REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.30 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. H.M. Nyaga – CM delivered on 10th February 2017 in Makadara CMC. CR. Case No.1360 of 2015)

JOSEPH MULINDI MUCHOCHO……APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellant, Joseph Mulindi Muchocho was charged with the offence of **committing an unnatural act** contrary to **Section 162(a)** of the **Penal Code**. The particulars of the offence were that on diverse dates between 8th January 2015 and 20th March 2015 at [particulars withheld] Estate, Industrial Area within Nairobi County, the Appellant had carnal knowledge of H M against the order of nature. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged and sentenced to serve fifteen (15) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court challenging his conviction and sentence.

The Appellant filed several grounds of appeal challenging his conviction. He was aggrieved that he had been convicted on the basis of insufficient and untrustworthy evidence of the prosecution witnesses. He faulted the trial magistrate for relying on incredible evidence that did not establish his guilt to the required standard of proof. He took issue with the fact that the trial had been irregularly conducted in that *voire dire* was not conducted to establish the complainant's suitability to testify under oath. The Appellant faulted the trial magistrate for convicting him on the charge yet penetration had not been established to the required standard of proof. It was the Appellant's assertion that critical witnesses were not called to testify in the case and therefore the trial court ought to have found that the prosecution had not established its case to the required standard of proof. He was finally aggrieved that his defence and later his mitigation had not been considered before the trial court convicted and sentenced him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the custodial sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow his appeal. Ms. Akunja for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence to connect the Appellant to the offence that he was charged with. In the circumstances, she urged the court to find that the Appellant's appeal lacked merit and should be dismissed. This court shall revert to the arguments made on this appeal after briefly setting out the facts of the case.

The complainant in this case was at the material time aged 15 years. His birth certificate which was produced as ***Prosecution's Exhibit No.1*** indicated that the complainant was born on 12th June 2000. According to the testimony of PW2 J S M, the father of the complainant, the complainant mentally challenged since birth. He did not do well in his KCPE examinations. He therefore did not continue with secondary education. PW2 testified that due to his condition, the complainant had the habit of disappearing from home. After disappearing, he would later be found in his friends' houses. During this particular period, the complainant disappeared for three months until when PW2 and PW4 D S, the mother of the complainant were told of his whereabouts.

The complainant testified that during the period that he had disappeared from his home, he was staying with the Appellant. He testified that the Appellant used to sodomize him. The incidents of sodomy were perpetration on different dates. The Appellant disputes this version of events by the complainant. He testified that he hosted the complainant when the complainant approached him to given accommodation. The complainant made this request when he met him at his place of work. He acceded to this request because he sympathized with the complainant's plight. However, their relationship soured thereafter because the complainant made disappearing acts and at times used to come to the house late at night. He told the complainant to go away. It was at that point that the complainant went back to his parents.

The complainant told his parents that he had been sodomized by the Appellant. The complainant was taken to Mathare MSF Clinic where he

was examined. On physical examination, no visible injuries were seen. The anal examination revealed no abnormality nor was any injury seen. The post rape form that was filled also indicated that the complainant had no injury in the anal area. The complainant was later seen by Dr. Maundu of the Police Surgery. He noted no significant abnormality in the complainant's anal area to support the complainant's assertion that he had been severally sodomized by the Appellant. It was clear from the evidence adduced by the prosecution, that the trial court essentially relied on the sole evidence of the complainant to convict the Appellant. The testimonies of PW2 and PW4 were not primary evidence but secondary evidence. PW2 and PW4 narrated to the court what they had been told by the complainant. The trial court weighed the evidence of the complainant and contrasted it with that of the Appellant as adduced in his defence and made the finding that the complainant version of events was the truth hence the conviction.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced during trial so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs-Republic [1987] KLR 19 at P.22**:

> **"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".**

The issue for determination by this court is whether the prosecution adduced sufficient evidence to establish the charge that was brought against the Appellant of **committing an unnatural offence** contrary to **Section 162(a)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

For the prosecution to establish the charge of committing an unnatural offence, it was required to establish that the Appellant had sexual intercourse with the complainant against the order of nature. Penetration must be established. In the present appeal, the complainant testified that he had been severally sexually assaulted against the order of nature. The complainant stated that the Appellant had anal sex with him on several occasions. Medical examinations undertaken did not establish or were not conclusive that indeed the complainant had been sexually assaulted. The complainant was examined by two different medical officers who came to the conclusion that there was nothing on examination that corroborated the complainant's claim that he had been so sexually assaulted. The trial magistrate, in assessing the evidence adduced, chose to believe the testimony of the complainant and ignored the medical evidence that was presented to the court.

In his judgment, the learned magistrate stated as follows:

> **"The medical evidence in form of a Post Rape Care Form (Exhibit 3) medical certificate (Exh.2) and a P.3 form (Exh.4) did not give a definite indication of defilement. However, the history given to the medical officer at MSF is consistent with the evidence tendered in court by the complainant. It alleged that the accused had been sodomizing the complainant for a long time. This may explain why the injuries were not noted on his anal area."**

On re-evaluation of this conclusion by the trial court, this court is not satisfied that that court treated the medical evidence in the manner that ought to have been treated. The prosecution produced the medical evidence in a bid to corroborate the testimony that was adduced by the complainant that he had been sexually assaulted. The medical evidence did not establish that fact. The history given by the complainant to the medical officials cannot form a basis for the trial court to reach the conclusion that such history corroborates the complainant's evidence.

Penetration is a matter of fact. *Did it happen or did it not happen?* In this case, medical evidence disproved the complainant's assertion that he had been sexually assaulted by the Appellant. Taken in the context that the complainant was a person with mental disability, it is not beyond the realm of conjecture that the complainant may have invented the story that he had been sodomized by the complainant to gain sympathy from his parents and explain away his truancy from home in the period that the sexually assault is alleged to have occurred. The evidence that the Appellant gave his defence to the effect that he hosted the complainant in his house as a good-Samaritan may well be the truth.

The upshot of the above reasons is that this court holds that the prosecution failed to prove that there was penetration to the required standard of proof beyond any reasonable doubt and for that reason, the appeal is allowed. The Appellant's conviction is quashed. He is acquitted of the charge. The sentence imposed upon him is set aside. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF APRIL 2018

L. KIMARU

JUDGE