



**IN THE COURT OF APPEAL
AT NAKURU**

CORAM: GICHERU, C.J., O’KUBASU & AGANYANYA, J.J.A.

CRIMINAL APPEAL NO. 28 OF 2006

BETWEEN

FRANCIS ODINGI APPELLANT

AND

REPUBLIC RESPONDENT

**(An appeal from the conviction & sentence of the High Court of Kenya at Kericho (Apondi, J)
dated 28th June, 2005**

in

HCCRA NO. 10 OF 2003)

JUDGMENT OF THE COURT

Francis Odingi, the appellant was charged in the Principal Magistrate’s court at Kericho with the offence of committing an unnatural offence, contrary to **Section 162 (a) of the Penal Code**. The particulars of the charge were that on the 18th day of October, 2002, in Kericho District of the Rift Valley Province, he had carnal knowledge of **M.O** against the order of nature.

When the appellant was taken to court on 24th October, 2002, he admitted the offence by pleading guilty to the charge. Then Inspector of Police Okila, who was conducting the prosecution case, narrated the facts which gave rise to the charge. The appellant replied:

“Maelezo ni ya ukweli. - The particulars are correct.”

The learned Senior Resident Magistrate (Ombaye) then convicted the appellant on his own plea of guilty. The appellant then mitigated as follows:

“Mimi ni mtoto wa shule. – I am a student.”

The learned Senior Resident Magistrate considered the mitigating circumstances and sentenced the appellant to 6 (six) years imprisonment. His appeal to the superior court was dismissed save that the learned Judge (Muga Apondi J) enhanced the sentence from 6 (six) to 14 (fourteen) years imprisonment. He appealed to this Court in a Memorandum of Appeal filed herein and which had 9 grounds all referred to as grounds of mitigation. However, when he appeared before us on 22nd February, 2011, the appellant said he was satisfied with the conviction but pleaded for the reduction of the

sentence. Mr Omwega, learned Principal State Counsel opposed the appeal stating that although the sentence provided for the offence was 21 years, the appellant was only handed 14 years. We note this is the maximum sentence provided under **Section 162 (a) of the Penal Code**.

Section 354 (3) (iii) of the Criminal Procedure Code, Chapter 75, Laws of Kenya provides:

“(b) In an appeal against sentence the High Court can increase or reduce sentence.”

However, **Section 354 (6)** specifically provides that:

“6. Nothing in sub section (ii) shall empower the High Court to impose a greater sentence than might have been imposed by the court which tried the case.”

The charge facing the appellant was triable by the learned Senior Resident Magistrate. The sentence provided for the offence is 14 (fourteen) years, but the learned magistrate sentenced the appellant to 6 (six) years imprisonment. He was aware and recorded that the appellant was a first offender and other mitigating circumstances and this is why he handed down 6 (six) years imprisonment. This was a discretionary function and it is our view that since the Attorney General had not applied for enhancement of the sentence, there were no compelling reasons for the learned Judge to enhance it as he did.

In the circumstances, we allow this appeal to the extent that the appellant will serve the 6 (six) years sentence imposed by the learned Senior Resident Magistrate on 24th October, 2002. This will be the order of the Court.

Dated and delivered at Nakuru this 24th day of February, 2011.

J. E. GICHERU

CHIEF JUSTICE

E. O. O’KUBASU

JUDGE OF APPEAL

D. K. S. AGANYANYA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR