REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 63 OF 2019

SAMSON WANYONYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of (Hon.T.W. Cherere, CM) in Eldoret Chief Magistrate's Court CMCRC No. 2426 of 2015)

JUDGMENT

The appellant was charged with rape contrary to section 3(1) (a) (b) (3) of the Sexual offences Act. The particulars of the charge were that on 19th May 2015 in Lugari District within Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of DCS without her consent.

He faced an alternative charge of indecent Act with an adult Contrary to Section 11A of the Sexual Offences Act and a second count where the charge was assault causing Actual bodily harm contrary to section 251 of the Penal Code. The particulars in Count 2 were that on 20th May, 2015 in Lugari District within Kakamega County he unlawfully assaulted DCS thereby occasioning her actual bodily harm.

After considering and evaluating evidence from the prosecution and the unsworn statement of the appellant the court found him guilty on the charges of rape and assault and sentenced him as follows: -

Rape - 10 years imprisonment

Assault - 6 months imprisonment

He then preferred this appeal. The grounds of appeal as initially contained in the petition filed herein on 15th April, 2019 were that: -

> **"[1 & 2] The appellant was a first offender who had never been found in such a situation and as such he was prompted not to plead guilty to the charges. However, after contemplating on the state of events he is enticed to beg for leniency from the honourable court because he is remorseful, repentant and reformed for what befell of him.**
>
> **[3] The appellant being a young man at the time of the alleged offence hence in his early twenties, he was fooled up with his passion of the social media. That, the very attracting events of the face book account cheated him into building up a relationship which later on caused him suffering at the hand of imprisonment. The appellant has hence learned the incarceration and he is now remorseful repentant and rehabilitated and pray for a second chance to go and make a role model to his peers, young generation and even the old generation.**
>
> **[4] That the appellant is a young energetic reformed and resourceful member of the society in his early twenties who has desire to develop his life and contribute to Nation building from your respective docket that he be granted a second chance in his life once and for all that he shall never once again fall a victim of this kind of circumstances.**
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> **Prison being a correctional Centre, harsh punishment like what was bestowed to the appellant is not correction but rather it is destruction in terms of his future life, psychological and even emotional that paints undeleted picture in his mind. It is of my humble prayer that may this honourable court be pleased to reduce my sentence by admitting me on probation and/ or setting me free to enable me pick-up in life.**
>
> **[5 & 6] The appellant is the only son in his family and a first borne in the family of six children to whom his young siblings and parents looked forward to for their future life. That his long and harsh terms of sentence is a jeopardy and a great pain to the entire family. That even as for now my mother passed on in the year 2017 while I was here in prison leaving my jobless father a bereaved widow who cannot be able to support the family to it's maximum. May this honourable court be**

pleased to invoke the provisions of section 39(2) of the Sexual Offences Act No. 3 of 2006 and admit me on probation because I am remorseful, repentant and reformed as I have learned the incarceration."

The Amended Petition is however against the sentence only and the grounds are as follows: -

"[1] That I am a first offender and beg for leniency,

[2] That, I did not plead guilty to the charges'

[3] That I was fooled by my passion for social media

[4] That , I am young, energetic, reformed and resourceful towards Nation development.

[5] That, I am a first borne and only son in my family depended upon

[6] That my beloved mother passed on while I have been in prison.

[7] That, may the honourable court invoke the provisions of Section 333(2) of the CPC Cap 75 Laws of Kenya.

[8] That I am remorseful, repentant and reformed for I have learned the incarceration and embraced education."

At the hearing of the appeal the appellant relied on written submissions in which he mainly prays for leniency. He has also urged this court to consider the period of nine months he spent in custody while waiting for the trial to be concluded.

The appeal was vehemently opposed. Prosecution counsel Ms. Busienei argued that the sentences are lawful and should not be disturbed.

The record shows that in sentencing the appellant the trial magistrate considered a victim impact assessment report as well as a presence report and noted that whereas the presentence report recommended a non-custodial sentence the appellant did not deserve it as he had lied to the court. The record also shows that the sentence on the second count was ordered to run concurrently with the one for rape. It must have been served by now. What remains is the sentence for rape for which the period already served is 3 years and 3 months.

Sentencing is in the discretion of the court and an appellate court may interfere with the sentence only if it is shown that the sentence was unlawful or it was manifestly excessive - see Wagude -Vs- Repulbic [1983]KLR 569. The punishment for the offence of rape is provided at Section 3(3) of the Sexual Offences Act. which states: -

"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 sentence of ten years imprisonment imposed against the appellant was the minimum provided in the law. Be that as it may and while I am alive to the emerging jurisprudence in regard to minimum sentences for sexual offences I find that in the circumstances of this case the sentence of ten years was neither harsh nor manifestly excessive. Moreover, the trial magistrate must have taken into account the period spent in remand hence the reason she did not enhance the sentence to the maximum permissible. The certificates exhibited by the appellant while they reveal he may have reformed do not give this court any justification to interfere with the sentence. In the upshot the appeal is found not merited and it is dismissed.

SIGNED DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF SEPTEMBER, 2019.

E. N. MAINA

JUDGE

In the presence of: -

1. Ms. Busienei/ Kagali for State

2. The Appellant in person

3. Joseph Mwelem - Court Assistant