

evidence clearly placed the Appellant at the locus-in-quo, he had opportunity and did commit the offences. In any event, the Appellant has unequivocally abandoned the appeal on conviction. I thus find that the Appellant was properly convicted on all the three counts.

Section 162 (a) of the Penal Code provides that any person who has carnal knowledge of any person against the order of nature is guilty of a felony punishable by 14 years imprisonment. However, under the proviso in section 162 (I), if the offence was committed “**without the consent of the person who was carnally known**” the offender is liable to 21 years imprisonment. The learned trial magistrate correctly found that the victims were minors. From the evidence, they were aged 14 years. They were thus incapable of giving legal consent to be carnally known. The Appellant was thus liable to imprisonment for 21 years. The trial magistrate upon hearing mitigation of the Appellant said as follows:-

“ I have considered the mitigating factors. Accused person is remorseful. He fends for himself. But section 162 (a) (ii) ties my hands and places the sentences at a minimum of 21 years. I can see he is old. For above reasons, accused is sentenced to imprisonment for 22 years with hard labour in count 1.”

The Appellant received similar sentences in counts 2 and 3. The learned trial magistrate correctly stated the law at section 162 (a). I am at a loss why he departed from 21 years to 22 years. The sentence of 22 years was clearly unlawful. Section 162 (a) (i) couched in mandatory terms. So long as no consent was obtained the offender shall be sentenced to 21 years imprisonment.

The Appellant says he is old, that he is remorseful, that he needs to fend for his Children and assist his wife to protect his property. Some of those matters were taken in mitigation. But it is not lost on me that the three minors were vulnerable persons who will carry the scars of this offence for life. The age and medical situation of the Appellant fades in comparison to the gravity of the offences and the ages of the minors. Furthermore, the law is in black and white: the sentence of 21 years is mandatory.

Granted those circumstances, I will set aside the sentence of 22 years and replace it with the lawful sentence of 21 years. The appeal thus succeeds narrowly on that point to the extent that the Appellant shall serve the sentence of 21 years on all the three counts or the remainder of the term thereof.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 23RD JUNE, 2014.

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G.K. KIMONDO

JUDGE.

Judgment read in open Court in the presence of:-

Javan Asiligwa (Appellant in person)

Mr. Omwenga (State Counsel)

Beatrice (Court Clerk)

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G.K. KIMONDO

JUDGE.

23/6/2014.