PAUL MWANIA NZIOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Kithimani Senior Resident Magistrate's Court

Criminal case No. 15 of 2009 by Hon. A. W.Mwangi on 13/5/2010)

JUDGMENT

The Appellant, **Paul Mwania Nzioka** faced 2 counts of the offence of unnatural offence contrary to section 162(a) of the Penal Code before the Senior Resident Magistrate's Court, Kithimani. In count 1, it was alleged that on 27th May, 2009 at […] Village, Yatta District he had carnal knowledge of **M.M.** against the order of nature. In count 2, the appellant again on 27th May, 2009 at […] Village in Yatta District had carnal knowledge of **M.M.** against the order of nature.

A plea of not guilty was entered against the appellant and 5 prosecution witnesses were called to testify by the prosecution in a bid to prove its case. Their evidence in summary was that on 27th May, 2009, PW1 and PW2, the complainants in counts 1 and 2 respectively were aged 12 and 6 years. They were at home on the material day. At about 1 p.m the appellant called both of them and took them to **N's** home where he was an employee and lived under the pretext that he wanted their assistance on herding goats. He then ushered them into his house. After a short while he sodomized each of them. On living his abode PW1 and PW2 reported to their mother PW3, **C.N.M.** on what they had gone through. She immediately reported the incident to Mayuni Administration Police Post and later to Matuu Police Station where she was issued with P3 forms. Thereafter she took the complainants to Matuu District Hospital where they were received and treated

Later the complainant's P3 forms were filled by PW4 ,a clinical officer. He concluded that both PW1 and PW2 had been sodomized because they had many mucus cells and red blood cells respectively in their anal areas upon an anal swab on each of them being taken and examined.

In his unsworn defence the appellant said that on 29th April, 2009 he was called from his shamba by his wife and when he went home, he was arrested for allegedly committing the instant offences. He denied nonetheless committing the same. The police beat him and took his cash Kshs. 5,000/= and mobile phone. He was taken to Mayuni Administration Police Camp where he remained for 3 weeks. Previously, he had lent the complainant's mother Kshs. 5,800/= and she had refused to pay him back and had even threatened him with dire consequences. Further in the month of June, the appellant's employer told him that the livestock he used to herd had gone missing. The complainant's mother according to the appellant knew what happened to the livestock and action ought to be taken against her.

The learned magistrate having carefully evaluated the evidence on record came to the conclusion that the appellant had committed the offences charged. Accordingly, she found him guilty, convicted and sentenced him to 10 years imprisonment on each count. She ordered nonetheless that the sentences run concurrently.

Aggrieved by the conviction and sentence, the appellant mounted the instant appeal. In his home made petition of appeal which he christened "*Mitigation"* the appellant stated thus-

"1.***That I am a first offender***

2. ***That I pleaded guilty at the trial***

3. ***That* I beg for leniency to this Honourable Court**.

4. ***That I am remorseful for the act I committed and promise that I will not repeat the same in future***

5. ***That I am now reformed prisoner to go and join other Kenyans in building our Nation***

6. ***That I beg this Honourable Court to consider my plea and reduce my sentence as I am the only breadwinner of my family".***

Essentially what the appellant is appealing against is sentence. He does not dispute his conviction. Indeed this even became apparent when **Mr. Mukofu,** learned State Counsel concluded his submissions opposing the appeal. Suddenly the appellant shot up and delivered himself thus,

"…***I wish to abandon the appeal on conviction. I pray to court to consider reducing the sentence only".***

From the conduct of the appellant throughout the proceedings, it is evident that he actually committed the offences and was looking for an easy way out. It is not therefore surprising that he has renewed that wish in this appeal by limiting it to sentence only.

The principle upon which this court will act in exercising its jurisdiction to interfere or review sentences imposed by the trial court were firmly settled as far back as 1954 when in the case of- **Ogola s/o Owour [1954] EACA 270,** the Court of Appeal for Eastern Africa stated:-

"the court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James vs Republic [1950] 18 EACA 147. It is evident that the judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case Republic vs Sshersawsky [1912]CCA 28 TL R 263."

But again, it must also be appreciated that the sentence imposed on an accused must be commensurate with the offence committed. It is not proper exercise of discretion in sentencing, for the court to fail to look at the facts and circumstances of the case in their entirety before settling for any given sentence. *See* **Ambani vs Republic [1990] KLR 161.**

The offences charged attract a maximum sentence of 21 years imprisonment. The appellant was however sentenced to 10 years. That sentence cannot be said to be manifestly harsh or excessive. I do not discern any wrong principles that may have influenced the learned magistrate in arriving at the sentence sought to be impugned. Nor do I see material factors that she overlooked at arriving at the sentence. She considered the appellant's mitigation and the fact that the offence was a felony. No doubt the offence committed was serious. It involved 2 complainants. All said and done, I think that the sentence imposed as aforesaid was commensurate with the moral blame worthless of the offender.

I do not find any merit in this appeal. It is accordingly dismissed.

JUDGMENT DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **30TH** day of **JULY 2012.**

ASIKE – MAKHANDIA
JUDGE