REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 422 OF 2010

A A M ….....…..... …... APPELLANT

VERSUS

REPUBLIC ……..…….....…RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 1081 of 2008 of the Principal Magistrate's Court at Kwale – Hon. Ogembo - PM)

JUDGMENT

A A M hereinafter referred to as the Appellant was Convicted and Sentenced to fifteen (15) years Imprisonment for the offence of unnatural act contrary to Section 162 (a) of he Penal Codee.

The particulars being that:-

> ***"On the 28th day of July, 2009 at [Particulars withheld] in Msambweni – Kwale County he had carnal knowledge of A B against the order of nature".***

The grounds for this appeal are that there was no proper voire dire examination done on the Complainant who was a child of tender years.

Secondly, that the evidence of the Complainant is that nothing ….....happened on him on the day in question.

Thirdly, that the Doctors evidence was contradictory in nature.

The brief facts of this case are that the Compliant is a child of tender years. The trial Court did observe that his age was between 3–5 years old.

The evidence of the child was not of any evidenttiary value.

He told the Court that he do not know the Accused. He did not remember the date of the incident. He further stated that he did not bleed anywhere that day but his mother took him to Hospital.

The mother of the Complainant did testify that the Accused was the father of the Complainant but they never got married and neither were they staying together but she occasionally allowed him access to the child.

Her evidence was that on the 28th day of July, 2009 at about 5:0 p.m. The child arrived home and she bathed and fed him before the Accused arrived and took him away.

Later at 7:30 p.m. when the child returned alone he said that he was feeling pain at the anal region, she checked the anal region of the child and found that it had cuts and was bleeding. She decided to take the child for treatment. She was advised to report the matter to police which she did the following day and a P3 form was filed by a Doctor. The Accused was later arrested and charged with this offence.

The grounds for this appeal are:-

1. **That no Voire dire examination of the child of tender years was carried of tender years was carried out by the trial magistrate before admitting it in evidence. On that issue there is nothing to show that the trial magistrate did rely on the evidence of the Complainant. Indeed there was nothing to rely on as he did give evidence touching on the charges facing the Accused. The trial magistrate had upon examining the Complainant found that he was a very small child. The prosecutor was also on record as stating that the child had problems in speaking.**

PW 4 GRACE NJUGUNA is a clinical officer at Tiwi Health Centre. She produced a P3 form which was filed by a colleague who had been transferred.

The child had been examined on 28th July, 2009 on allegations of sodomy. He had bruises on the anal wall which were tender on touch.

The Accused gave evidence on oath and alluded to differences existing between himself and PW 2 the mother of the Complainant. Among them being the allegation by the child that he had another father.

He further testified that he had enrolled the child in school and was paying school fees but he stopped and the child was chased away.

On the 25th day of July, 2009 he had taken the child for a walk and returned him at 5:00p.m. and handed him over to his grandmother but he was surprised when he was later charged with this offence facing him.

The Appellant alleges that there was in existence a grudge between him and the mother of the Complainant. During cross-examination of the Complainant he did not allude to the alleged grudge and it is an afterthought.

He does not dispute the fact that he had taken out the child for a walk and returned him at 5:00 p.m. and handed him over to the grandmother.

PW 3 who is a neighbour of the Appellant had seen him with the child at 5:00p.m. He bought chips for the child at the Appellants request. The two later headed towards home at about 6:45 p.m.

One and a half hours later it was reported to the Witness that the Appellant had sodomized his son and arrangements were made to take the child to Hospital. He later caused him to be arrested the following day and he was taken to police station.

In the present case nobody saw the Appellant sodomising the child and the evidence against him is largely circumstantial in nature.

In the Court of Appeal case of **JAMES MWANGI –VS- REPUBLIC 1983 KLR (Criminal Appeal No. 33 of 1983)** it was held,

1. **In a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the Accused, the guilt of any**

other person and incapable of explanation upon any other reasonable hypothesis than that of guilt.

2. **In order to draw the inference of the Accused guilt from circumstantial evidence, there must be not other co-existing circumstances which would weaken or destroy the inference.**

The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted onto sustain the Conviction and Sentence of the Accused".

In the present case it is the appellant who had custody of the Complainant. He took him away from the mothers custody (PW 1) at 5:00 p.m. and later returned him.

When the mother checked him upon her arrival in the house at around 7:30 p.m. The child was complaining of pain emanating from her anal orifice and when she checked she saw some blood stains and cuts. Her evidence was corroborative by the Doctors finding which are found in the P3 form which was produced in Court as an exhibit. It showed that the child had bruises on the anal wall and it was tender on touch.

I am satisfied that the appellant had custody of the child from 5:00 p.m. To the time when the mother found him in the house which was around 7:00 p.m. He had the opportunity and he indeed utilized that opportunity to sodomize his son.

I find that the Conviction was safe. As for the Sentence. The offence caries a maximum of twenty one years. In the present case he was Sentenced to fifteen (15) years imprisonment. The Sentence is therefore legal.

The appeal has no merit and its disallowed.

Judgment delivered dated and signed this **21st** day of **March, 2014.**

….....

M. MUYA

JUDGE

21ST MARCH, 2014.

In the presence of:-

Learned State Counsel Mis Mwaura

Thee appellant present

Court clerk Buoro