



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 27 OF 2020

JUMA KIGOJO SAIDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Nyawade for the appellant

Mr. Mwangi for the state

J U D G E M E N T

The appellant was initially faced with three counts. In Count one, he was charged with robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The charge sheet alleged that on the 28th day of September 2015, at Mwangutwa area in Rabai Sub-County of Kilifi County with another not arraigned before the trial Court robbed AHJ of Kshs. 650/=, National identity card no. xxxx and at the time of such robbery used actual violence to the complainant.

In the second Count, the appellant was faced with the offence of committing unnatural offence contrary to section 162(a) of the Penal Code. The charged encapsulates that on the same date and place of the alleged robbery with violence, the appellant unlawfully and forcefully had carnal knowledge of the complainant against the order of nature.

In Count three, the appellant was charged with the offence of malicious damage of property contrary to section 339(1) of the Penal Code by willfully and unlawfully destroying a black t-shirt being the property of the complainant valued at Kshs. 250/=.

The appellant pleaded not guilty to all the offence levelled against him by the prosecution. The matter proceeded to full trial after which the Learned Magistrate **Stephen K. Ngii SRM**, acquitted the appellant of the charges of robbery with violence and malicious damage to property but however convicted him of the offence of committing unnatural offence contrary to section 162(a) of the Penal Code. After having considered both the mitigation by the appellant and the aggravating circumstances of the matter, the Learned Magistrate sentenced the appellant to five (5) years imprisonment.

The appellant was dissatisfied by both the conviction and sentence, and filed this instant appeal whose memorandum of appeal is dated 3rd August 2020. The grounds of appeal as follows:

- 1. That the Learned Trial Magistrate erred in Law and in fact in holding that the offence of Committing Unnatural Act Contrary to Section 162(a) of the Penal Code had been proved by the prosecution beyond reasonable doubt against the appellant.***
- 2. That the Learned Trial Magistrate erred in Law and in fact in convicting the Appellant of the above offence while the prosecution had not proved their case to the required standard of proof beyond reasonable doubt.***
- 3. That the Learned Trial Magistrate erred in Law and in fact in failing to properly direct himself on the necessary ingredients of the offence of Committing an Unnatural Act.***
- 4. That the Learned Trial Magistrate erred in Law and in fact in making such findings without any proper basis and/or evidence howsoever.***

5. That the Learned Trial Magistrate erred in Law and in fact in meting out a highly excessive sentence in the circumstances of the case.

6. That the Learned Trial Magistrate erred in Law and in fact in failing to make proper consideration of the appellant's Defense.

The Evidence

The first prosecution witness was the complainant who testified as **(PW1)**. He told the trial court that on the material date, a mob of about seven people came to his work station and demanded to have a word with him. They forcefully ordered the complainant to go with them, which demand he was hesitant to heed. **(PW1)** alleged that the appellant struck him with a bottle on the head and proceeded to bundle him into a matatu which took him to a certain house. He was instructed to sit down. The complainant asserted that the appellant made several calls and many people came shortly afterwards.

He further stated that the appellant and his colleagues lifted him up, tore his shirt in the process and seized his wallet which had Kshs. 650/=. They proceeded to force him to pull down his pants after which they went on to commit unnatural offence in turns against him. He asserted that the appellant made a phone call to his wife and told the accused to speak to and tell her that he was being sodomized because of her.

He stated that certain people came to his aid and banged the door after having heard his screams. That a certain lady managed to open the door and told his captors that they were perpetrating an offence. He also told the court that at that time the appellant was looking for a pliers to pull his private parts. After having been rescued by the members of the public, the complainant proceeded to Rabai Police Station. He asserted that the appellant's wife also came to the police and explained what had transpired. He also

The appellant produced the treatment notes and a P3 form filled at Mariakani Sub-district hospital where he went for treatment pursuant to the commission of offence. The same was marked as MFI-2 and 1. He also produced torn t-shirt that was torn during the incident which was marked as MF1-3. The incident happened in broad day light.

(PW2), Kwekwe Kazi Chagwa testified that she heard of the dispute between the appellant and the complainant after which she visited the place where she found a multitude of about 30 people. That there was a house within which the complainant, the appellant and another were inside. She found the complainant in distress with a torn t-shirt on. She stated that the complainant alleged that the accused had threatened him. She confirmed that the exhibit marked as MFI-3 was indeed the t-shirt that the complainant was wearing on the material day. She identified the appellant as one of the two suspect which were in the house and that they were both well known to her.

(PW3), NO. 6750 Corporal Simon Mureithi testified that the complainant came in a group of people on the material day. He alleged that he had been robbed and sodomized. He had lost Kshs. 650 and a national identity card. Suspects were identified which he went ahead to apprehend. **(PW4), the Clinical Officer Barrington Kyalo** stationed at Mariakani who examined the complainant testified before the trial court as PW4. He testified that the complainant had complained that he had been sodomized by the appellant and his colleague. Further that the complainant was wearing a black torn and muddy T-shirt. His left leg was swollen and painful. Further examination on his anal orifice which showed that he had lacerations in the anus. He had blood stained faeces on the buttocks. He confirmed that the complainant had been sodomized. He treated the complainant, filed the P3 form which he produced before court as exhibit PEX-1 and the post rape case forms marked as PEX-2.

