REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 24 OF 2015

JOHN MUNYIRI MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against sentence in original conviction in Karatina Principal Magistrates' Court

Criminal Case No. 5 of 2014 (Hon. D.N. Musyoka, Principal Magistrate) on 28 April 2015)

JUDGMENT

The appellant was charged with the offence of kidnapping with intent to confine contrary to section 259 of the Penal Code, cap. 63. The particulars were that on the 14th day of March 2014 at [particulars withheld] village in Mathira East subcounty within Nyeri County with intent to cause CMM to be secretly and wrongfully confined he kidnapped CMM.

He also faced a second count of rape contrary to section 3 of the Sexual Offences Act No. 3 of 2006 and in this count the particulars were that on diverse dates between 14th to 18th March 2014 at [particulars withheld] village in Mathira East sub County within Nyeri County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of CMM by use of force and threats. In the alternative to this count the appellant was charged with offence of committing an indecent act with an adult contrary section 11 (A) of the Sexual Offences Act the particulars being that on diverse dates between 14th to 18th day of March 2014 at [particulars withheld] village in Mathira East sub County within Nyeri County the appellant intentionally touched the vagina of CMM with his penis against her will.

The record shows that the appellant pleaded guilty to the count of rape but he later changed his plea to that of not guilty. Subsequently, the charge was substituted with the charges to which he also entered a plea of not guilty. However, he was convicted on the first count and the second principal count; he was sentenced to imprisonment for seven and ten years respectively on each of those counts.

He has appealed against sentence only and although he has raised what in his view are four grounds and listed them as such in his petition filed on 8 May 2015, all I can see is just one ground which is that the prison terms of seven and ten years respectively are harsh and excessive. In the rest of the 'grounds' he has asked this honourable court to reduce the terms and also consider the fact that he is married with two children. He also states that he has an elderly parent and that he is the sole breadwinner for all these souls.

At the hearing of the appeal the only point he urged was that that in sentencing him, the trial court did not take into account the period he had been in remand prison pending the conclusion of his trial.

The state opposed the appeal and Ms Ndungu, the learned counsel for the state, urged that the sentences meted out were lawful. In particular, counsel urged that according to section 3(3) of the Sexual Offences Act, the offence of rape carries a maximum sentence of life imprisonment.

Ordinarily on appeals such as the present one, this honourable court would be enjoined to consider the evidence afresh and come to its own conclusions on matters of fact regardless of whether such conclusions may be inconsistent with those reached by the trial court.

In the present appeal, the appellant does not, as earlier noted, challenge his conviction; his bone of contention is, as far as I understand him, the legality of the sentence. It follows that it may not be necessary to rehash the evidence on record and evaluate it afresh as this court would ordinarily do whenever a conviction is questioned.

The penalty for the offence of kidnaping with intent to confine contrary to section 259 of the Penal Code is found in that same section and it reads as follows:

259. Kidnapping or abducting with intent to confine

Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years.

The appellant was sentenced to seven years imprisonment which is the maximum sentence prescribed for this offence. The record shows that when he was given opportunity to mitigate, all that he said was to ask for a non-custodial sentence. The learned magistrate was thus entitled to mete out the maximum sentence since he was not given any mitigating factors that would have influenced his discretion to give a less severe sentence.

I note that the state informed the court that the appellant had no previous criminal record and therefore he was treated as a first offender. However, this fact, of itself, did not entitle the appellant to a lesser sentence than the one he was given.

That notwithstanding, it is apparent that the appellant was remanded in custody pending his trial; he was given bond but apparently he could not meet the bond terms. In these circumstances, the learned magistrate ought to have taken into account the period the appellant had spent in custody during his trial; consideration of such a period is a legal obligation placed on the trial court by the proviso to section 333(2) of the Criminal Procedure Code which reads as follows:

(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

The record shows that the appellant was arrested on 20 March 2014 and he remained in custody till 28 April 2015 when he was sentenced, and his trial concluded. Accordingly, the learned magistrate ought to have stated that the prison term of seven years for the conviction on the first count ought to have commenced on 20 March 2014 and to the extent that he did not, the appellant's appeal against sentence on the first count succeeds.

As far as the second count is concerned, section 3 (3) of the Sexual Offences Act, specifies that the minimum sentence for the offence of rape is ten years imprisonment. That section reads as follows:

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

The appellant was given the very minimum sentence; any sentence other than the prescribed one would have been unlawful. However, just like the sentence on the first count was vitiated by the omission to take into account the period the appellant spent in custody, so it was with the sentence on the second account. The learned magistrate ought to have complied with the proviso to section 333 and taken into account the period the appellant had spent in custody before the conclusion of his trial.

In the final analysis, the appellant's appeal succeeds only to the extent that the sentences meted out against him upon conviction on the first and second counts are deemed to have commenced on 20 April, 2014. Orders accordingly.

Signed, dated and delivered on 2nd October 2020.

Ngaah Jairus

JUDGE