



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: OKWENGU, MAKHANDIA & SICHALE, J.J.A.)**

**CRIMINAL APPEAL NO. 91 OF 2014**

**BETWEEN**

**ADHAN NASSIR.....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal against the judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 18<sup>th</sup> December, 2013*

*in*

*H.C.Cr.A.No.74 of 2012 )*

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**JUDGMENT OF THE COURT**

The appellant **Adhan Nassir** was charged with two counts. In count 1, he was charged with unnatural offence contrary to **section 162 (a) (i)** of the Penal Code. The particulars were that on the 8<sup>th</sup> day of June, 2010 at Agricultural Development Corporation Galana Ranch within Kilifi County, unlawfully had carnal knowledge of **R N H** a girl aged 16 years.

In count II, he was charged with the offence of stealing contrary to **section 275** of the Penal code. The particulars were that on the 8<sup>th</sup> day of June, 2010 at Agricultural Development Corporation, Galana Ranch within Kilifi county, he stole one mobile phone make Nokia 1600 and cloth wrapper all valued at kshs.3,850/= the property of **R N H**.

The trial proceeded before **L.W. Gitari**, the then Chief Magistrate, Malindi, who on 13<sup>th</sup> September, 2011 convicted and sentenced the appellant to twenty one (21) and two (2) years imprisonment in respect of counts I and II respectively. The sentences were to run concurrently. The appellant was dissatisfied with the conviction and sentence and filed an appeal in the High Court. On 18<sup>th</sup> December, 2013, **Meoli, J.** dismissed the appellant’s appeal thus provoking this appeal.

**R N H**, (PW1) was 16 years old and a standard 7 pupil at [Particulars withheld] Primary School where the

appellant was a teacher. On 8<sup>th</sup> June, 2010 at about 7p.m., she received a telephone call from the appellant asking her to go to where he was. She declined as her mother was not at home. The appellant telephoned her again at about 9p.m. and she heeded the call. On getting to the venue of the meeting, the appellant got hold of her and in spite of her protestations and resistance, he tore her biker and inserted his penis in her anus. Fortunately for her, **Yusuf Mohamed (PW3)**, a neighbor came looking for her. As PW3 directed the spotlight on him, the appellant fled. The appellant took with him PW1's headscarf and a mobile phone, a Nokia 1600. Later when her mother came home, she narrated her ordeal and a report was subsequently made to the police and a P.3 filled.

**B H, PW2**, is the mother of PW1. On 8<sup>th</sup> June, 2010, she was in Malindi and arrived at her home at about 12.20 a.m. On learning of what had happened to PW1, she reported to the G.S.U Camp at Galana. The report was received by PW8, CPL George Opiyo on 9<sup>th</sup> June, 2010. PW2 had earlier in the day received a phone call from the appellant who was finding out where she was. PW3, **Yussuf Mohamed**, a neighbor went to look for PW1 when he learned of her absence from her home. He directed his search towards a toilet and on flashing a spotlight, he saw a man whom he identified as the appellant running away. He followed the girl to her home and she narrated the incident to him. He waited until PW2 returned home and informed her of what had befallen PW1. PW1 was examined by PW4, **Ibrahim Abdullahi** a Clinical Officer at Malindi District Hospital, on 11<sup>th</sup> June, 2010. He found no spermatozoa in her genitalia but her anal orifice had a laceration and indicated as much in the P3 which he filled. PW1 had earlier on 9<sup>th</sup> August, 2010 been examined by PW6, **Charlo Oscar Kabi**, a Clinical Officer at Galana who also found a small laceration on the rectum with no evidence of penetration. PW5, **Corporal Millicent Soi** of the Gender and Children's Desk at Malindi Police Station received the exhibits from PW8 **CPL George Opiyo** who had visited the scene on 9<sup>th</sup> June, 2010 and recovered a used condom, an empty packet of condoms and an unused condom. He also recovered the biker worn by PW1 on the material day. He arrested the appellant. PW5 produced the exhibits in court, these were PW1's biker, a used condom, an unused condom and an empty packet of condoms. However, PW1 had washed her biker and hence it had no seminal stains.

In his unsworn statement of defence, the appellant denied having committed the offences he was charged with. He attributed his arrest to a love relationship gone sour between him and PW1's mother (PW2). PW2 had threatened him with dire consequences and because of her incessant false reports to the Galana ADC Ranch Manager, he quit his job on 10<sup>th</sup> April, 2009. However, due to pleas from parents and the Manager, he returned to work on 2<sup>nd</sup> June, 2009.