After the close of the prosecution case, the Learned Trial Magistrate found the appellant with a case to answer. He was therefore placed on his defence. The appellant testified as **(DW1)** and he denied all the charges levelled against him. He claimed that the complainant had a grudge with him which started after he had found him with his wife. He further claimed that the complainant bragged that he would use money to ensure that he is thrown into jail so that he can move on with his wife. He maintained that the charges are trumped up.

Submissions

On the allegation that the appellant and his colleague took some items from the complainant's pocket, the appellant contends that the complainant has not given evidence of the actual person who took the said items and that he did not demonstrate details as regards possession of any money on the said date.

On the medical evidence led by the prosecution to prove that the complainant was indeed sodomized, the complainant submitted that **(PW4), Barrington Charo** the Clinical Officer at Mariakani Sub County Hospital, stated that 'examinations revealed that the patient had been sodomized.' But he did not adduce any further evidence to demonstrate that it was actually the appellant person who sodomized the complainant.

It is the appellant's humble submission that the evidence tendered by the prosecution is weak, circumstantial and hearsay evidence. Further that they did not prove their case to the required standard. **(PW2)**, having attended the scene of the alleged crime as it was allegedly happening, admitted to the court that she did not enter the house where the alleged offence was being carried out and it therefore follows that she did not witness the crime in question. She says that there were three people inside the house. He further referred to (Page 6 Line 9 of the Record) where **(PW2)** stated that "The wife to the 14 Accused then came and asked why he had sodomized the complainant." It is therefore argued that **(PW2)** did not give credible evidence of seeing the appellant sodomizing the complainant and so it is unclear if the accused committed the offence.

The appellant argues that the prosecution was not meticulous in its duty to call material witnesses since it failed to call the appellant's wife to produce evidence before the trial court. The appellant stated that as per the lower court's record, she is the only person who could have confirmed that complainant was sodomized by the Appellant and his colleague, as she allegedly received a phone call from the Appellant while the act was in motion (see Page 5 Line 5 of the Record). Further, the complainant stated that (Page5 Line 10 of the Record), they then proceeded to Rabai Police Station. The wife to the appellant then came to the police station and explained what had transpired. PW3 the

investigating Officer did not testify as to the information he got from the complainant's wife which further weakening the prosecution's case. It the appellant's humble submission that, because of the phone call alluded to by the complainant in evidence, the appellant's wife was the closest person able to confirm if at all the complainant as sodomized by either the Appellant or his co-accused person.

The appellant cited the case of **Patrick Mutwiri Gikonyo v Republic Nyeri Criminal Appeal No. 15 of 2015**, where **Hon Jairus Ngaah, J** opined that,

“It follows that in a situation where there is an eye witness to a sexual offence, such as was the case in the trial against the appellant, there was no reason why the prosecution should not have called her, if not for anything else, to dispel any doubt on the complaint against the appellant. It is for this reason that I am of the view that the omission call N who is alleged to have seen the complainant being sexually assaulted cast doubt on the complainant's evidence. The court went on to allow the Appeal and quash the conviction and sentence of the Appellant.”

The appellant therefore submitted that the appellant's wife was the only person able to factually confirm if at all the complainant was sodomized at the house as alleged and, if so, by which person. Failure to call her as a witness fatally weakened the prosecution case.

The appellant humbly submitted that the prosecution failed to prove its case to the required standard and, as such, the conviction and sentence that followed is bad and unsustainable in law. Further that for an offence of such gravity, it was vital for the prosecution to lead evidence that positively identifies the Appellant as the one who allegedly sodomized the complainant, seeing as there were three people in the room at the material time and the Complainant's allegation that the accused persons sodomized him is not supported by any shred of credible evidence.

The prosecution opposed the appeal. It argues it proved its case beyond any reasonable doubt. That the evidence adduced by the 4 prosecution witnesses is unshaken. Further that it was proved that the Identification of the Appellant was watertight owing to the time he had interacted with the Complainant prior to and during the commission of the offence. He also testified that he was sodomized by the appellant.

The prosecution further enunciated that there was corroboration between the events that led to the commission of the offence, the Medical Evidence and afterwards the testimony (PW4) who was the clinician and who examined the appellant clearly stated that there were lacerations on the in the anus and blood stained faeces on the buttocks of the complainant.

