REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

LODWAR HIGH COURT CRIMINAL APPEAL NO. 92 OF 2016

EMURIA KAYAMA …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(An appeal from conviction and sentence in original Kakuma RM CR

67/2015 delivered on 10/3/2015 by E N WASIKE Resident Magistrate)

JUDGMENT

The appellant **Emuria Kayama** was charged in the magistrate's court with the offence of rape Contrary to **section 3(1) (a) c (3) of the sexual offences Act Act No.3 of 2006.** The particulars of the offence are that on the 12th day of February, 2015 at [particulars withheld] village in Turkana West District of the Turkana County unlawfully caused his penis to penetrate the vagina of A A by force. He faced an alternative charge of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act. Act No.3 of 2006. The particulars of the offence are that on the 12th day of February, 2015 at [particulars withheld] village in Turkana West District of the Turkana County intentionally touched the buttocks, breasts and vagina of A A with his penis against her will.

Upon the charge being read to the appellant on 17/2/2015, he admitted the charge on the main count. The facts were narrated by the prosecution to which the accused responded.

Accused: facts are correct.

The appellant was then convicted on his own plea of guilty and in mitigation informed the court that he is sickly. After ascertaining that age of the complainant to be above 18 years appellant was sentenced to ten (10) years imprisonment.

The appellant then filed this appeal. His grounds of appeal which are in effect mitigation are that he is the only bread winner to his children and elderly parents, that he is remorseful and that he prays for the sentence to be reduced. He filed written submissions in which he amplified the grounds of appeal.

Mr. Kimanthi for the state opposed the appeal. He submitted that the appellant pleaded guilty and that under the provisions of section 348 criminal procedure code no appeal lies except on the legality or extent of the sentence. He submitted that the sentence of 10 years for an offence of rape is the minimum sentence under the act and therefore cannot be said to be excessive.

The procedure and legal principles to be applied while taking plea in criminal cases are as set out in **Adan**

– VS – Republic 1973 E.A 445 where the court stated

> **(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.**
>
> **(ii) The accused own words in response to the charge should be recorded and if they are an admission a plea of guilty**
>
> **(iii) The prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.**
>
> **(iv) If the accused does not agree with the facts or raises any question as to his gilt his reply must be recorded and change of plea entered.**
>
> **(v) If there is no change of plea, a conviction should be recorded and a statement of facts relevant to the sentence together with the accused's reply should be recorded.**

This procedure is reiterated and provided for in section 207 of the criminal procedure code.

I have perused the proceedings before the trial magistrate on 17/2/2015 and I am satisfied that the procedure for plea was properly followed and the plea of guilty was unequivocal.

The appellants appeal is on the basis that the sentence of 10 years is excessive.

This is an appeal from the Magistrate court in which the appellant submits that the sentence imposed on his is excessive. The principles upon which an appellate court can interfere with the trial courts discretion on sentence were well set out in **Nelson – VS – Republic 1970 EZ 599** following Ogalo Son of **Owuora – VS – Republic (1954) 21 EA 270** as follows.

> **"The Principle upon which an appellant court will act in exercising the jurisdiction to review sentences are fairly established". The court does not alter a sentence on the mere ground that if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by the trial judge unless as was said in James – VS – Republic (1950) 18 E.A 147 in is evident that the judge had acted upon wrong principle or overlooked some material factor. To this we add the third criteria namely that the sentence is manifestly excessive in view of the circumstances of the case" (John Muendu Musai – VS – Republic NBI C.A 365/2011).**

The appellant was charged with the offence of rape contrary to section 3(1) (a) C (3) which provides:

> 3. (1) A person commits the offence termed rape if-
>
> > **a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genitals organs**
> >
> > **b) the other person does not consent to the penetration; or**
> >
> > **c) the consent is obtained by force or by means of threats or intimidation of any kind**
>
> **(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this act.**
>
> **(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.**

From the provisions of section 3 (3) the sentence of 10 years imposed on the appellant is the minimum. It cannot therefore be said to be excessive. I find that the sentence of 10 years imprisonment is proper and legal. I therefore find no merit in this appeal and it is hereby dismissed.

S N RIECHI JUDGE

6/3/2017

Dated at Lodwar this 6th day of March, 2017

S N RIECHI

JUDGE