When the appellant appeared before us on 19<sup>th</sup> November, 2014, he relied on his grounds of appeal filed on 19<sup>th</sup> November, 2011, as well as his written submissions. The appellant's grievances were that he was charged under a repealed provision of the Penal Code, that the sentence of twenty one (21) years was illegal as section **162(a)** and **(b)** of the Penal Code provides for a maximum of fourteen (14) years; that the charge was defective as it did not indicate that the act was "against the order of nature", that the evidence adduced disclosed an offence of defilement and not unnatural act; that no DNA was conducted linking the seminal fluid found in the condom to him; that the evidence of PW6, the Clinical Officer was that there was no vaginal penetration but the "small laceration on the rectum" was caused by a sharp object; and finally that his defence of alibi was not considered.

**Mr. Musyoki**, the learned Senior Principal Prosecution Counsel opposed the appeal. He contended that **section 162** of the Penal Code was not repealed; that the severity of the sentence is a matter of fact and is outside the purview of this Court's jurisdiction; and that the appeal was unmeritorious. He however was of the view that the sentence of twenty one (21) years was excessive as the appellant was a first offender.

This being a second appeal, this Court will not as a general rule interfere with the concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. In **David Njoroge Macharia v R [2011] eKLR** it was stated that under **section 361** of the Criminal Procedure Code:

***"Only matters of law fall for consideration and the court will not normally interfere with***

*concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemangong vs Republic (1984) KLR 213).”*

We have no option but to be faithful to the above summation of the law. In the case of sentence, severity of the sentence is a matter of fact, only open to this courts’ jurisdiction if the sentence has been enhanced by the High Court. It therefore follows that an appeal against sentence can only be as to its legality which then is a matter of law. In this appeal, the appellant’s grievance was that the sentence was illegal and this therefore falls within our purview. The issue which we must address is whether the sentence of twenty one (21) years imposed on the appellant was illegal. According to the appellant, he was charged under **section 162(a) (i)** which provides for a maximum sentence of fourteen (14) years. It was his contention that this sentence was illegal and further that **section 162** of the Penal Code had been repealed.

First, we wish to point out that **section 162** of the Penal Code was not repealed by the enactment of the Sexual Offences Act. The appellant seems to have operated under a misguided notion that **section 162** of the Penal Code was repealed. Nothing is further from the truth. **Section 162** of the Penal Code is still in existence in our statute books.

As regards the allegation that the sentence was illegal as he ought to have been sentenced to fourteen (14) as opposed to twenty one (21) years imprisonment, again a plain reading of **section 162** of the Penal Code supports the sentence of twenty one (21) years. **Section 162 (a) and (b)** provide as follows:

**“162. Any person who-**

- a. **has carnal knowledge of any person against the order of nature; or**
- b. **has carnal knowledge of an animal; or**
- c. **permits a male person to have carnal knowledge of him or her against the order of nature,**
- d. **is guilty of a felony and is liable to imprisonment for fourteen years.**

**...provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if-**

- i. **the offence was committed without the consent of the person who was carnally known; or**
- ii. **the offence was committed with that person’s consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.”**

Accordingly, the maximum sentence of 21 years is provided for if the complainant does not give consent to the unnatural act. PW1 did not give consent to the act of sodomy by the appellant. She was lured by the appellant to the meeting point near a toilet. The appellant had earlier ascertained from her mother (PW2) that she was away. At the venue, inspite of PW1’s protestations and resistance, the appellant overpowered her and inserted his penis in her anus, an unnatural offence. We note that Mr. Musyoki’s view was that the sentence of twenty one (21) years was excessive given that the appellant was a first offender. It is however, our considered view that the appellant, having been PW1’s teacher, abused the trust bestowed upon him by his student. Indeed, PW1 agreed to go to where PW1 was as she respected him as her teacher. We too like the trial court are of the view that he deserved the maximum sentence of twenty one (21) years.

The other complaint raised by the appellant was that the ingredients of offence of natural offence were not fully captured in the charge sheet by the omission of the words ‘against the order of nature’. Whereas the said words were omitted, we are of the view that the appellant did not suffer any prejudice by the said

omission as charge pointed to no other offence other than that of unnatural offence. The offence led by the prosecution did not point to any other offence but that of sodomy which is unnatural offence. Contrary to the appellant's assertion that there was need to carry out a DNA to establish that the spermatozoa in the condom was his, we do not think much turns on this. The appellant having ascertained that PW1's mother was away from home, he took the opportunity to call PW1 to the place where he molested her. PW1 knew the caller, the appellant, who was her teacher. PW3 too did see the appellant leave the *locus in quo* after directing his spotlight on him. This was sufficient evidence to link the appellant to the commission of the offence and it is immaterial that the spermatozoa in the condom was not established to have been the appellant's.

The upshot of the above is that we have come to the conclusion that this appeal is devoid of merit and is accordingly dismissed.

**Dated and delivered at Malindi this 26<sup>th</sup> day of February, 2015.**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**