



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO.486 OF 2010**

*(An Appeal arising out of the conviction and sentence of Hon. M. Kasera - SRM delivered on 31<sup>st</sup> August 2010 in Kibera CM. CR. Case No. 5051 OF 2007)*

G O O.....APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

**JUDGMENT**

The Appellant, G O O was charged with two (2) counts of **committing unnatural offence** contrary to **Section 162(a)** of the **Penal Code**. The particulars of the offences were that on 31<sup>st</sup> July 2007 at *[particulars withheld]* in Ngong, Kajiado County, the Appellant had carnal knowledge of J W, a boy aged twelve (12) years and C M, a boy aged ten (10) years by inserting his penis into their anuses against the order of nature. He was alternatively charged with two (2) counts of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offences were that on the same day and in the same place, the Appellant committed an **indecent act** by placing his male organ (penis) on the surface of the male organ (anus) of J W and C M. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the main charges. He was sentenced to serve seven (7) years imprisonment on each count. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of identification that did not stand up to legal scrutiny. He faulted the trial magistrate for failing to take into consideration the fact that no medical evidence was produced to establish the charges. He took issue with the fact that the trial court had not considered his defence before reaching the determination finding him guilty of the offences as charged. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

Prior to the hearing of the appeal, the Appellant filed written submission in support of his appeal. His advocate Mrs. Omoro made oral submission in further support of the appeal. She stated that the trial court had relied on insufficient and incredible evidence of the complainant. It was the Appellant's case that a

proper analysis of the evidence would have shown that the complainant's evidence had gaps which directly impacted on the credibility of the said complainants. For instance, she submitted that although the complainants had testified that they knew where the Appellant resided, from the testimony of other prosecution witnesses, it was clear that the complainants did not know the whereabouts of the Appellant's house. She further submitted that the evidence adduced by the complainants did not establish penetration. The medical evidence clearly pointed to the fact that although there were bruises in their anuses, no spermatozoa was found.

She wondered why the prosecution did not perform DNA to establish beyond reasonable doubt that it was indeed the Appellant who defiled the complainants. She offered a theory that the bruising seen in the anuses of the complainants could have been caused by a severe case of constipation. She reiterated that the finding of the medical doctor was not conclusive enough to lead the court to the finding that the complainants had indeed been sodomized. Learned counsel submitted that the trial court had ignored the fact that one of the complainants had a wound on his penis. The source of this wound was not investigated. She further submitted that the complainants were seen by another doctor who formed the opinion that they had in fact not been sodomized. In the premises therefore, she submitted that the prosecution had failed to prove its case to the required standard of proof. Learned counsel relied on two (2) cases: **Mumini Athman Mohamed –vs- Republic [2009] eKLR** and **Stephen Nguli Mulili –vs- Republic [2014] eKLR** in support of her submission.

Ms. Aluda for the State opposed the appeal. She submitted that the Appellant used his position of trust as the teacher of the complainants to lure them by enticing them with a sum of Kshs.10/- to commit sodomy with them. She explained that the reason why there were no serious injuries in the anuses of the complainants was because the Appellant lubricated their anuses before sexually assaulting them. In the case of the 1<sup>st</sup> complainant, the incident took place several times before the material day that the Appellant was arrested. She urged the court to disregard the submission made on behalf of the Appellant to the effect that penetration had not been established. She submitted that the testimony of Dr. Muhombe (PW6) was conclusive in that regard. She made a finding that the complainants had indeed been sodomized. She explained that the evidence of the complainants were consistent and were corroborated by the respective testimonies of their mothers. She urged the court to dismiss the appeal as in her view the prosecution had established its case on the charges brought against the Appellant to the required standard of proof.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to a fresh examination with a view to reaching an independent determination whether or not to uphold the conviction of the Appellant. In reaching its verdict, this court is required to take into account the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of witnesses (see **Njoroge –vs- Republic [1987] KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant committed unnatural act with the complainants.

To establish its case against the Appellant, the prosecution was required to establish the three elements that constitute the charge of committing unnatural act against the order of nature: the first element is penetration. The prosecution must establish that the Appellant caused penetration on the anuses of the complainants which is against the order of nature. In the present appeal, the complainants, who were the students of the Appellant, testified that on the material day of 31<sup>st</sup> July 2007, the Appellant separately took them to a toilet which was being used by both students and teachers, ordered them to remove their short trousers, before applying a lubricant on the anuses and then having intercourse with them in the anuses. The complainants testified that after the Appellant was through with them, he gave them each Kshs.10/-.

The complainant's went home and reported the incident to their respective mothers. The mothers, PW3 M W W and PW4 P W N testified that upon being informed of what had transpired they made a report to the police who immediately arrested the Appellant. The police advised them to take the complainants to Nairobi Women Hospital. The complainants were examined at the said hospital on the same day by Dr. Ketra Muhombe (PW6). She noted that the complainants had bruises and tears in their anuses which was

consistent to the complainants being sodomized. The medical reports prepared by Dr. Muhombe were produced as exhibits in evidence. Other medical reports prepared by PW5 Dr. Zephaniah Kamau were also produced. Dr. Kamau saw the complainants on 8<sup>th</sup> August 2007. He was of the opinion that the complainants had not been sodomized.

The Appellant took issue with these contradictory medical evidences which in his view proved that the charges laid against him were indeed contrived. The prosecution submitted that the trial court correctly relied on the evidence of Dr. Muhombe who examined the complainants immediately after the incident had occurred. This is the second element in support of the charge that the prosecution was required to establish. That is, medical evidence to support the claim by the complainants that they had been sodomized. On re-evaluation of this evidence and that of the complainants, this court formed the opinion that indeed the prosecution established, to the required proof beyond any reasonable doubt that the Appellant had sodomized the complainants. The evidence adduced by the complainants was credible and consistent. It was corroborated, firstly, by the testimony of their respective mothers who saw oily substance in the backsides of the complainants upon the complaint being made. Medical evidence supported the complainants' claim. Both complainants had bruises in their anuses which was consistent to being sodomized.

The third element that the prosecution was required to establish is the identity of the perpetrator. Both complainants knew the Appellant prior to the incident. In fact, the Appellant was their teacher. The Appellant also knew the complainants. The complainants testified that it was the Appellant who had sodomized them. The school had other teachers. The complainants did not accuse any teacher other than the Appellant. There cannot therefore be a case of mistaken identity. The complainants' testimony in regard to how they were lured into a toilet before they were sodomized by the Appellant was credible, cogent and consistent. The complainants obeyed the instructions that they were given by the Appellant because they respected him as their teacher. The Appellant was in a position of authority over them. There was no reason for the complainants to implicate the Appellant for something that he had not done. In the premises therefore, upon re-evaluation of the evidence adduced, this court reaches the same finding as the trial court that the prosecution established its case on the charges of committing **unnatural act against the order of nature** contrary to **Section 162(a)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

As regard sentence, the maximum sentence provided under the section is seven (7) years imprisonment. The Appellant should have been charged under the **Sexual Offences Act** where he would have faced a more severe penalty. The Appellant should ride his luck and serve the concurrent sentences of seven (7) years imprisonment. His appeal against sentence is similarly dismissed. It is so ordered.

**DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MAY 2015**

**L. KIMARU**

**JUDGE**