



IN THE HIGH COURT OF KENYA

AT KAKAMEGA

(CORAM: CHERERE -J)

CRIMINAL APPEAL NUMBER 35 OF 2013

KELVIN AWINJA MATEKWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number SO 1032 OF 2012 in the

Chief Magistrate's Court at Kakamega delivered by Hon. C. Kendagor (SRM)

on 6th February, 2013)

JUDGMENT

Background

1. **KELVIN AWINJA MATEKWA**, the appellant herein has filed this appeal against conviction and 14-year sentence on a charge of unnatural offence contrary to section 162(a) of the Penal Code Chapter 63 Laws of Kenya allegedly committed against **E.A.Y** on 20th May, 2012.

The prosecution's case

3. The prosecution called 6 witnesses in support of the charge. **PW1, E.A.Y**, the complainant herein stated that he was 14 years old. He recalled that on 20th May, 2012, his mother sent him to deliver milk to the appellant and appellant offered him a cup of tea which he took and lost partial consciousness after which the appellant had carnal knowledge with him against the order of nature. That he later regained consciousness and went away and reported the matter to one Elijah who in turn informed his mother. That the appellant was immediately arrested by members of public and handed over to the police while complainant was taken to hospital. **PW2** Phanice Andisa Ayisi, the complainant's mother upon receiving complainant's report escorted him to hospital where the doctor confirmed that he had injuries in his anus. **PW3 Elijah Mutesa Motokaa**, stated that on the material date about vv1.00 pm, he met complainant crying and he disclosed that he had been defiled by the appellant. That he called **PW2** and reported the matter to him and together with **PW4** Roger Lihanda Isabwa arrested and escorted the appellant to the police station. **PW5 Bertha Otieno**, a clinical officer stated that on 21.5.12, she filled the complainant's P3 form (PEXH. 2) on the basis of treatment notes dated 20.5.12 which showed that complainant had wetness and bruises on the anal orifice. **PW6 PC Moses Mungai**, the investigating officer stated that he received complainant's report on 20.5.12, re-arrested the appellant on the same date and later caused him to be charged.

4. When put on his defence, the appellant in his sworn defence denied the offence. He also denied that complainant was known to him.

5. *In a judgment dated 6.2.13*, appellant was convicted and sentenced to serve 14 years imprisonment.

The Appeal

6. The conviction and sentence provoked this appeal. In his undated petition of appeal, the appellant raised 5 grounds of appeal which I have summarized into 3 grounds as follows: -

- 1) **That his constitutional right under Article 50 (2)(j) was violated**
- 2) **That the prosecution case was full of contradictions**

3) **That the sentence was harsh and excessive**

7. When the appeal came up for hearing on 7.9.18, the appellant stated that he wished to withdraw the appeal but considering the seriousness of the sentence metted on him and that he was not represented both before the trial court and on appeal, this court in its discretion decided to consider the appeal on the basis of the grounds of appeal.

Analysis and Determination

9. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that:-

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and since the appellant indicated that he wished to withdraw the appeal which this court declined for the reasons stated hereinabove, I will consider the appeal only on the ground and that is whether or not the sentence was harsh and excessive.

11. Section 162 of the Penal Code states: -

Any person who—

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

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her 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; or

12. Appellant was convicted and sentenced to 14 years imprisonment. The maximum sentence under this section is 21 years. In sentencing the appellant to 14 years, the learned trial magistrate observed that although the appellant was a first offender, the offence was committed without the consent of the complainant and found that to be an aggravating factor. The learned trial magistrate's observation was in my considered view just. The sentence imposed by the trial court is lawful.

Determination

13. Having considered this appeal, I am satisfied that the appellant was convicted on very sound direct evidence. The upshot of this is that the appellant's sentence and conviction are upheld. It is so ordered.

DATED THIS 19th DAY OF September 2018

T. W. CHERERE

JUDGE

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 26th DAY OF September 2018

WILLIAM M. MUSYOKA

.....

JUDGE

In the presence of-

Court Assistant - Erick/Polycarp

Appellant - Present