Further the prosecution of the view that the ingredients of the offence of Committing an Indecent Act were clearly brought out and the Sentence meted out was not excessive

Section 162(a) of the Penal code states thus

Any person who-

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

The prosecution contends that the ingredients here, in the charge sheet and as enunciated from the evidence adduced have been clearly brought out. The language used in the charge sheet is very simple and clear. The appellant was also represented throughout his trial and no such issue was raised by his learned counsel. The Counsel for the state cited the case of **Meshack Kitonga v Republic (2014) KLR** in support of its view.

Further that a sentence of 21 years is provided for if no consent is obtained from the complainant as was in this case. Counsel's view is that the appellant ought to have been sentenced to imprisonment upto 14-21 years but the court was extremely lenient to him. Counsel gave an example by citing the case of **Adhan Nassir v Republic (2015) eKLR** in which the court of appeal dealt with this issue. It is Counsel's humble submission that this petition is a misuse of the court process and precious judicial time, it is hapless and presumptive and that the Petitioner's interpretation of the constitution is also self-serving, misleading and misconceived and as such the petition should be dismissed.

Analysis and Determination

As this is a first Appeal, I'm obliged to subject the evidence on record to my own evaluation and assessment and come up with an independent decision on the issues raised before me. I shall also give due regard to the findings and determinations arrived at by the Learned Trial Magistrate who had the added advantage of physically seeing and listening to the witnesses testify before him. (See **OKENO V R (1972) EA 32**).

I have re-evaluated the evidence on record. The appellant has appealed to this court on several grounds. The following seems to be the issues for determination from the appellant's grounds of appeal;

(a) Whether the prosecution proved the charge of committing an Unnatural Offence to the required standard of proof beyond reasonable doubt.

(b) Whether the evidence adduced by the prosecution in support of its case reveals any glaring gaps and inconsistencies such that the trial court overlooked the same and entered a conviction without any proper basis.

On whether the offence of committing an Unnatural offence was proved to the required standard of proof beyond reasonable doubt, the appellant is adamant that the same was not proved. The Appellant faced a charge Contrary to Section 162 (a) of the Penal Code that provides thus:

“Any person who—

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

or

(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; 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”.

According to the Black’s Law Dictionary 4th Edition, ‘carnal’ means of the body; relating to the body; fleshly; sexual. ‘Carnal knowledge’ is defined as the act of a man in having sexual bodily connection with a woman. Carnal knowledge and sexual intercourse hold equivalent expressions.

The phrase against the order of nature has been judicially defined in **Gaolete v. State [1991] B.L.R. 325** where the court had this to say on ‘carnal knowledge:-

“Carnal knowledge” is not defined in the Penal Code, but its accepted meaning is “sexual intercourse”. There must be penetration, however slight and emission of semen is not necessary. With particular reference to the offence with which the appellant was charged (otherwise known as sodomy), penetration per anum must be proved. The other party involved in the intercourse may be a man or a woman. It is the penetration through the anus that makes the intercourse “against the order of nature” and therefore provides the other element of the offence.’ (Emphasis added).

A reading of section 162 (a) of the Penal Code interprets the provisions under section 2 of the Sexual Offences Act on what constitutes penetration. For purposes of sexual intercourse or carnal knowledge section 2 defines genital organs to include the whole or part of the male or female genital organs and also the anus. Whereas penetration means the partial or complete insertion of the genital organs of a person into the genital organ of another person.

For the prosecution to prove the offence of committing an unnatural offence in the circumstances of this matter, evidence must lead to show that there was penetration of the complainant’s anal orifice by another man without consent and the positive identification of the appellant as the perpetrator of the offence. In the instant matter, the complainant told the trial court that sodomized interchangeably by the appellant and his colleague. His testimony was corroborated by the medical evidence tendered by **(PW4)**, the Clinical Officer **Barington Kyalo** stationed at Mariakani. He averred that he examined the complainant. His findings were that the complainant’s left leg was swollen and painful, examination on his anal orifice showed that he had lacerations in the anus and he had blood stained faeces on the buttocks. **(PW4)**, confirmed that the complainant had been sodomized. There was overwhelming evidence of penetration of the complainant’s anal orifice. In that regard I find no fault in the trial court’s findings on this limb.

On whether the appellant was positively identified as the perpetrator of the alleged offence, the testimony of the complainant was that it was the complainant and his colleague who sodomized him in turns. The evidence of **(PW2)** confirms that the appellant was one of the persons who locked themselves in the house where the offence took place. The offence was committed in brought day light and it was witness by many members of the public. From the circumstances of the case, it seems to me that the offence was committed to settle a score. The identification was done by recognition. Thus, the chances of mistaken identity were drastically reduced.

As regards the question of contradictions and inconsistencies in the prosecution case as alleged by the appellant in his submissions, I find the evidence on the offence of committing unnatural offence consistencies and bereft of any gaps capable of creating any considerable doubt in the mind of the court. It is therefore, this court’s finding that the trial court properly convicted the appellant.

The conviction was sound, and I uphold it.

I also uphold the sentence.

The appeal is dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. The appellant
2. Mr. Mwangi for the state
3. Mr. Nyawade for the appellant