



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 171 OF 2011

NICHOLAS MWALILI NDUNDA APPELLANT

versus

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 941 of 2011 by

Hon. S. Gacheru PM on 22/9/11)

JUDGMENT

1. The appellant was charged and convicted of the **offence of rape contrary to section 3(1)(a)(c) (3) of the Sexual Offences Act**. He was sentenced to life imprisonment. Being dissatisfied with the sentence imposed he appealed against the legality of the sentence on the grounds that the sentence imposed is unlawful and manifestly unsafe.
2. Conceding to the appeal the learned State Counsel Mrs. Abuga stated that the trial court should have considered the appellant's mitigation.
3. This being the first appeal I am enjoined to scrutinize the record and come up with my own conclusions.
4. The appellant pleaded guilty to the charge and was sentenced accordingly.
5. Section 3(1)(a)(c)(3) of the Sexual Offences Act provides thus:-

“3. Rape

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 genital organs;***
- b. ***the consent is obtained by force or by means of threats or intimidation of any kind;***

(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.”

6. The principle upon which an appellate court can interfere with the sentence imposed by a trial court

were set out in the Supreme Court case of **Kiwalabye Bernard versus Uganda; Criminal Case No. 143 of 2001 (SC)** where it held;

“The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed being excessive or so low as to amount to a miscarriage of justice, or where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence, or if the sentence imposed is wrong in principle.”

7. The accused was a first offender. He admitted the charge and sought leniency in his mitigation. The learned trial magistrate ought to have taken into consideration these facts. Imposing life imprisonment in the circumstances was manifestly harsh and excessive. It is therefore necessary for this court to interfere with the sentence meted out. In the circumstances I set aside the sentence imposed and substitute it with ten (10) years imprisonment.

8. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 7TH day of JULY, 2015.

L. N. MUTENDE

JUDGE