



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO.40 OF 2019

ALBANUS KIOKO MWONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Senior Resident Magistrate Honourable C. O Nyawiri dated 15/3/2017 in Makueni SRMCR No. 142 of 2017.)

JUDGMENT

1. **Albanus Kioko Mwonga** the Appellant was charged with the following offences: **Count I: Attempted Rape contrary to Section 4 of the Sexual Offences Act No. 3 of 2006.** Particulars being that on the 12th day of March, 2017 in Ukia location in Makueni District within Makueni County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of EMK without her consent.

Count II: Assault causing actual bodily harm contrary to Section 251 of the Penal Code. Particulars being that on the 12th day of March 2017, in Makueni County unlawfully assaulted EM, thereby occasioning her actual bodily harm.

2. The Appellant was convicted on admission on both counts. He was sentenced to serve five (5) years imprisonment on each count. The sentences are to run consecutively. Being dissatisfied, he appealed raising the following grounds: -

i. **That** he is a first offender hence prays for leniency.

ii. **That** he is deeply remorseful, repentant and regrets his action.

iii. **That** he is a reformed and rehabilitated through the prison integrated correctional rehabilitation systems and programs.

iv. **That** prior to his arrest and his subsequent conviction, he was a sole bread winner of his family married to house wife bestowed with heavy responsibility of taking care of his school going children.

v. **That** he has learned the value of patience and moral upright ness.

vi. **That** he entreats this honourable court to order for his sentences to run concurrently.

vii. **That** having served a custodial sentence for some time, he prays this court to grant him a non-custodial sentence to give him a chance to provide for his young innocent dependants.

viii. **That** may this honorable court issue any orders it deems fit in his circumstances and he promises to abide by the orders issued by this honorable court.

3. In his written submissions, he prayed for the court to have the sentences run concurrently based on Section 37 of the Penal Code. He submitted that he was operating under the influence of alcohol at the time of the commission of the offences. He therefore asked the court for leniency, as he was a first offender.

4. He claims to be a changed person having undertaken rehabilitation programs at the prisons. He states that he is a father/husband/son and the family's sole bread winner.

5. The appeal was opposed by the state through learned counsel Mrs. Owenga. She submitted that the Appellant deserved the sentence. She contended that the offence in the 2nd count was committed in the process of the attempted defilement in count 1. There was therefore no way

the sentences could run consecutively, she said.

6. It was her submission that the sentence of five years on each count was sufficient. She prayed for dismissal of the appeal.

Determination

7. This is a first appeal and this court has a duty to re-evaluate the evidence and arrive at its own conclusion. **See Okeno –vs- R 1972 E.A 32: Kiilu & Another –vs Republic (2005)1KLR 174.**

8. This is a matter where the Appellant admitted both counts and facts were read to him. He confirmed that the facts were correct, and was convicted on his own admission. He was given an opportunity to mitigate which he did. The record shows he was a 1st offender. The Appellant is not challenging the conviction on both counts. Upon perusal of the record, I am satisfied that the plea was unequivocal, and I uphold it.

9. The Appellant is only challenging the order requiring the two sentences to run consecutively. The State has opposed his request.

10. A concurrent sentence is a term of imprisonment equal to the length of the longest sentence. This mode of sentencing only applies when an accused person has been sentenced for two or more crimes. One of the considerations to be noted is whether the convictions are related or whether they stem from the same circumstances.

11. Section 37 of the Penal Code provides: -

“that a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsequent subsection (1) of section 28 or of any part thereof”.

12. In the case before this court it is clear that the offence in count II was committed following the complainant’s resistance to what the Appellant wanted to do to her. One thing followed the other and the series can be said to have flowed seamlessly. Even the learned prosecution counsel submitted that the assault was committed in the process of the attempted rape. The circumstances were therefore the same.

13. I therefore find that the order for the sentences to run consecutively was an error on the part of the learned trial magistrate.

14. I therefore confirm the conviction and sentence. I however set aside the order for the sentences to run consecutively and substitute it with an order for the sentences to run concurrently.

15. **For avoidance of doubt, the sentences remain but they SHALL run CONCURRENTLY, from the date of conviction.**

Orders accordingly.

DELIVERED, SIGNED & DATED THIS 16TH DAY OF JULY 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG’UDI

JUDGE