REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 122 of 2003

(From Original Conviction and Sentence in Criminal Case No. 656. 666, 662 of 2003 of the Senior Resident Magaistrate's Court at Kwale L.N. Mbatia, Principal Magistrate)

MURYANI NYANJE …….……. APPELLANT

- Versus -

REPUBLIC …….……. RESPONDENT

Coram: Before Hon. Mr. Justice L. Njagi

Mrs. Mwangi for State

Appellant in person

Court clerk – Kinyua

J U D G M E N T

The appellant in this case was charged in the lower court with rape contrary to section 140 of the Penal Code and with an alternative count of indecent assault on a female contrary to section 144(1) of the Penal Code.

After the charge was read and explained to the appellant in Kiswahili, he is recorded as having said, "It is true," whereupon a plea of guilty was entered. The facts were then read out in English/Kiswahili at the end of which the appellant said, "The facts are correct." The prosecutor invited the court to treat the appellant as a first offender, and after considering the appellant's mitigation, the learned magistrate sentenced him to fifteen years imprisonment with four strokes of the cane and hard labour.

At the hearing of the appeal, the appellant appeared in person while the Republic was represented by Mrs. Mwangi. Although in his written submissions the appellant had prayed for the appeal to be allowed, the conviction quashed and the sentence set aside, during the hearing of this appeal he made it clear that he was appealing only against the sentence. He told the court that the sentence he was serving was a long one. He was thirty three years old and a father of three children who were dependent on him. In his memorandum of appeal, he had further indicated that his parents, brothers and sisters also depend on him. He appealed to the court to be lenient to him, and added that he had suffered so much in prison that he had become a born-again Christian.

Supporting the fifteen years sentence, Mrs. Mwangi submitted that the appellant was found guilty of

rape which carries a maximum sentence of life imprisonment. In that context, fifteen years were not too many. She further submitted that rape was a serious offence which leaves the victim traumatized for life, and that in sentensing the appellant to fifteen years imprisonment, the magistrate had considered the mitigation. She urged the court to set aside the strokes but to retain the hard labour.

It is instructive in this case that the appellant's conviction of the offence set out above was based on his own plea of guilty to the said offence. A conviction based on an accused person's plea of guilty to an offence is proper and an appeal against such a conviction is without merit. As the appellant herein appeals only against the sentence, it is imperative that the circumstances under which the offence was committed be re-visited.

The facts leading to the commission of the offence to which the appellant pleaded guilty are quite disturbing. They are that at about 8 p.m. on 13th December, 2002, the complainant and her daughter were seated outside the homestead of one Chikophe Chilo after they had worked the whole day as casual labourers. They had not been paid and were accommodated by their employer. They had to stay overnight so that they could complete their work the next day and be paid. At around 8 p.m., the appellant went to that homestead. He confronted the owner of the homestead, the above named Chikophe Chilo, and demanded to have sex with one of his wives or his daughter-in-law. As the owner of the homestead tried to reason with the appellant, the ladies who were in the homestead overheard the conversation and fled through the back door; Chikophe went into the house and also left through the back door and went to the chief's house. The appellant then entered the house and on finding no one went back outside where the complainant and her daughter were. He set upon them and beat them up. The complainant ran away into a cassava shamba leaving her young daughter behind.

The appellant took the opportunity to defile the girl as her mother watched from the cassava shamba from where she was shouting for help. After the appellant had finished defiling the young girl, he went to the cassava shamba and raped the complainant. He then left. Investigations went on until 10th April, 2003, when the appellant was arrested and charged.

The appellant is recorded as having told the court that these facts were correct. The facts do not depict the appellant as a person deserving of any sympathy. His conduct on the material night would not endear him to any right thinking member of the society. He has not offered any explanation as to why he conducted himself in the manner he did. He does not even feign any excuse. He merely wanted to have sex with one of another man's wives or daughter-in-law, or perhaps with anybody else for that matter. Incredible. As if that were not enough, he first beat up the complainant and her daughter before he raped them.

Leniency in such circumstances would be equal to licensing sex maniacs like the appellant to rape mothers with their children. It is because of such misconduct that the likes of the appellant have frequently been described as beasts. But in my view, beasts are even better behaved inasmuch as most animals do not rape their females. In these days of HIV/aids, would-be rapists ought to think twice, which clearly the appellant did not do. Contracting the HIV virus invites an early death to the individual, and spreading it spells disaster to family units as well as to a healthy, working nation.

Rape is one of the most heinous and demeaning offences that a man can commit against a woman. It leaves the woman traumatized for the rest of her life. What would be a befitting sentence in circumstances such as those of the appellant in this case? The learned trial magistrate imposed a term of imprisonment for fifteen years with 4 strokes of the cane and hard labour. Should this court interfere with that sentence? In REX v. MOHAMEDALI JAMAL (1948) 15 EACA 126, the Court of Appeal for Eastern Africa said –

"**It is well established that an appellate court should not interfere with the discretion exercised by a trial judge or magistrate except in such cases where it appears that in assessing sentence the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive."**

More recently, in WANJEMA v. REPUBLIC [1971] E.A. 493 at page 494D, Travelyan J. set out the principles to be applied most succinctly as follows –

"**A sentence must in the end however depend upon the facts of its own particular case... An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."** The offence of rape of which the appellant was convicted carries a maximum sentence of imprisonment with hard labour for life. In the instant case, it is not evident that the learned trial magistrate overlooked some material factor, except, perhaps, that the appellant pleaded guilty, or took into account some immaterial factor or acted on a wrong principle. Whether a sentence is patently inadequate or manifestly excessive is a matter for the conscience of different courts. There is no objective test on the issue; the test is a purely subjective one.

In my view, taking into account that the appellant pleaded guilty and thereby saved some precious judicial time, a sentence of fifteen years imprisonment with 4 strokes of the cane and hard labour is slightly too severe and calls for moderation. I accordingly reduce it to twelve years imprisonment with hard labour. The four strokes of the cane are also set aside.

In the result, the appeal succeeds only to the limited extent I have indicated.

Dated and delivered at Mombasa this 10th day of July, 2006.

L. NJAGI

JUDGE