REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

HIGH COURT CRIMINAL APPEAL NO. 14 OF 2015

ALLAN WEKESA SIMIYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against sentence of the Hon. J. Kingori CM- Bgm Court)

J U D G M E N T

1. Upon arraignment, **Allan Wekesa Simiyu**, the Appellant, was charged with the offence of Rape Contrary to Section 3 (1) (a) (c) as read with Section 3 (3) of the Sexual offences Act. Particulars being that on the 16th day of November 2015 at [Particulars withheld] village in Bumula Sub County of the Bungoma County, intentionally and unlawfully caused his Penis to penetrate the vagina of A**MK** by use of force.

2. At the outset he pleaded guilty to the charge. Facts of the case were that the complainant, a lady aged 56 years old was at her home when she heard her cow mooing. She went out to check on it only to be grabbed by a man who wrestled her to the ground and forcefully violated her sexually. She positively identified him as the Appellant, Medical examination carried out ascertained the presence of bruises on her labia minora, oedema, and bruises on the vaginal canal and mucosal tears. Having admitted the facts outlined by the prosecution to support the charge he was convicted and sentenced to serve 20 years imprisonment.

3. Aggrieved, per his amended grounds of appeal, he appeals against the sentence. In his written submission he avers that he pleaded guilty having suffered in remand for two (2) months, being a first offender, he did not understand the consequences of the law and he calls upon the court to consider consequences of Section 333 (2) of the Criminal Procedure Code.(CPC)

4. Further , he expressed remorse and called upon the court to consider the Judiciary Sentencing Policy Guidelines and the case of Christopher Ochieng -vs Republic (2005) eKLR, Article 28 of the Constitution on the right to protection and respect to human dignity.

5. In response, the State opposed the appeal. It was urged that the offence was committed in aggravated circumstances on a woman of advanced age, a factor that should be considered. This court was therefore called upon to uphold the sentence meted out.

6. As a first appellate court I am duty bound to re-look at what transpired at the lower court and reach an informed determination.

7. Principles of interfering with sentence by an appellate court have been considered in a myriad of cases. Sentences that are excessive may not serve interests of justice but it has been stated that an appellate court should not interfere with the sentence unless it is manifestly excessive in the circumstances of the case.

8. In the case of **Bernard Kimani Gacheru -vs Republic (2002) eKLR** the Court of Appeal states that:

> **“ It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist**.”

9. Article 28 of the Constitution is in respect of the right to inherent dignity and protection. In particular, the Appellant complains of the sentence having been harsh, unfair and contrary to the requirements of the constitution. It is important to note that the Appellant was not arbitrarily deprived of freedom. He was incarcerated after being taken through the due process of the law. The trial was fair as he was informed of his rights and having understood what was transpiring at that time, he admitted the charge. He was granted the opportunity to

mitigate and he pleaded for leniency.

10. Section 333 (2) of the CPC obligates the court to take into consideration time spent in custody prior to the sentence being passed. In the case of ***Bethewel Wilson Kibor -Vs Republic (200 (g) eKLR*** the court stated as follows:

> **"By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody."**

11. The Appellant alluded to the case of **Christopher Ochieng -vs- Republic (2005)** where the court of Appeal being guided by the case of ***Francis Karioko Muruatetu & Another -vs Republic SC Petition No. 15 and 16 of 2015*** stated that mandatory nature of sentences deprive courts to exercise their discretion and therefore fails to contour to fair trial. In the stated case of **Ochieng** (supra) the court of Appeal set aside life sentence and substituted it with 30 years imprisonment. Courts were of the view that minimum or mandatory sentences fettered courts' discretion.

12. However, in **Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR,** the Supreme Court reviewed the Muruatetu case. It clarified that the principle that was set declaring the mandatory death sentence unconstitutional was only applicable to murder cases. This means that the minimum and mandatory sentences provided by the Sexual Offences Act are applicable.

13. There are various purposes of sentences including punishment which would depend on the circumstances in which the offence was committed that is applicable to the case herein as the statute provides for a minimum sentence. The learned trial magistrate took into consideration the notoriety of the offence, aggravated circumstances in which the offence was committed and the age of the complainant.

14. Other mitigation factors that would be of importance would be whether the offender pleaded guilty to the offence, his age and current sentencing practices. In this case of ***Bosco Rioba Nyaitika -vs* Republic (2021) Eklr** Wendoh J. confirmed a sentence of 10 years imprisonment for the offence of rape. In ***Muhamed Omar Mohamed -vs Republic (2020) eKLR*** Kariuki J. found a sentence of 10 years imprisonment to suffice justice.

15. The trial court exercised its discretion in accordance to the law and would not be faulted. However, the appellant having pleaded guilty at the outset and considering his age alleged to be 26 years; the experience of being incarcerated for the minimum period provided would help in rehabilitating him. In the premises, this is a case that calls for interference of the sentence meted out.

16. Therefore the appeal succeeds in that, I set aside the sentence imposed and substitute it with ten (10) years imprisonment, to be effective from the date of sentence by the trial court.

17. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY IN BUNGOMA THIS 10TH DAY OF SEPTEMBER, 2021

L. N. MUTENDE

JUDGE

10.9.2021