IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 28 OF 2015

BETWEEN

JAMES NG'ANG'A NJAU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Nairobi (**Achode, J**.) dated 12th March, 2014*

in

H.C. Cr. A. NO. 298 OF 2009)

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JUDGMENT OF THE COURT

The appellant was convicted by **Senior Principal Magistrate, Kiambu,** of the offence of **Rape** contrary to **section 3(1)** of the **Sexual Offences Act** and sentenced to life imprisonment. His appeal to the High Court against conviction and sentence was dismissed. He filed a memorandum of appeal in person, which shows that his appeal is against the entire decision of the High Court. However, **Mr. Amutallah Robert Julius**, upon appointment as counsel for the appellant, filed a supplementary memorandum of appeal containing four grounds of appeal. At the hearing, the appellant's counsel abandoned the grounds of appeal in the original memorandum of appeal and relied on the grounds in the supplementary memorandum of appeal. He intimated that the appeal is against sentence only.

At the trial, **P W M**, the complainant who was 68 years of age testified that on the night of 17th February 2009, the appellant who was armed with a panga broke into her mud-walled hut where she was living alone, held her neck and threatened to kill her if she raised alarm and thereafter raped her twice.

The appellant then fell asleep and the complainant locked him inside the house and called neighbours who found the appellant still inside the house and arrested him as he tried to escape. The complainant testified that she sustained bruises on the neck and chest which injuries were confirmed by a doctor.

In his unsworn statement in defence at the trial, the appellant stated that after work he drank beer and later left for his home and that he did not know how he lost his way only to find himself at a police post.

Section 3(2) of the Sexual Offence Act provides that a person guilty of the offence of rape:

> ***" …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."***

Upon conviction, the prosecution stated that the appellant had one previous conviction which fact the appellant admitted. The trial magistrate stated that the appellant was not remorseful and was not a first offender and that he deserved a deterrent sentence in the circumstances.

The two relevant grounds of appeal state that the judge erred in law in failing to note that the sentence was a maximum sentence based on an alleged unproved conviction and that the trial judge erred in law by failing to note that the life sentence was illegal.

The appellant's counsel relies on **Sajile Salemulu & Anor *v* Republic [1964] EA 34** - a decision of the High Court of Tanzania, for the submission that it is manifestly wrong to increase a minimum sentence merely because the offender has a previous conviction, as in effect, the offender is being punished twice for the same offence which is unjustifiable.

He also relied on **Josephine Arissol *v* Republic [1957] EA 447** for the principle that it would be wrong to impose the maximum sentence on a first offender. The appellant's counsel also relied on **section 66(1)** of the **Interpretation and General Provisions Act** (**Cap 2**) which provides:

> ***".where in a written law a penalty is prescribed for an offence under that written law that provision shall, unless contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty so set out."***

Mr. Kivihya for the Republic relying on **section 361 (1) (b)** of the **Criminal Procedure Code**, submitted that we have no jurisdiction to hear the appeal on sentence because it was not enhanced by the High Court; that the court exercised its discretion properly and that sentence would have been an issue of law had the court exercised its discretion improperly, which it did not.

By section 361(1) of the **Criminal Procedure Code** (CPC), a second appeal lies to this only on a point of law. The section further provides that the court shall not hear an appeal under the section –

> (a) on a matter of fact – and states that severity of sentence is a matter of fact ; or
>
> (b) against sentence except where a sentence has been enhanced by the High Court unless the subordinate court had no power under section 7 to pass that sentence.

It is not necessary to engage in a long discourse on the extent of the court's jurisdiction - that is, on what constitutes a decision on a matter of law

As regards sentence, it is clear that the Court cannot hear an appeal on the severity of sentence. However, the Court can hear an appeal on sentence if it is erroneous in law. An error of law can arise, *inter alia*, from the manner in which a trial court exercises its discretionary jurisdiction on sentencing. If in imposing the sentence the court acted on the wrong principle of law or committed some errors of law or misdirected itself in some respect, or the exercise of discretion is plainly wrong in the sense, *inter alia*, that no reasonable court could exercise its discretion in such a way an appellate court can interfere with the exercise of judicial discretion on the principles stated in **Mbogo *v* Shah [1968] EA 93**.)

