



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: OUKO, (P), MUSINGA & J. MOHAMMED, J.J.A.)**

**CRIMINAL APPEAL NO. 79 OF 2014**

**BETWEEN**

**HILLARY NDUGUTHO MWAI .....1<sup>ST</sup> APPELLANT**

**JAMES KINYUA MUTHIKE.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

(An appeal from the judgment of the High Court of Kenya at Kerugoya (Githua, J.) dated and delivered on 16<sup>th</sup> May, 2014 in H. C. C.R.A. No. 29 & 30 of 2013)

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**JUDGMENT OF THE COURT**

The appellants lodged this appeal against the sentence imposed on them following their conviction for the offence of gang rape under **Section 10** of the **Sexual Offences Act**. The 1<sup>st</sup> appellant, however, as the appeal was pending hearing, withdrew his appeal on 17<sup>th</sup> September, 2020.

In convicting the appellants, the trial court was persuaded on the evidence that on 7<sup>th</sup> May, 2010 at around 1:00a.m. PW1 was woken up by two intruders who had gained access into the house by breaking in through the window; that PW1 and her daughter, PW2, recognized both intruders, the two appellants. The 1<sup>st</sup> appellant, being PW1's brother-in-law and therefore an uncle to PW2, while the 2<sup>nd</sup> appellant was known generally by his *alias* name, 'Besty'.

The court also found, as a matter of fact, that the two appellants dragged PW1 into the shamba where they proceeded to rape her in turns; that after that the two led her back to the house they met PW4 and PW7, the 1<sup>st</sup> appellant's brother and father, respectively, who had responded to PW1's children's distress call; that after the appellants were reprimanded and ordered to leave PW1's house, the appellants went away only for the 1<sup>st</sup> appellant to return shortly to harass PW1's and her children, forcing them to spend the rest of the night in PW7's house. The next morning, the 1<sup>st</sup> appellant was found fast asleep on PW1's bed.

The matter was reported to the police and the two appellants arrested. PW1 was examined by a clinical officer who concluded that she had been raped.

The appellants denied the charge.

On the basis of the prosecution evidence and having considered the appellants' defence that they had falsely been implicated, the trial court found that the charge had been proved against the appellants beyond any doubt. Upon their conviction, the appellants were sentenced to imprisonment for a term of 25 years each.

Their first appeals against both the conviction and sentence were rejected by the High Court (Githua, J.).

Unrelenting, the appellants brought this second appeal, which he argued in person, challenging the above decision. We have pointed out earlier that the 1<sup>st</sup> appellant applied for and leave to withdraw his appeal was granted on 17<sup>th</sup> September, 2020, by this Court.

According to Mr. Ondimu, the Principal Prosecution Counsel representing the respondent, the 1<sup>st</sup> appellant's re-sentencing before the trial court has been adjourned to await the outcome of this appeal. For this reason, we clarify, that this judgment, therefore relates only to the 2<sup>nd</sup> appellant.

Although the memorandum of appeal lists nine grounds, in our assessment of those grounds, the 2<sup>nd</sup> appellant is challenging the sentence only. This is confirmed by the appellant's own brief oral address before us in which he simply expressed his remorse for the crime; that he has since changed to lead a constructive life; that he is the sole breadwinner of his family; and that the sentence passed was harsh and excessive. Mr. Ondimu too identified sentence as the only question, to which he has responded comprehensively in the written submissions and also highlighted before the Court. Therefore, in opposing the appeal, Mr. Ondimu submitted that the main objective of sentencing is to protect innocent citizens and prevent crime; and that any punishment imposed by the court should aim at promoting those objectives. Counsel acknowledged that sentencing is a matter within the trial court's discretion, which discretion must be exercised judiciously on certain principles, as explained in decision of the High Court of Botswana in **The State vs. Mpho Mpelegang** (CTHLB-000008-07) [2007] BWHC 200.

In counsel's view, taking into account the manner in which PW 1 was attacked and raped, the 2<sup>nd</sup> appellant did not deserve mercy. He prayed that we do not interfere with the sentence which, in his view, was lawful and well deserved in the circumstances of the case.

This is a second appeal which, by the provisions of **section 361** of the Criminal Procedure Code, requires us to consider only matters of law, and also not to interfere with the decision of the courts below on matters of fact, unless it is demonstrated that they considered matters they ought not to have considered or that they failed to consider matters they should have considered or that, generally speaking, they were plainly wrong in their decision. The section explains that "severity of sentence is a matter of fact". In **Ahamad Abolfathi Mohammed & Another vs. R** [2018] eKLR this Court held-

**"As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive."**

In a nutshell, the 2<sup>nd</sup> appellant is seeking our re-consideration of the 25 year sentence imposed upon him by the trial court and confirmed by the High Court, either by reducing it or substituting it with a non-custodial sentence, and also to consider the period of 10 years he has served in prison, in addition to the fact that he is remorseful and has reformed.

We repeat that, apart from being discretionary, sentencing must depend on the facts of each case and must also be based upon sound principles, which include,

- a. The seriousness of the offence,
- b. The offence's impact on the victim,
- c. The circumstances of the offender,
- d. The wider public interest.

Taking into account the manner in which the offence was committed; the two young men raping PW1 in turns, who to their knowledge was a married woman; the trauma to which PW1 and her children were exposed to and their harassment the whole night, we do not think, like the two courts below, that the 2<sup>nd</sup> appellant and his confederate deserve mercy. The offence was committed in the dead of the night by the appellants breaking into PW1's house. The appellants exhibited acts of violence on PW1 in the presence of her children. They had planned it and came ready with condoms.

On the basis of these aggravating circumstances, we find that the sentence of 25 years' imprisonment was proportional to the gravity of the offence and circumstances under which it was committed. See **Ambani vs. R.** [1990] KLR 161. We also note that in issuing the sentence, the trial court took into consideration the mitigation by the 2<sup>nd</sup> appellant and the period he had been in custody. Consequently, we are convinced that neither the trial court nor the High Court committed any error in principle in, respectively, issuing and confirming the sentence.

Secondly, and of significance, the question of severity of sentence is a matter of fact, which the Court has no jurisdiction to entertain. **Section 10** of the Sexual Offences Act, under which the charge against the appellant was brought, prescribes a minimum penalty of 15 years' imprisonment which can be enhanced to life imprisonment upon conviction. Obviously, the appellant has based his plea for our re-consideration of the sentence on the recent decision of the Supreme Court in the now well-known **Francis Karioko Muruatetu & another vs. Republic** [2017] eKLR, where in paragraph 48 of the judgment the Court emphasised that;

**"48. Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right. (Our emphasis).**

We too suspect that it is this judgment that informed the 1<sup>st</sup> appellant's decision to withdraw his appeal and instead pursue re-sentencing in the trial court, a very common course in the courts in the recent past.

Did the High Court err in confirming the sentence issued by the trial court? The answer to this question lies with the circumstances of the case, as we have explained earlier. Those circumstances support the conclusion the learned Judge reached in confirming the sentence.

In the result, we too find that this appeal is bereft of any merit and accordingly dismiss it in its entirety.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of February, 2021.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**