IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MWERA & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 94 OF 2014

BETWEEN

MUSYEKI LEMOYA ....APPELLANT

AND

REPUBLIC ....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at

Nairobi (Achode, J.) dated 6th June, 2012

in

H.C.CR.A. NO. 444 OF 2010)

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JUDGMENT OF THE COURT

1. This is a short appeal on sentence only. On the face of it, and as submitted by learned Senior Assistant Director of Public Prosecutions, Mr. Njagi Nderitu, the court has no jurisdiction to consider it by dint of *section 361 (1) (a)* of the Criminal Procedure Code which provides as follows:

"(1) 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.

2. The appellant was charged before Makadara Principal Magistrate (Hon. T. Ngugi) with committing an unnatural offence contrary to *Section 162 (a)* of the Penal Code. It was alleged in the main count that on the 25th day of October 2007 at about 8 p.m in Kayole Estate, Nairobi, he had carnal knowledge of CSA, a boy aged 10 years against the order of nature. He also faced an alternative count of indecent act with a child contrary to *Section 11(1)* of the Sexual Offences Act No. 3 of 2006. The allegation was that on the same date and time he unlawfully and intentionally committed an indecent act with the same child by

touching his private parts, namely anus.

3. He denied the offences but the prosecution proved through seven witnesses that on the alleged date and time, the appellant, who was a watchman at an enclosed Yard in Kayole, accosted and grabbed the young boy who was walking back home, before shoving him into the yard and locking it behind them. Inside the yard, the appellant forced the child to remove his trousers and started raping him through the anus. When the boy screamed, the appellant hit him on the head with a rungu and threatened to kill him if he screamed again. For the next thirty minutes he sodomised the boy before releasing him with a warning that he should not tell anyone what happened to him. But the boy informed his parents as soon as he arrived home that he had recognized the appellant. They reported to the police who swung into action and arrested the appellant the same night. Medical evidence confirmed that sodomy had indeed taken place, hence the charges laid against the appellant.

4. The trial court was of the view that the offence charged in the main count under *section 162 (a*) of the Penal Code was proved beyond reasonable doubt and convicted the appellant accordingly and sentenced him to serve 14 years imprisonment. On first appeal, the High Court (Achode, J), made concurrent findings on the facts and dismissed the appeal. However, the court set aside the conviction on the main count since the Penal Code had been repealed by the enactment of the Sexual Offences Act in 2006 and the Code was thus no longer applicable. The court convicted the appellant on the alternative count and retained the sentence of 14 years.

5. As stated earlier, this is a second appeal but it does not challenge either of the convictions. The appellant in his "Grounds of Appeal" which he drew up in person, challenged the sentence for being excessive and prayed for reduction on the ground that he had undergone rehabilitation in prison and will henceforth obey the laws of this Republic. However, *Section 361* (1) of the Criminal Procedure Code aforesaid, declares that the severity of sentence is a factual matter. On a second appeal, this Court may only consider issues of law. As the Court stated in Chemagong -vs- Republic (1984) KLR 213 at page 219:-

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja- vs- Republic 17 EACA 146)."

On that premise, we would have summarily dismissed the appeal as Mr. Nderitu urged us to do.

6. However, during his oral submissions, the appellant raised a pertinent issue which in our view relates to the legality of the sentence. In many decisions of this Court, it has been stated that the court is at liberty to interfere with the legality of sentence if it is called to question on second appeal. The Court did so in Fred Michael Bwayo vs Republic – Criminal Appeal No.

130 of 2007 and Lazaro Kundu Simiyu vs Republic – Criminal Appeal No. 8 of 2007 (ur). In Amolo vs Republic (1991) KLR 392 at p. 397 this Court stated:-

"As a matter of law we have, as learned Principal State Counsel submitted, jurisdiction to restore a sentence which has been altered on wrong principles which, we are satisfied, occurred in this case. To do so does not, we think, infringe the principles set out in section 361 (1 (a) of the Criminal Procedure Code, which otherwise takes away our powers to reduce a sentence which is manifestly too severe."

7. The submission by the appellant was this: he was arrested on 25th October 2007 but remained in custody throughout his trial until he was convicted on 26th July 2010. That is a period of about three years. That period was never considered by the trial court or the first appellate court when meting out the sentence. He therefore urged us to take that period into consideration and at least factor it into his sentence of 14 years. Is this a valid submission?

8. The repealed section of the Penal Code under which the trial court purported to convict and sentence

the appellant provided in relevant part as follows;

"Any person who—

(a) has carnal knowledge of any person against the order of nature;

(b) ....

(c) ....

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...."

(Emphasis added).

The conviction by the trial court was for the main and more serious offence and the sentence of 14 years was commensurate to the gravity of that offence as spelt out under the proviso to the section. In meting out the sentence, the trial court did not consider the extenuating circumstance that the appellant had already spent three years in custody during his trial. This was a requirement of the proviso to *Section 333 (2)* of the Criminal Procedure Code which states as follows:

"Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

We can only speculate what the court would have decided if it had considered that factor.

9. On appeal, the High Court correctly set aside the conviction on the main count and entered a conviction for the lesser offence under *Section 11 (1)* of the Sexual Offences Act which provides as follows:-

"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

10. The court did not revisit the sentence although the nature of the offence had changed. It simply said the term of 14 years was within the minimum provided for in the section and left it intact. The court did not direct its mind to the changed nature of the offence or the mitigating circumstances in the case and once again, it was left to speculation.

11. We think for ourselves that the two courts below had a discretion to exercise in assessing the sentence in this matter. The exercise of that discretion is a judicious process which must accord with the law. Sentencing is, of course, one of the crucial rights to a fair trial which our Constitution jealously guards. *Article 50(2)(p)* provides as follows:-

"50. Fair hearing

1. ....

2. Every accused person has the right to a fair trial, which includes the right –

....

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing....”

Those provisions of the Constitution were in existence when the High Court considered the first appeal and delivered the judgment on 6th June, 2012.

12. Our view, in these circumstances, is that the two courts below erred in principle in assessing the sentence and this Court is thus entitled to interfere. The minimum sentence for the offence under the alternative count is 10 years imprisonment. The time spent in custody was a relevant factor to consider but it was not considered. We set aside the sentence of 14 years and substitute therefor a sentence of 11 years. To that extent only does this appeal succeed, but is otherwise dismissed.

Dated and delivered at Nairobi this 10th day of October, 2014.

P.N. WAKI

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JUDGE OF APPEAL

J.W. MWERA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUY REGISTRAR