



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CORAM: D. S. MAJANJA J.**

**CRIMINAL APPEAL NO. 68 OF 2016**

**BETWEEN**

**JOB WEKESA BWAYO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. J. Macharia– PM*

*dated 30<sup>th</sup> April 2013 at the Senior Resident Magistrate’s Court*

*at Keroka in Criminal Case No. 204 of 2013)*

**JUDGMENT**

1. The appellant was convicted on his own plea of guilty on two counts as follows. The first count was for robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on 12<sup>th</sup> March 2013 at Keroka Township in Masaba North District of Nyamira County, the appellant and his co-accused robbed JMM cash Kshs. 11,700/-, Samsung mobile phone valued at Kshs. 3,500 all valued at Kshs. 17,300/- and before or after such robbery used actual violence on the said JMM. The second charge was of rape contrary to **section 3 (1) (a) (b) (3)** of the *Sexual Offences Act*. It was alleged that on the same day, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of JMM without her consent.
2. The appellant was sentenced to serve forty (40) years imprisonment on each count with both sentence to run concurrently. He now appeals against the sentence only. He complains that the sentence was harsh and excessive in the circumstances.
3. The general principles upon which the first appellate court acts are now well settled. It has jurisdiction to interfere with a sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see *Wanjema v Republic [1971] EA 493*).
4. When called upon to offer his mitigation, the appellant stated as follows; “*I have nothing to say but the court to decide my case as it sees fit.*” Before imposing the sentence, the trial magistrate noted as follows, “*I have considered the circumstances of the case. I have also considered that the accused has admitted the charges. He does not look remorseful at all. The offence he is facing is serious.*”
5. I note that the mandatory minimum sentence for the offence of rape is 10 years’ imprisonment. I do not see why the trial magistrate increased it by 30 years given that he said nothing but admitted the charge. The comment that “*He doesnot look remorseful at all*” was unwarranted and in the circumstances prejudicial to the appellant. I therefore reduce the sentence to the statutory minimum of 10 years’ imprisonment. Likewise, I reduce the sentence of robbery with violence to ten years in view of the plea of guilty.
6. In reducing the sentence, I have taken into account the fate of the appellant’s co-accused. The 1<sup>st</sup> accused pleaded guilty and being a child was sentenced to 3 years at a Borstal Institution while the case against the 3<sup>rd</sup> accused was dismissed after witnesses failed to turn up and exhibits could not be produced at the trial.
7. For the reasons I have set out, I therefore allow the appeal on sentence only and substitute the sentence on each count with a sentence of

ten (10) years imprisonment on each count to run concurrently and the sentences to run from the date of conviction, i.e, 30<sup>th</sup> April 2013.

**DATED and DELIVERED at KISII this 9<sup>th</sup> day of NOVEMBER 2018.**

**D.S MAJANJA**

**JUDGE**

Appellant in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.