour fits the crime. Mercy can only be exercised in situations where an accused person could be said to have committed the crime in “*understandable*” circumstances. In this case the appellant’s act was deliberate. He never put into consideration the feelings of the complainant. He did not consider that the complainant was sick at the time. Neither did he consider that he was violating a woman’s human rights. I cannot exercise mercy on the appellant especially where he deliberately set out to violate the modesty of a woman without due regard to her feelings. I find nothing in the grounds of appeal put forward by the appellant that would make me reduce the sentence imposed by the trial magistrate. The appellant shall serve the said sentence imposed.

His appeal against sentence is therefore dismissed. The conviction and the sentence of the trial magistrate is hereby confirmed.

DATED at NAKURU this 1st day of March 2006.

L. KIMARU

JUDGE