

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.18 OF 2012

(An Appeal arising out of the conviction and sentence of T.W. MURIGI - PM delivered on 20th December 2011 in Makadara CM. CR. Case No.4215 of 2008)

EMMANUEL NAPENDA.....
.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Appellant, Emmanuel Napenda was charged with the offence of **Rape** contrary to **Section 3(1)(a)(c)** as read with **Section 3(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 2nd November 2005 at Karura forest within Nairobi County, the Appellant had sexual intercourse with C W (the complainant) without her consent. He was further charged with the offence of **Stealing** contrary to **Section 275** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the Appellant stole a mobile phone make motorolla C116 valued at Kshs. 5,000/- from the complainant. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to both charges. After full trial, he was convicted as charged. He was sentenced to serve fifteen (15) years imprisonment on both counts. The sentences were ordered to run consecutively. The Appellant was aggrieved by his sentence only and has filed an appeal to this court. He was not challenging his conviction.

In his petition of appeal, the Appellant challenged his sentence on the ground that it was manifestly harsh and excessive. He stated that he was ailing and was in remand for a long period of time prior to his conviction by the trial court. He urged the court to exercise leniency on him. The Appellant amplified these grounds of appeal during the hearing of the appeal. He told the court that he was suffering from tuberculosis and an eye ailment. He had been in remand custody for a period of six years prior to his conviction. Upon his conviction, he has served three (3) years of the term imposed. He urged the court to review his sentence. On her part, Ms. Aluda for the State noted that the minimum custodial sentence for the offence was ten (10) years imprisonment. The Appellant was in remand custody for a period of six (6) years before he was convicted. He has served three (3) years of the sentence. She submitted that the court should consider the period that the Appellant was in custody and the Appellant's age in determining the appropriate sentence.

The Appellant is not appealing against conviction. He is appealing against sentence. The Appellant was charged with sexual assault under the **Sexual Offences Act 2006**. The offence was committed on 2nd November 2005. The **Sexual Offences Act** came into effect on 21st July 2006. It is apparent that the Appellant was charged under an **Act** of Parliament that was not in existence at the time the offence was committed. This was contrary to **Article 50(2)(n)** of the **Constitution** that prohibits the conviction of any accused person for an act or omission that at the time it was committed or omitted was not an offence in Kenya. The Appellant should have been tried under **Section 140** of the **Penal Code** (now repealed). This was the applicable law at the time the Appellant committed the offence.

The result of this miscarriage of justice is that the Appellant was sentenced to serve a more severe custodial sentence that he would otherwise have served were he to be charged and convicted under the **Penal Code**. The Appellant admits committing the offence. He has been lawful custody for more than nine (9) years. If the Appellant was convicted under the Repealed Section of the **Penal Code**, the maximum sentence he would have served is ten (10) years imprisonment. The Appellant has pleaded with the court to exercise leniency on him. Taking into consideration the entire facts of this case, it was clear that the Appellant was sentenced to serve an illegal custodial sentence. The State concedes to this fact. In the premises therefore, the custodial sentence of the Appellant is commuted to the period already served. The Appellant is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2014.

L. KIMARU

JUDGE