



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MAKHANDIA & J. MOHAMMED, JJ. A)

CRIMINAL APPEAL NO. 162 OF 2019

BETWEEN

FRANCIS MULWA MUNYAO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi (J. B. Ojwang, J.) dated 24th October, 2009*

*in*

*H.C.CR. A. NO. 506 OF 2007)*

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**JUDGMENT OF THE COURT**

1. **Francis Mulwa Munyao** (the appellant) was charged before the Chief Magistrate’s Court at Nairobi with three counts of committing an unnatural offence contrary to **Section 162(a) of the Penal Code**. There were also alternative charges of indecent assault on a boy contrary to **Section 164 of the Penal Code** for each of the main offences.

2. He pleaded not guilty to the charges and the matter went to full trial culminating in his conviction on the 3 main counts. When invited to mitigate, the appellant entreated the court to be merciful saying that he was married with three children and had also been in remand for a long time. A probation officer’s report was called for and after considering the contents therein, the trial magistrate concluded that a deterrent sentence was called for. She consequently sentenced the appellant to serve 21 years’ imprisonment on each count but ordered that the sentences run concurrently.

3. Aggrieved by the conviction and sentence, the appellant challenged both conviction and sentence before the High Court. The High Court (Ojwang, J (as he then was)), after reanalysing the entire evidence before the court and submissions by the appellant and the state counsel rendered itself as follows:-

**“I have seen no reason at all to doubt the truthfulness of the several prosecution witnesses, and I believe each of the complainants not only to have been subjected to a sodomy assault, but to have fully identified the suspect, who was in each case the appellant herein. The appellant for his part, has not raised any doubts at all in the integrity of the evidence, on the basis of which he was convicted.**

**As to sentence, the trial Magistrate carefully considered the circumstances in which the offences had been committed, and deliberately chose to impose a twenty one year jail term. I have seen no cause for interfering with that exercise of the judicial discretion. I dismiss the appeal, uphold the conviction, and affirm the sentence as imposed.”**

4. Being dissatisfied with the dismissal of his appeal, the appellant moved this Court through his homemade grounds of appeal on 4th November, 2009 raising issues of both law and fact. A cursory look at his nine grounds however shows that the issues raised by the appellant are purely factual and raise no points of law.

5. On 10th March, 2020 the appellant filed before this Court an application headed **“APPLICATION FOR WITHDRAWAL OF APPEAL AGAINST CONVICTION I.R.O CR. APPEAL NO. 162 OF 2019 AND ALTERNATIVE APPLICATION OR SENTENCE**

## REVIEW”.

In the said letter, the appellant stated that he has served almost the entire sentence and has only 14 months to go. Following the said letter and the appellant’s address to Court, the appeal against conviction is hereby marked as withdrawn pursuant to **Rule 68** of the Rules of this Court.

6. The appeal before us is only on sentence and is premised on the following grounds:-

**“1. THAT, the trial Court while sentencing me did not consider the one (1) year and ten (10) months spent in legal custody prior to conviction in contravention of Section 333(2) of the Criminal Procedure Code. Reliance is based on Musyeki Lemoya v Republic [2014] eKLR. (annexed)**

**2. THAT, the trial Court while sentencing me further failed to consider that I was a first offender without any previous criminal records.**

**3. THAT, the trial Court while sentencing me did not also consider the probation report that included a positive community report in my favour.**

**4. THAT, the 21 years imprisonment, being the maximum sentence as by then provided by law was harsh and inappropriate under the circumstances.”**

7. The rest of the grounds are in support of his mitigation and list of his achievements while in prison. There is no doubt that the appellant has utilised his time in jail very productively. As he leaves prison and breathes the air of freedom, he will do so as a lawyer and one who has immensely contributed to the welfare of his co-prisoners in terms of offering them legal advice and also contributing to their rehabilitation and reintegration to society. We applaud him for those great achievements.

8. That said however, and as has been appreciated by the appellant, this is a second appeal and only issues of law call for our determination as prescribed by **Section 361(1) of the Criminal Procedure Code**. As appreciated by the appellant also, by dint of **Section 361(a) of the Criminal Procedure Code**, severity of sentence is a question of fact.