In **Evans *v* Bartlam [1937] AC 473**, a decision of the House of Lords cited by **Sir Clement De Lestang V.P.** in ***Mbogo v. Shah***, (supra) **Lord Atkin** said in part at p. 480-481:

> ***"..and while the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both***

the power and duty to remedy it."

Lord Atkin's dictum to the effect that the power of an appellate court to interfere with the exercise of discretion by a trial court is not limited to only consideration of the ground of error of law and can interfere on other grounds to avoid injustice, has often been cited as representing the modern thinking.

Section 3(2) of the Sexual Offences Act provides for a minimum sentence for the offence of rape but also gives discretion to the court to enhance the sentence to life imprisonment.

Section 26(2) of the Penal Code provides:

> ***"Save as may be expressly provided by the law under which the offence concerned is punishable a person liable to imprisonment for life or any other period may be sentenced to any short term".***

The first question of law which arises in this appeal relates to the failure by the High Court to consider the appellant's appeal on sentence. The appellant had in his amended grounds of appeal, appealed against the sentence on the ground that it was harsh and excessive. In addition, the appellant submitted on the sentence in his written submissions to which the counsel for the repsonents replied.

However, the learned judge did not deal with the issue of sentence at all in her judgment. That is a grave error of law which gives this Court jurisdiction to entertain the appeal on sentence and, as section 361(2) of CPC provides, make any order which the trial court or the High Court could have made.

The second question of law is whether the trial court erred in principle or was plainly wrong in failing to impose the minimum sentence or in enhancing the sentence to the maximum life imprisonment.

In **Sajile Salemulu *v* Republic** (supra) **Biron J**, said at p. 345 paras B –

C: -

> ***"In assessing the appropriate sentence, the chief determining factor is the offence itself. Where there is no prescribed minimum or maximum penalty, the court has absolute discretion as to what sentence it considers appropriate. Where there is a prescribed maximum and minimum, the court's discretion to what is the appropriate sentence is limited to the range between the two extremes. The prescribed minimum penalty is the appropriate one where there are no aggravating features. And even where there are aggravating features, the prescribed minimum penalty may still be adequate. But a previous conviction*** *ipso facto* ***is not such an aggravating feature justifying a more severe penalty, if but for the previous conviction the prescribed minimum penalty would have been considered adequate."***

We would respectfully adopt those statements as a correct exposition of the guiding principles.

Although the trial magistrate took into account that the appellant was not a first offender, the certificate of previous conviction was not apparently produced as it is the norm nor was the nature, the age and relevance of the conviction revealed. We have not been able to trace the original record of the trial to verify that the appellant had indeed a previous conviction. Furthermore, the trial magistrate was not aware or did not consider that it was lawful to enhance the sentence to any other term other than life imprisonment. The range between the prescribed minimum and the life sentence imposed is so big that in the absence of any express consideration of other terms of imprisonment less than life imprisonment and a finding that they were inappropriate sentences, the trial court should be taken to have acted arbitrarily without considering the other available prison sentences and hence to have committed an error of law within the jurisdiction.

Lastly, the trial magistrate failed to apply the sentencing policy in the Sexual Offences Act and in particular, failed to appreciate that the maximum sentence of life imprisonment is prescribed for the more serious offence of defilement of children under the age of twelve years and thus breached the principle of

proportionality.

For those reasons, both the High Court and the trial magistrate erred in law in imposing a life sentence and this Court has jurisdiction to consider the appeal on sentence and interfere.

The only aggravating factors are that the appellant broke into the house armed with a panga and raped an old woman. There was no evidence however that the appellant threatened the complainant with the panga.

In the circumstances and having regard to the range of sentences prescribed for other offences in the Sexual Offences Act, a sentence of 15 years imprisonment would have been appropriate.

For the foregoing reasons, the appeal against sentence is allowed. The sentence of life imprisonment is set aside and the appellant is sentenced to fifteen (15) years imprisonment with effect from the date of sentence, that is 3rd July, 2009.

Dated and delivered at Nairobi this 30th day of September, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR