



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)**

**CRIMINAL APPEAL NO. 4 OF 2013**

**BETWEEN**

**PATRICK NDUNGU .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(An appeal from a judgment of the High Court of Kenya at Nairobi (Mbogholi Msagha, J.)  
dated 14<sup>th</sup> November, 2012***

**in**

**H.C.CR.A. NO. 306 OF 2010)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is a second appeal. In his notice and memorandum of appeal, the appellant intended to challenge both the conviction and sentence imposed on him by the two courts below, but at the hearing of the appeal before us, he abandoned the appeal on conviction. It follows that the concurrent findings of fact made by the two courts below are undisputed.

On the evening of 7<sup>th</sup> August, 2008, 12 year-old **S.N**, who was an orphan boy, was standing outside the door of his aunt’s house at Tigoni Trading Centre, Limuru. He was staying in the house with the aunt, **J.W.N** (PW2) and cousin, **L.W.W** (PW3), and was waiting for them to open the door. Just then, the appellant, who was the next door neighbour and friend of the family arrived. He persuaded S.N to go to his house instead of waiting for too long outside their house and S.N agreed. Inside the house, the appellant told S.N to undress and sleep. The appellant started to touch him on the thighs whereupon S.N got out of bed, took his trousers intending to leave but the appellant pulled him back to the bed, removed his trousers and raised the volume of his radio. S.N shouted to call his aunt but the appellant covered his mouth with his hand. The appellant started sodomising him and did so for about 30 minutes to 1 hour as S.N screamed in pain calling out his aunt.

The first person to hear S.N’s screams was PW3 who alerted PW2. PW2 went out and knocked on the appellant’s door asking what S.N was doing in his house. It was then that S.N took the opportunity to escape as the appellant started wiping out some whitish discharge from his anus, and he ran out of the

house leaving the appellant talking to PW2. The appellant lied to PW2 about rats having invaded his house and asked her for some rat poison, but when S.N reached the safety of their house, he reported to both PW2 and PW3 that the appellant had sodomised him. The matter was reported to the local Chief (PW4) and to the OCS Tigoni Police Station (PW6) who arrested the appellant. A medical examination carried out by PW5, a Clinical officer, confirmed that S.N was indeed sodomised and infected with some STI for which he was treated.

The appellant was charged with the offence of sexual assault contrary to **Section 5(1) (a) and 5 (2)** of the **Sexual Offences Act**, in that he “*willfully, unlawfully and sexually assaulted S.N by penetrating his male organ (penis) into the anus of the said S.N*”. He was tried before Limuru Senior Principal Magistrate (M.A. Murage) who heard the evidence of six prosecution witnesses and the appellant’s defence that he was just a good samaritan who gave S.N shelter that night and did not sodomise him. The learned magistrate convicted him and sentenced him to serve 20 years in prison, and the conviction and sentence were upheld by the High Court (Mbogholi Msagha, J.) on first appeal.

As stated earlier, the only plea made before us is on sentence, which we were urged to reduce to such level that the appellant leaves prison at once. The appellant, who appeared in person, stated that he had two children of his late sister who were left in his custody and care, but did not know their whereabouts after his incarceration. He had also contracted HIV in prison, although he had no medical documents to show for it.

In response to those submissions, Ms. Jacinta Nyamosi, (ADPP), for the State, submitted that the appeal did not lie before this Court by dint of **Section 361** of the **Criminal Procedure Code**. The sentence was also a legal one and the High Court had considered it before dismissing the appeal and confirming it. As for the claim of being HIV positive, Ms. Nyamosi submitted that this was being raised for the first time and could not affect the validity of the sentence.

Ms. Nyamosi is, of course, right about the jurisdiction of this Court on second appeal. **Section 361 (1)** states as follows:-

**“ A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –**

- a. **On a matter of fact, and severity of sentence is a matter of fact; or**
- b. **Against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”**

The offence of sexual assault for which the appellant was convicted is punishable **under Section 5 (2)** of the **Sexual Offences Act** which states as follows:-

**“ A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.”**

There is thus a minimum sentence of 10 years imprisonment on which the Court has no discretion. The only discretion is on whether the term of imprisonment shall be enhanced to life imprisonment. Like all discretions exercisable by the Court, such discretion must be judicious and cannot be based on whim or caprice. The trial magistrate recorded the appellant’s antecedents in mitigation before considering the appropriate sentence and determined that 20 years would serve the ends of justice. The High Court re-examined the sentence and determined that there was no error made in principle by the trial court. That would have been the end of the matter as this Court has no jurisdiction to consider the sentence except where the legality of it is in issue, which it is not in this matter.

We have considered the appellant’s submissions and find no reason to disturb the sentence meted out to him. The fact that he has contracted some disease in prison is regrettable but is not an automatic licence

for his release. We believe the prison authorities will make arrangements to ensure that the appellant's medical condition is appropriately managed. The **Constitution** in **Article 51** declares in no uncertain terms that a person imprisoned under the law retains all the rights and fundamental freedoms in the Bill of Rights. Also, the Constitution in **Article 133** and Parliament in the **Power of Mercy Act, No. 21 of 2011** have created an avenue for the exercise of mercy by the President, in deserving cases. In our view, the appellant is not without recourse to the law.

In the result, this appeal has no merit and is dismissed. We so order.

*Dated and delivered at Nairobi this 30<sup>th</sup> day of May, 2014.*

**P.N. WAKI**

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**JUDGE OF APPEAL**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

**DEPUTY REGISTRAR**