



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCRA NO. 115 OF 2019**

**ANTONY MUSYOKI MUTUA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(From the original conviction and sentence of Hon. A. Ndungu (RM) in Makindu Senior Principal Magistrate's Court Sexual Case No. 1085 of 2015 delivered on 22<sup>nd</sup> March, 2018).***

**JUDGMENT**

1. **Anthony Musyoki Mutua** the Appellant was charged and convicted and sentenced to ten (10) years imprisonment for the offence of rape contrary to section 3(1) of the Sexual Offences Act, after a full hearing.
2. Being aggrieved by the judgment he filed this appeal citing the following grounds: -
  - a) **That, he is a first offender hence pray for leniency.**
  - b) **That, he is deeply remorseful, repentant and regret his action.**
  - c) **That, he is spiritually upgraded through the department of spiritual reformation and now an ambassador of Christ.**
  - d) **That, he has learned the value of patience and moral uprightness.**
  - e) **That, he prays this honourable court to entreat the entire period that has been in custody as punishment already and reduce the sentence to the time served.**
  - f) **That, he is ready to carry on the newly acquired virtues to the society if given a second chance.**
  - g) **That, he also prays for a non-custodial or community based sentence to give a chance to provide for his young and innocent dependants.**
  - h) **That, the honourable court to issue any other orders it deems fit in his circumstances of which he promise to abide by.**
3. The prosecution case is premised on the evidence of four witnesses. The star witness the complainant **CM** testified as **(Pw1)**. Pw1 gave a detailed account of how the Appellant had on 15<sup>th</sup> July 2015 evening come to her house just after she had arrived from a hotel.
4. He had previously snatched her headscarf from her when he was drunk. He told her that he was quitting the plot where he lived after being issued with a quit notice. On this note he pleaded with her to go with him to his house to pick the headscarf before he would leave. They left together for his house.
5. After giving her the headscarf, he jumped and locked the door and pulled her back into the house demanding for sex. When she refused he started issuing threats to her. There was a struggle and he bit her on her right hand and kicked her. He eventually overwhelmed her and had sex with her three (3) times that night. He even removed her natural hair from the head injuring her in the process. The incident took an hour.
6. She was able to leave after the Appellant was called by somebody who told him to go and remove a diesel vehicle. He then ordered her out of his house. She went to her house from where she called her cousin Kitungu (Pw2) who advised her to go to generation where he was.
7. On the way he met the Appellant who wanted to know what she had told the police. Kitungu (Pw2) had been arrested. At the police

station she gave an explanation of what had happened. It was then that the Appellant was arrested and Kitungu (Pw2) released. She reported to Emali police station from where she was issued with a P3 form (EXB2) and post rape forms (EXB3). She produced the piece of hair and hair band pulled from her head by the Appellant (EXB4).

8. **Pw2 JMK** received an SMS from Pw1 on 15/07/2015 after work at 11.00 p.m. Pw1 was requesting him to go and get police officers to remove her from the Appellant's house. He did so and the police asked him to call the Appellant which he did. The Appellant came to where he was with the officers.

9. On being asked by the police what he had done he denied saying the information was false. Pw2 was handcuffed until the time Pw1 came and gave her side of the story. It is then that Pw2 was released and the Appellant arrested.

10. **Pw3 Dr. Charles Mwendwa Mutisya** examined Pw1. He confirmed that Pw1 sustained injuries on the hand, head from where hairs had been removed. The right hand had a bite. Upon examination she was found to have blood inside her vagina. In cross examination he confirmed his evidence in chief.

11. **PW4 P.C. Obed Kosgey** a police officer testified on behalf of the investigating officer. He produced a photo (EXB1) showing the injury on Pw1's head, where hair had been removed.

12. When placed on his defence the Appellant elected to remain silent.

13. Mr. Nzaku for the Appellant elected to wholly rely on his written submissions in respect to the appeal filed on 17<sup>th</sup> January 2020. Relying on the grounds of appeal, Mr. Nzaku implored this court to reduce the sentence meted out against the Appellant. He appreciated that the trial court had given the Appellant a minimum sentence. On this he referred to a number of authorities namely;

- **Charo Ngumbao Gugudu –Vs- Republic [2011] eKLR cited in Kennedy Indiemu Omuse –Vs- Republic, Cr. Appeal No. 344 of 2006, (unreported).**
- **Sejile Selemulu & Anor –Vs- Republic [1964] EA 34.**
- **James Ng'ang'a Njau –Vs- Republic [2016] eKLR.**
- **Francis Karioko Muruatetu & Anor –Vs- Republic, Pet. No. 15 of 2015.**
- **Raphael Mutunga Mutinda –Vs- Republic [2019] eKLR.**

14. Counsel further submits on how the constitution speaks to prohibition against cruel inhumane or degrading treatment; violation of the limitations imposed on fundamental rights and freedoms, violation of the independence of the judiciary. The cited provisions are Articles 29(f), 24(1), 24(2), 24(3), and 160(1). He invites the court to place considerable reliance on the said constitutional provisions in exercising discretion as regards the sentence imposed on the Appellant.

