



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, WARSAME, MURGOR JJA)

CRIMINAL APPEAL NO. 126 OF 2010

BETWEEN

SAFARI MATANO LUMBAO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Ojwang, J) dated 21st January, 2010

in

H.C.CR.A. NO. 450 OF 2007)

JUDGMENT OF THE COURT

The appellant, **SAFARI MATANO LUMBAO**, was tried by the Senior Principal Magistrate's court on a charge of an unnatural offence contrary to **Section 162 (a)** of **the Penal Code**. The particulars of the offence were that on 24th September 2006, at Ongata Rongai in Kajiado District, within the Rift Valley Province, the appellant had carnal knowledge of **R.C.S.** against the order of nature.

Briefly, the facts of the case were that on 24th September 2006 at Ongata Rongai, the complainant, aged four was in the house, while her mother was in the bathroom located outside the house. On hearing the child cry, the mother went to check, and found the complainant without her under pants, bleeding and in pain. The complainant cried out the name of "**Matano**", the appellant who had been present, but had seemingly disappeared. The mother, with the assistance of neighbours, searched for the appellant, arrested him, and handed him to the police. Thereafter, the police commenced investigations and recorded the relevant witness statements and charged the appellant with the offence.

The appellant was arraigned in court for a plea on 29th September 2006. Before the plea was taken, the substance and every element of the charge was stated to the appellant by the Court in a language that he understood, which was English/Kiswahili interpretation whereupon the appellant when called upon to plead replied:-

"True".

The facts were read out to him by the prosecution, to which upon being asked whether the facts were correct, the appellant confirmed that the facts were indeed correct. The learned trial magistrate proceeded to enter a plea of guilty, and convicted the appellant on his own plea. The appellant gave no statement in mitigation, and the court sentenced him to 20 years imprisonment with hard labour.

Being dissatisfied with the sentence of the trial court, the appellant appealed to the High Court. In his judgment, *Ojwang J*, (as he then was), dismissed the appeal, and upheld the conviction and sentence.

Being further aggrieved by the decision of the High Court, the appellant filed a second appeal for the reduction of sentence which is before us.

In his appeal against the sentence, the appellant stated that he would rely on the submissions dated 24th October 2013, wherein he confirmed that he had pleaded guilty to the offence; that he had been convicted to serve a sentence of 20 years with hard labour; that he has been in prison for seven years, and was remorseful of the offence committed; that he suffered from voluntary intoxication at the time he committed the offence, and though he was cognizant that this was not a defence in the circumstances, he pleaded that the Court considers that he did not have any previous criminal record; that he had made significant effort towards complete rehabilitation, and therefore prayed that the Court reduces his sentence.

In her submissions, *Ms. Nyamosi*, Assistant Director of Public Prosecutions, opposed the appeal, and contended that an appeal could not lie to this Court unless it is on a matter of law, or if the sentence was irregular or unlawful; that the question of severity of sentence was a matter of fact; that the appellant had pleaded guilty to the offence and had been convicted; that the High Court had taken into consideration the age of the complainant, who at the time was 4 years old, and dismissed the appeal. Counsel urged this Court to similarly dismiss the appeal.

The appeal before us is in respect of the severity of the appellant's sentence. With regard to the question of severity of sentence, **Section 361 (1) (a)** of the **Criminal Procedure Code** provides:-

“A party to an appeal from a subordinate court my 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 a sentence, except where a sentence has been enhanced by the High Court.....”***

Relying on this provision, in the case of ***PAUL TANUI VS REPUBLIC (2010) eKLR***, this Court stated thus,

“Second appeals to this court are on a point of law only and the severity of sentence is expressly a matter of fact (see Section 361 (1) (a) of the Criminal Procedure Code). It is clear that an appeal against the severity of the sentence as opposed to the legality of the sentence is not maintainable.”

What is before us therefore, is in respect of the severity of the appellant's sentence. This is not a question of law, but a matter of fact. In terms of **Section 361 (1) (a)**, this Court has no jurisdiction to interfere with the sentence of the Courts below, on a matter of fact.

However, when we consider the relevant sentencing provisions, **Section 162 (a)** of the Penal Code states:-

“Any person who -

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

... 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;”

The appellant was charged and convicted for committing an unnatural offence against a child aged 4 years. It means the issue with or without consent cannot arise. **Section 162(a)(i)** provides for a specific and exclusive mandatory sentence. In our view where a statute provides for a particular mandatory sentence, the court has no jurisdiction to met out another sentence. **Section 162(a)(i)** omits the discretionary powers of the court, hence the jurisdiction is mandatory or restrictive in nature. In this regard, the only lawful sentence that could be meted out for the offence, the appellant committed is twenty one (21) years imprisonment.

From the record, the appellant pleaded guilty to the offence, upon which the trial court convicted and sentenced the appellant to twenty (20) years with hard labour. On appeal the High Court upheld the conviction and sentence, and found that the appellant raised no valid grounds in law to challenge the conviction based on his own plea of guilty.

In our view, the sentence meted out was contrary to the mandatory provisions of **Section 162(a)(i)** which provides for twenty one (21) years, while there is no provision for hard labour. Therefore, in so far as the trial court and the High Court failed to sentence the appellant in accordance with the mandatory provisions of **Section 162(a)(i)**, we find the sentence to be unlawful.

We consider that it is incumbent upon us to bring the sentence within the requirements of **Section 162(a)(i)** and enhance the sentence to twenty one (21) years imprisonment with no hard labour.

As a consequence, we set aside the sentence of twenty (20) years imprisonment with hard labour, and enhance it to twenty one (21) years with no hard labour. It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd day of NOVEMBER, 2013.

D.K. MARAGA

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JUDGE OF APPEAL

M. WARSAME

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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.

DEPUTY REGISTRAR