

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 156 of 2005

(From the original conviction and sentence of the Resident Magistrate's court at Eldama Ravine in Criminal case No.457 of 2005 – Kagendo W. M – R.M)

KIMUTAI RUTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Kimutai Ruto was charged with **Rape** contrary to **Section 140 of the Penal Code**. The particulars of the offence were that on the 21st of April, 2005 in Koibatek District, the appellant unlawfully had carnal knowledge of T.K without her consent. The appellant was charged with a second count of **Assault causing actual bodily harm** contrary to **Section 251 of the Penal Code**. The particulars of the offence were that on the same day and in the same place, the appellant unlawfully assaulted T.K occasioning her actual bodily harm. The appellant was further alternatively charged with Indecent Assault on a female contrary to **Section 144(1) of the Penal Code**. The particulars of the offence were that on the same day and in the same place, the appellant unlawfully and indecently assaulted T.K by touching her private parts. The appellant pleaded guilty to the main charge of rape. He also pleaded to the charge of **Assault** contrary to **Section 251 of the Penal Code**. He was convicted on his own plea of guilty and sentenced to serve 7 years imprisonment on the count of Rape and 3 year imprisonment on the count of assault. The said sentences were ordered to run consecutively. In effect, the appellant was sentenced to serve 10 years imprisonment. The appellant was aggrieved by his sentence and has appealed to this court.

In his petition of appeal, the appellant raised several grounds of appeal basically pleading in this court to exercise leniency on him and reduce the term of imprisonment that he was sentenced to serve. At the hearing of the appeal, the appellant told the court that he had been sufficiently punished for the offence which he had committed. He pleaded with the court to reduce the term of imprisonment imposed on him because he was the sole provider for his younger siblings. He stated that his parents were drunkards and were not in a position to provide for his younger siblings. Miss. Opati on behalf of the State opposed the appeal. She submitted that the appellant had been convicted for raping and seriously injuring the complainant. She submitted that the sentence imposed on the appellant was lenient in the circumstances and it should not be interfered with.

I have considered the submissions made by the appellant and the response thereto made by Miss. Opati on behalf of the State. The appellant is not appealing against conviction. In fact he pleaded guilty to the charges that were preferred against him when he was arraigned before the trial magistrate's court. He filed this appeal against sentence. The appellant submitted that the sentence that was imposed upon him was harsh in the circumstances and should be reviewed. The appellant is basically pleading for this court to exercise mercy on him and reduce the term of imprisonment which was imposed upon him. The State opposes the appeal filed by the appellant.

The appellant's appeal is therefore basically against sentence. This court is therefore being called upon to reconsider the sentence that was imposed upon the appellant by the trial magistrate. When a magistrate

sentences an accused person, he is exercising judicial discretion. An appellate court will not interfere with the exercise of judicial discretion by a trial court unless it is established by the appellant that the trial magistrate exercised his discretion wrongly or in breach of the law. In this appeal, the appellant pleaded guilty to raping the complainant in the case who was aged 65 years old at the time of the incident. According to the P.3 form which was produced as an exhibit before the trial magistrate, the appellant seriously injured the complainant during the rape incident to the extent that she had to be hospitalized.

I agree with Miss. Opati that the sentence imposed upon the appellant by the trial magistrate was lenient in the circumstances. The State did not give a notice of enhancement of sentence before this appeal was argued. If it had done so, this court would have been amenable to reviewing the sentence imposed upon the appellant appropriately. Be it as it may, no such notice was given to the appellant. I will let the sleeping dogs lie. I will not interfere with the sentence. The trial magistrate properly exercised her discretion when she sentenced the appellant. I find no merits with the appeal filed by the appellant. I hereby dismiss it. The conviction of the appellant and the sentence imposed upon by the trial magistrate is hereby confirmed.

It is so ordered.

DATED at NAKURU this 24th day of November, 2006

L. KIMARU

JUDGE