



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 87 OF 2014

MUENDO NDONGA alias MBELA MAKAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the sentence of P. Wambugu SRM in Criminal [Case No. 1474 of 2014](#) delivered on 28th November 2013 in the Principal Magistrate's Court at Makindu)

JUDGMENT

The Appellant pleaded guilty to the offence of unnatural offence contrary to section 162(b) of the Penal Code. The particulars of the offence were that on the 5th of November 2013 at Kathekani village in Nthongoni location in Kibwezi District within Makueni County, he had carnal knowledge of a goat against the order of nature. The facts were that on 5th November 2013 at 2pm, the complainant went to check on her goats and found that the Appellant had been arrested by members of the public. She also found one of her goats bleeding from its vagina, and a veterinary report produced in court confirmed that Appellant had carnal knowledge with the goat. The Appellant admitted these facts. The trial magistrate while noting that this was a deplorable offence, sentenced the Appellant to fifteen years' imprisonment.

The Appellant being aggrieved appealed the sentence meted by the trial magistrate. His main grounds of mitigation as stated in his Petition filed in Court on 14th May 2014 were that he was remorseful, a family man, a first offender and was suffering from health problems. The Appellant was unrepresented during the appeal.

Mr Mamba, the learned counsel for the State opposed the appeal and submitted that the mitigation factors cited by the Appellant were noted by the lower court. He also relied on the medical report on the Appellant presented by Mathari Hospital.

I have considered the arguments made by the Appellant and the State, and find that the issue for determination by the court is whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Penal Code or in any other statute, and whether the sentence is amenable to reduction. The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor, (1954) EACA 270** wherein the Court of Appeal stated as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

In the case of ***Shadrack Kipkoech Kogo –v- R, Eldoret Criminal Appeal No.253 of 2003***, the Court of Appeal stated thus:-

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered “

In the instant appeal, the Appellant was charged with an unnatural offence under section 162(b) of the Penal Code, which provides as follows:

“Any person who—

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years...”

It is noted from the said provisions that the maximum penalty provided by the law for the commission of an unnatural offence under section 162(b) is 14 years’ imprisonment. In the circumstances, the sentence imposed by the trial magistrate of 15 years imprisonment was illegal and is hereby quashed.

In imposing a new sentence on the Appellant I have considered the fact that the Appellant has already served one and a half years’ imprisonment is a first offender and is remorseful. He also pleaded guilty to the offence, and I am convinced that he has learnt his lesson while he has been incarcerated.

This Court accordingly allows the Appellant’s appeal and reduces the sentence to the time served. The Appellant shall forthwith be set free unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 23rd DAY OF JULY 2015.

P. NYAMWEYA

JUDGE