



**REPUBLIC OF KENYA**

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

**HCRA NO. 39 of 2015**

**MUEMA KITEMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from Original Conviction and Sentence in Kitui Principal Magistrate's Court Criminal Case No. 27 of 2014 by Hon. A.S. Lesootia (Ag. SRM) on 18/03/2014)*

**J U D G M E N T**

1. The Appellant was charged with offence of **Rape** Contrary to **Section 3(1) (a) (b) (3)** of the Sexual Offences Act. NO. 3 of 2006. Particulars were that on the **8<sup>th</sup>** day of **March 2014** at about 7.30p.m. in **Kitui County**, intentionally and unlawfully caused his penis to penetrate the vagina of **KK** a female adult **aged 25 years** without her consent.

2. In the alternative, he was charged with the offence of **indecent act** with an adult contrary to **Section 11(a)** of the Sexual Offences Act **NO. 3 of 2006**. Particulars were that on the **8<sup>th</sup>** day of **March 2014** at around **7.30p.m.** in **Kitui County**, intentionally and unlawfully committed an act of Indecency with **KK** a female adult **aged 25 years** by touching her private parts namely vagina and breasts with his hands.

3. He pleaded guilty, he was convicted and after being offered chance to mitigate, he said nothing. The court therefore considering he was a first offender as stated by the prosecution awarded him **15 years imprisonment**.

4. Being aggrieved by the decision aforesaid he lodged the instant appeal and set out the 4 grounds of Appeal namely:

*(1) He was first offender and was not aware of the law.*

*(2) He was sole bread winner for his single parented children as well as his late brother children.*

*(3) He was remorseful he can now control himself fully against the offence.*

*(4) It was a mistake thus ask court to consider same.*

5. The court directed the appeal be heard by way submissions. Only prosecution filed same but Appellant opted to tender oral submissions. He told court that he has been in custody now for 5 years and he is aged 60 years. He has learned courses and has certificates from the prison to evident the same.

6. He says he is repentant and remorseful. He sought release or reduction of his terms of imprisonment.

7. The prosecution unsigned submissions opposes the appeal. The prosecution cites **Section 348 Criminal Procedure Code Cap 75 Laws of Kenya** which bars appeal on sentence upon conviction on plea of Accused guilty except to the extent or legality of the sentence. They also cite the case of **Alexander Lukoye Maliko vs. R(2015) eKLR** which held that: **".....where an accused person has pleaded guilty to the charge, the court can interfere with situation only where the accused guilty is as a result of mistake or Apprehension of fact or the charge is not known to law"**

8. After going though the record and parties submissions, I find the only issue is whether the appeal has merit.

**Analysis and Determination**

From the Appeal Lodge grounds and the address to court, the court notes that the Appellant is seeking an opportunity to mitigate which

aspect ought to have been done in the trial court. The Appellant was offered an opportunity to do so but he now tenders same mitigation to this court. Of course same is not tenable and is not based or grounded on any legal provisions. He does not challenge the extent of sentence or its legality.

9. However this court discretion is available to scrutinize the record and ensure under revisionary powers whether the record or conviction and sentence has any errors or shortfalls.

10. The Appellant was unrepresented. He was said to be a first offender and pleaded guilty saving court's time. The minimum sentence for rape case is 10 years imprisonment. The court awarded 15 years imprisonment. The sentencing guidelines of the Judiciary were not utilized by the trial court when sentencing the appellant nor alluded to.

11. There were no aggravating circumstances such as excessive force or injuries noted on the victims.

12. The sentencing guidelines are to the effect that where an accused pleads guilty saving court's time and also being a first offender, he be awarded a credit in sentencing. Relying on the said principle, I will award the Appellant credit of 5 years to retain sentence at its minimum sentence of rape level.

13. Though I don't do it on recognition same as mandatory minimum sentence but as the circumstances of this case dictate such as the Appellant went to intoxicate himself and then took advantage of a deaf and dumb victim.

14. Thus the court makes the following orders:

**(i) Conviction is affirmed.**

**(ii) Sentence of 15 years is set aside and substituted with a term of 10 years to run from the date of conviction 18.3.2014.**

**Dated, Signed and delivered at Kitui this 17<sup>th</sup> day of October, 2019**

**C. KARIUKI**

**JUDGE**