



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 98 of 2010

PHILIP MUTHAMA MWINZI APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant **Philip Mwinzi** was charged in the subordinate court with unnatural offence contrary to **section 162(a)** of the **Penal Code**. The particulars of offence were that on 10th January 2009 at **{particulars withheld} Kangundo** District within Eastern Province had carnal knowledge of **S. M.** against the order of nature. He denied the charge. After a full trial, he was convicted of the offence and sentenced to serve ten (10) years imprisonment. He has now appealed to this court only against sentence.

His grounds of appeal are as follows:-

1. **THAT he is extremely remorseful for the crime of which he stands convicted.**
2. **THAT he is of advanced age (65 years) and of poor health.**
3. **THAT I he has learnt his mistakes and undertakes to be a law abiding citizen if granted the chance to rejoin his family.**
4. **THAT the 10 years imprisonment is manifestly harsh granted his advanced age and unforgiving prison environment.**
5. **THAT he prays for a favourable review of the sentence so that it is either reduced or he be allowed to serve the remaining part of his sentence under the Community Service Order (CSO).**

At the hearing of the appeal, the appellant relied on his grounds of appeal.

The learned State counsel, **Mr Mukofu**, opposed the appeal. Counsel argued that under **section 162** of the **Penal Code**, the maximum sentence for the offence was 14 years imprisonment where there was consent for commission of the unnatural act. Where there was no consent, the maximum sentence was 21 years imprisonment. Counsel submitted that the trial court sentenced the appellant to serve 10 years imprisonment. The trial court therefore, properly exercised its discretion in sentencing.

This appeal is on sentence only. However, as a first appellate court, I am duty bound to re-evaluate all what is on record and come to my own conclusions and inferences. See **Okeno –vs- Republic (1972) EA 32.**

I have perused the record and evidence. I see no legal error on the record that can vitiate the conviction. From the evidence, though the complainant was a child of 12 years, there is sufficient evidence to found a conviction. The complainant (PW1) was found with spermatozoa in his anus. There was no reason why he should have framed the appellant. The incident occurred in broad daylight, around 3 p.m. The appellant worked in a neighbourhood bar and was known to the complainant.

The appellant was sentenced to serve 10 years imprisonment. The maximum sentence under **section 162** of the **Penal Code**, which covers a situation where there is consent to the unnatural offence, is 14 years imprisonment. Where there is no consent or where there are threats or misrepresentation used by an accused, the maximum sentence is 21 years imprisonment.

The victim herein was a child of about 12 years. Being a minor, he did not have the capacity to give consent. Therefore, no consent was given. In addition, there was misrepresentation by allurement with money. The appellant gave the complainant money. The appellant took undue advantage of the defenseless and inexperienced boy to commit an offence which was likely to damage the whole personality of the child for a lifetime, in addition to other negative medical consequences.

In my view, even though the appellant was a first offender, the sentence meted by the learned magistrate was appropriate and reasonable. He says that he wants to join his family. I observe that he himself stated that he doesn't have a wife presently. I am not sure whether his children will be safe when he joins them, in view of his conduct.

Taking into account the totality of the matter, I find no merits in the appeal and uphold the sentence imposed by the trial court. The appeal is dismissed.

Dated and delivered at Machakos this 5th day of **December** 2012.

George Dulu
Judge

In presence of:-

N/A for State

Appellant present in person

Mutinda - Court clerk