15. Mrs. Owenga learned counsel for the Respondent opposed the appeal vide her written submissions filed on 5<sup>th</sup> February 2020. She submits that though the Appellant's appeal in its introduction challenges both conviction and sentence, it's apparent that he is only challenging the sentence. To her the Appellant should have filed an application for review of sentence and so he is not properly before this court.

16. She argues that considering the overwhelming and the circumstances of the case, the sentence is very lenient and is merely the minimum. It is her plea for the court to vary the sentence upwards and not downwards.

### **Analysis and Determination**

17. This is a first appeal and this court has a duty to re-analyse and re-evaluate the evidence and arrive at its own independent conclusion. It ought to give an allowance since unlike the trial court it did not see or hear the witnesses. See **Kiilu & Anor –vs- R [2005] IKLR 174 and Simiyu & Anor –vs- R [2005] IKLR.**

18. I have considered the evidence on record, the grounds of appeal, the submissions by both parties and the cited authorities. From the grounds raised and the Appellant's submissions it is clear that the Appellant is challenging the sentence. Contrary to the prosecution's submissions on this, one may appeal against sentence and not necessarily apply for its review. The Appellant is therefore properly before this court. Secondly had the Respondent been serious about enhancement of sentence the State should have filed and served a notice to that effect.

19. Before I deal with the issue of sentence, I must satisfy myself that the conviction is grounded. I have set out the evidence of the witnesses. The complainant testified on what happened to her on the material night. She was aged 30 years and had a child at that time.

20. She informed her cousin (Pw2) of what was happening while still at the Appellant's house and a report was made to the police. The Appellant was arrested the same night of incident. Pw1 was so clear in her evidence about the happenings and this was not shaken. The medical examination by Pw3 supported her complaint in all material aspects. I am satisfied that the conviction is well founded.

21. The issue is whether this court should interfere with the sentence passed against the Appellant. First of all, there is no dispute that the sentence is lawful as it's provided for under the Sexual Offences Act. Infact it is the minimum sentence while the maximum is life imprisonment.

22. Before the trial court passed its sentence the Appellant was given an opportunity to mitigate and this is what he told the court;

***“I have a family with young children. I am the bread winner. I ask for consideration. I ask for forgiveness. I will not repeat the same.”***

23. Upon consideration of the mitigation, the fact that the Appellant was a first offender and the circumstances of the case the learned trial magistrate gave him the minimum sentence.

24. Counsel for the Appellant has asked this court to consider the various articles of the constitution which prohibit cruelty, inhumane and degrading treatment. Counsel did not however indicate how the ten-year sentence was cruel or inhuman to the Appellant. The evidence of Pw1 is so detailed on what the Appellant took her through for him to gratify himself. Between Pw1 and Appellant, I find Pw1 to be the one who went through an inhumane experience by virtue of the Appellant's conduct.

25. The Appellant first appeared in court for plea on 17<sup>th</sup> July 2015 whereas the offence was committed on 15<sup>th</sup> July 2015. He was released on bond on 14<sup>th</sup> August 2015 and was out on bond upto the time of his conviction. He was sentenced on 27<sup>th</sup> March 2018. He has therefore only served two (2) years imprisonment which he wants this court to treat as sufficient punishment.

26. I have considered the authorities cited including the **Francis Muruatetu case** (supra). What the said case outlawed is the lack of exercise of discretion by judicial officers in mandatory minimum sentences. In the instant case the Appellant was given an opportunity to mitigate. The trial court took into account all the circumstances of the case including what Pw1 went through at the instance of the Appellant, and passed the minimum sentence. This is what she stated before sentence;

***“The court has considered the accused is a first offender and his mitigation. The court has also considered the nature and circumstances of offence. No one should have to go through what the complainant went through. The offence is demining to the complainant as a woman and human being and leaves the victims with life psychological effects. The law is very clear as to the sentence and as such the accused is sentenced to serve 10 years' imprisonment. Right of appeal 14 days.”***

27. In the case of **Raphael Mutunga Mutinda –Vs- Republic** (supra) the Appellant was convicted of indecent act with a child aged 14 years. His sentence was reduced from ten (10) years to five (5) years imprisonment. The instant case concerns rape of an adult and how it was carried out.

28. The Appellant claims to be a family man. That's all the reason why he should have behaved better. He also says he is remorseful and has learnt a lot for the short period he has been in prison.

29. I have considered all this plus his mitigation before the trial court and all other circumstances of the case.

**30. I hereby set aside the sentence of ten (10) years imprisonment and substitute it with seven (7) years imprisonment from the date of sentence (27/03/2018). The conviction is upheld.**

Orders accordingly.

**Delivered, signed & dated this 3<sup>rd</sup> day of April, 2020, in open court at Makueni.**

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**H. I. Ong'udi**

**Judge**