9. The appellant filed a soft copy of submissions on 8th June, 2020, a day before the hearing of this appeal. In the said submissions, he has added three grounds to his application. He seeks a finding from this Court that **Section 333(2) of the Criminal Procedure Code** was violated by failure by the trial court to consider the time he had spent in remand during sentencing; that the 21 years’ imprisonment was harsh and inappropriate in the circumstances; and lastly, that the long delay in the hearing and determination of his appeal was a violation of his rights to fair trial under **Article 50 of the Constitution of Kenya 2010**, which right is non-derogable. He reiterated these submissions and even went further to challenge the constitutionality of **Section 361 (1) of the Criminal Procedure Code** saying that it limits an appellant’s right to have his sentence reduced on second appeal.

10. The appeal was opposed by Mr. Abdi Hassan, learned Senior Assistant Director of Public Prosecutions who represented the State. He urged the Court to dismiss the application saying that the law clearly proscribes this Court’s jurisdiction to interfere with severity of sentence. He submitted that the sentence meted against the appellant was lawful; it was justified and interfering with the same would be tantamount to interfering with the exercise of discretion by the two courts below and there is no basis for us to do so.

11. Further, Mr. Abdi urged that the constitutional issues which have been raised in the submissions were not properly before the Court. They have not been articulated with specificity as required in claims involving contravention of constitutional rights. He maintained that this is the wrong forum for the said issues to be raised. He urged us to dismiss the appeal and allow the appellant to serve the remainder of the sentence.

We have considered the application, which is actually part of the appeal against sentence. We have also considered the appellants’ submissions both oral and written and the response thereto by the learned state counsel.

12. We start with the question whether we have jurisdiction to entertain the constitutional issues raised by the appellant at this point. Whereas we appreciate that points of law can be raised and considered by the court at any level, in this case, the alleged violations of the appellant’s constitutional rights have not been raised in the grounds of appeal before us. The same were also not raised before the High Court. They have just been thrust to the Court through the appellant’s written submissions, which were not even served on the state counsel, and expounded in the appellant’s oral highlights. Our view of the matter is that the said issues have not been properly placed before us for determination. They have no roots whatsoever either in the notice of appeal or on the grounds of appeal. Determining those issues will be tantamount to acting outside the jurisdiction bestowed on us by **Article 164(3)(a) of the Constitution** and the Appellate Jurisdiction Act and Rules of this Court.

13. On failure by the learned magistrate to consider **Section 333(2) of the Criminal Procedure Code**, we hold the view that the appellant ought to have raised this issue with the High Court first. The reason we say so is because, we do not have the original record, nor do we have the computation of the sentence to calculate if the 21 years included the term spent in remand or not. The magistrate’s order does not state that the sentence starts to run from the date of conviction. This therefore makes it difficult for this Court to determine whether there was violation of **Section 333(2) of the Criminal Procedure Code**. We also note that the appellant was sentenced in July 2007. The provision in question was amended in 2007 but the exact date is not indicated. There is possibility therefore that the sentence was passed before the said amendment. Moreover, this now becomes a point of fact which is outside our remit.

14. Should we interfere with the sentence? We note that the 21 years imposed by the trial court was not a mandatory minimum. In fact, in her very detailed sentencing notes, the magistrate did not imply that her hands were tied by the law, or that her discretion in sentencing was fettered. She could have given the appellant a shorter term. She did not do so, the sentence was informed by the circumstances surrounding the matter and the gravity of the offence. The High Court found that the learned magistrate had exercised her discretion properly and

affirmed the sentence. We have no basis interfering with the exercise of discretion by the two courts below. As long as **Section 361(2)** remains intact as it is in our statutes, this Court will eschew interfering with issues pertaining to severity of sentence as long as the said sentences are lawful.

We are in agreement with learned counsel for the state that the appellant's fate on sentence lies elsewhere and not with this Court. Ultimately, we are not persuaded that this appeal has merit. The same is hereby dismissed.

**Dated and delivered at Nairobi this 7th day of August, 2020.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**ASIKE – MAKHANDIA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**