



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NUMBER 144 OF 2014

CORAM: JUSTICE S.M GITHINJI

(From original conviction and sentence in criminal case number 77 of 2014 of the Principal Magistrate's Court at Kimilili

CHRISTOPHER WANYAMA NYONGESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein, one Christopher Wanyama Nyongesa, pleaded guilty to the main count of Attempted **Rape, contrary to section 4 of the Sexual Offences Act number 3 of 2006.**

The particulars of this offence are that on the 25th day of November 2014 at [particulars withheld] in Bungoma North District within Bungoma County, the appellant intentionally and unlawfully attempted to cause his penis to penetrate the vagina of L N without her consent.

The said charge was read to the appellant on 27.11.2014 in Swahili, a language of

which is indicated the appellant understood and he pleaded guilty to the offence. The court entered a plea of guilty. Penal consequences were explained to him given the plea and he affirmed the plea of guilty.

The prosecution read out the facts as follows:-

On the night of 25/11/2014 at around 11.00pm the complainant aged 80 years old was asleep in her house when the accused entered the said house through the window and because of the sleep the accused managed to remove her pant and was only awoken when the accused started touching her vagina in readiness to penetrate her. She started screaming when the accused got hold of her head and twisted her neck covering her mouth to stop her from screaming. When she resisted while screaming the accused sensed danger came out of the bed and hit her on the head with a blunt object injuring her right eye. He managed to run away through the same window. The aunt of the complainant and B W responded and found the accused had escaped leaving behind a cap, shoes and condoms. After about 30 minutes the accused went back to the scene, tried to apologize to the victim but the public wanted to lynch him. He ran away and was arrested by the public and taken to Tongaren AP Camp. The complainant was treated on 26.11.2014. She reported at Kimilili Police Station where she was issued with a P3 form. The P3 form and treatment notes were produced as exhibits 1(a) and (b) respectively.

The appellant pleaded to the facts by stating that, "**Facts are true.**" The court convicted him on own plea

of guilty. The prosecution had no records and asked the court to treat him as a first offender.

The appellant offered no mitigation. He was sentenced to serve 20 years imprisonment. He appealed to this court against conviction and sentence on the grounds that:-

- 1. He was beaten, threatened and intimidated by police to plead guilty.**
- 2. He did not understand the language of the court.**
- 3. The trial court did not follow the law.**
- 4. He did not mitigate.**

The state opposed the appeal on the grounds that the appellant understood the proceedings. He did not complain of torture during trial and the sentence was fair.

I have well considered the way the trial magistrate took the plea and recorded it. It complies with the steps laid down in the case of *Adan versus Republic [1973]EA 445*. The appellant was not truthful when he said he did not understand the language of the court. He did. The language was Swahili, a language of which he used during the appeal, of which confirms he is conversant with it. The plea was unequivocal and he has only the right to appeal against sentence and not conviction. Regarding the sentence, **Section 4 of Sexual Offences Act** states a person convicted for the offence of **Attempted Rape** is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life. This means given the circumstances of the case, the court has discretion to sentence between 5 years and life imprisonment. The circumstances of this case, where the victim was aged then 80 years and was injured in the process, called for an enhanced sentence. Were it not probably for the consideration that he is a first offender and pleaded guilty to the offence, the enhancement would have been to life imprisonment rather than 20 years. He got a fitting sentence and this court has no cause to interfere with it. The appeal lacks merit and is dismissed.

Judgment read in the presence of the state counsel, court assistant and the appellant this 17th day of July 2017.

S. M. GITHINJI

JUDGE