

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.620 OF 2010

(An Appeal arising out of the conviction and sentence of HON. E. OMINDE- PM delivered on 11th February 2010 in Makadara CM. CR. Case No.7158 of 2005)

ALFRED NELSON LUTA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Alfred Nelson Luta, was charged with seven (7) counts of **committing an unnatural act** contrary to **Section 162(a)** of the **Penal Code**. The particulars of the offence were that on various dates between 1st September 2005 and 4th November 2005 at Shauri Moyo Estate in Nairobi, the Appellant had carnal knowledge of B T, P W, B M, B O, B A, S O O and F M W (the complainants) against the order of nature. The Appellant was alternatively charged with **indecent assault** of the complainants contrary to **Section 164** of the **Penal Code** (now repealed). The particulars of the offence were that on various dates between 1st September 2005 and 4th November 2005 at Shauri Moyo Estate in Nairobi, the Appellant unlawfully and indecently assaulted the complainants by inserting his finger into their anuses. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted of four (4) of the main counts of **committing an unnatural act**. The Appellant was sentenced to serve fourteen (14) years imprisonment in each of the four counts. The sentences were ordered to run concurrently. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

Although the Appellant filed an appeal challenging his conviction, during the hearing of the appeal, he abandoned his appeal on conviction and instead pleaded with the court to exercise leniency on him and reduce the custodial sentence that was imposed on him. He told the court that during his incarceration, his parents had died. He urged the court to take into consideration that he had served nine (9) of the years of the custodial sentence he was ordered to serve. He had a family who needed his assistance. Ms. Ndombi for the State opposed the appeal. She submitted that the Appellant had committed several unnatural acts with boys of less than fourteen (14) years. She was of the view that the sentence fitted the crime. She urged the court to dismiss the Appellant's plea for reduction of sentence.

When the trial magistrate sentenced the Appellant to serve the said period in prison, the trial magistrate was exercising judicial discretion. This court cannot interfere with such exercise of judicial discretion unless it is established that the trial court either took into consideration wrong factors in determining the sentence or failed to take into consideration the correct factors when sentencing the Appellant. Where the sentence is manifestly excessive or exceedingly lenient, the Appellate court will interfere with the sentence. In the present appeal, the Appellant failed to establish any wrong exercise of discretion by the trial court or any wrong application of the law. The custodial sentence that the Appellant was ordered to serve was extremely lenient taking into consideration that he had committed several offences of a similar nature. He took advantage of young and vulnerable children. The sentence was legal. This court will not interfere with the sentence.

In the premises therefore, the Appellant's plea for reduction of sentence lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS DAY OF 2ND MARCH 2015

L. KIMARU

JUDGE