



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 35 OF 2016**

**BAYA MWAMURE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From Original Conviction and Sentence in Criminal Case No. 161 of 2012 of the Chief Magistrate's Court at Malindi - N. Shiundu, Ag. SPM)**

**JUDGEMENT**

1. The Appellant, Baya Mwamure is serving fifteen years imprisonment having been tried, found guilty and convicted together with another person for the offence of gang rape contrary to Section 10 of the Sexual Offences Act, 2006. The particulars of the offence disclosed that on 8<sup>th</sup> March, 2012 at [Particulars withheld] Village in Malindi District the Appellant in association with his co-accused intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely anus of KK.

2. The Appellant's appeal is limited to reduction of sentence to the period already served. His submission is that the period of over six years which he has already served is sufficient punishment. Further, that he has indeed reformed and deserves to be released back to society. His case is that he was arrested at the age of 22 years and his plea is that he should be given a chance to reconstruct his life.

3. The Respondent opposed the appeal stating that the sentence imposed was the minimum sentence as prescribed by the law.

4. The only issue for the consideration of the court in this appeal is whether the Appellant has established grounds to warrant interference by this court with the sentence imposed by the trial court.

5. In considering whether to interfere with the sentence imposed by a trial court, an appellate court is guided by the principles laid down by the Court of Appeal in **Bernard Kimani Gacheru v Republic [2002] eKLR; Criminal Appeal No. 188 of 2000 (Nakuru)** thus:

**“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.”**

6. In the case at hand, the Appellant was sentenced to fifteen years imprisonment which is the minimum sentence provided for the offence of gang rape by Section 10 of the Sexual Offences Act. As per that section, a person found guilty of the offence of gang rape is **“liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.”**

7. The trial magistrate thus acted within the law. That explains why the Appellant has simply appealed to the mercy of this court without pointing out any errors on the part of the trial court. The offence that was committed by the Appellant was indeed a serious one and the sentence imposed, apart from being the minimum sentence provided by the law, was reasonable in the circumstances.

8. The logical conclusion is that this appeal is without merit. The appeal is dismissed and the Appellant shall continue serving the sentence imposed by the trial court.

**Dated, signed and delivered at Malindi this 14<sup>th</sup> day of February, 2019.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**