REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL CASE NO. 414 OF 2013

F. N. K.……APPELANT

VERSUS

REPUBLIC…….RESPONDENT

(Being an appeal against conviction and sentence in the judgment delivered in the Thika Chief Magistrates' Court Criminal Case No. 501 of 2009(Hon. B.A. Owino) on 30th March, 2011)

JUDGMENT

The appellant was charged with five counts of unnatural offences contrary to section **162(a)** of the **Penal Code**; in all the five counts, it was alleged that the appellant had on five different occasions, on diverse dates, had carnal knowledge of R K against the order of nature at [Particulars Withheld], in Kirinyaga district of the central province. Of the five counts, the appellant was found guilty of three counts and was convicted on each of those counts with sentences running consecutively.

Being dissatisfied with the conviction and the sentences, the appellant appealed to this court and in his petition of appeal, he listed eleven grounds of appeal in which he faulted the learned magistrate's decision. Amongst the grounds in the petition was the complaint about duplicity of charges against him; this ground arose from the fact that the appellant was charged with the same offence in five different counts, the only difference being the dates when he is alleged to have committed the offences. It was also contended for the appellant that the there was no sufficient evidence to convict him and that the learned magistrate erred in law and in fact in relying upon contradictory and insufficient evidence tendered by the prosecution to convict the appellant. The learned magistrate was also faulted for failing to consider the appellant's defence and instead shifting the burden of proof to the appellant. Finally, the learned magistrate is said to have erred in law and in fact for sentencing the appellant to five years imprisonment for the three counts with each of those counts running consecutively rather than concurrently.

In order to appreciate the case against the appellant it is necessary to consider and evaluate afresh the entire evidence and the witnesses' testimony at the trial. It is only after this evaluation that this court can make its own conclusion on whether the state proved its case beyond reasonable doubt.

The first prosecution witness, J W K, told the court that on 23rd January, 2009, the complainant, who was then at Kerugoya, called her saying that he wanted to see her urgently. She sent him money for his bus fare and on the same day, the complainant arrived at her place at about 8 pm. In her evidence this witness said that the complainant appeared depressed and when she sought to know his problem, he told her that the appellant had consistently sodomised him. Apparently, the appellant was his employer and in fact this witness had met him, albeit briefly, at Kabati soon after he had employed the complainant.

The witness testified that the complainant lived in the appellant's house and the appellant took advantage of his position as the complainant's host and employer to sodomise him for the period they put up together. This witness reported the incident to the police but the appellant was arrested only after the intervention of a district commissioner after the police were seemingly slow to act. The witness confirmed that the complainant was treated at Thika district hospital and that he was also counselled for trauma.

The complainant and the appellant got to know each other through an advertisement for jobs in a radio advertisement. According to the complainant he heard of an employment opportunity through a local radio station advertisement while he was living with **J W K (PW1)** who was his aunt. In the advertisement, one was asked to send a short message to a particular number and he would be linked to a potential employer. The complainant, being jobless then, sent the text message as instructed and on 16th January, 2009, he received a call from the appellant who told him that he wanted a house help.

After a few phone conversations between them, the appellant and the complainant met at Kerugoya on 18th January, 2009, at the appellant's retail shop. The appellant showed him around his shop and later joined the appellant in his house where he spent the night. With the permission and knowledge of the appellant, the complainant left the following day to collect the rest of his belongings from his aunt's place; he went back to his new employer on 23rd January, 2009.

On the night of 23rd January, 2009, the complainant shared a bed with the appellant and according to his evidence the appellant is said to have sodomised the complainant and threatened to harm him if he ever told anybody of this assault. In order to prove that these were not empty threats, the appellant is alleged to have shown the complainant what looked like police paraphernalia to threaten the complainant that he was a former police man and that he could easily harm the complainant if he told anybody what the appellant had done.

The complainant testified further that on 24th January, 2009, the appellant locked him in his house and only came back at 1 pm. He was again subjected to the same ordeal on the night of 24th January, 2009 and on 26th January, 2009. When he could not take it anymore he called his aunt to rescue him; fortunately, his aunt (PW1) sent him some money to cater for his fare back home. The complainant testified that as a result of what the appellant did to him, his anus was loose and he could not hold his stool. The complainant reported the incident at Kabati police station.

The doctor, who examined and treated the complainant, Dr Ndegwa, from Thika district hospital, did not find anything unusual in the complainant's genitals. The doctor did not make any conclusions on his findings and the P3 report which he filled was admitted in evidence though it was produced by his colleague, Dr Onyimbo Kirama who told the court that he had worked with Dr Ndegwa for some time and therefore he was familiar with his hand writing. Dr Ndegwa himself is said to have been transferred to Kerugoya hospital at the material time.

Police constable Samuel Gatoto from Gaichanjiru police patrol base confirmed that the complaint against the appellant was reported at Kabati police station though the appellant was arrested on 31st January, 2009 by administration police officers attached to Kenol district commissioner's office. This witness investigated the complaint against the appellant and formed the opinion that the appellant should be charged with the offences for which he was convicted.

When the appellant was put on his defence, he gave an unsworn statement to the effect that indeed he had advertised for a job through Kameme FM radio station and that the complainant is one of the people who responded to fill the advertised post. He hired the complainant to help him in his shop. The appellant confirmed that the complainant spent the night in his house but on the following morning he asked him to go back to his home and collect his identity card. When the complainant called three days later to ask whether he could go back and resume his duties, the appellant had hired somebody else although he allowed the complainant back. Indeed he confirmed that he met the complainant at Kabati where he had asked the complainant to wait for him; he gave the complainant Kshs. 200/= for his fare back to

Kerugoya while the appellant himself proceeded to Nairobi.

The appellant testified that he spent the night in Nairobi and only came back to Kerugoya the following day in the night. He also told the court that the complainant left two days after he had arrived. At that time the appellant is said to have been in Nairobi. He was informed of the complainant's disappearance by one Kinyua whom he had earlier hired to work in the same shop where the complainant briefly worked.

As for the police apparel in his house, the appellant testified that the police uniform was given to him by a friend who worked at the police training college. In his view they were not real police uniforms but merely a costume he had used in a concert.

In summary the appellant denied having committed the unnatural offences as alleged and his unsworn testimony summed up the evidence that was presented at the trial.

Section 162 (a) of the Penal Code under which the appellant was charged reads:

162. 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;***

The complainant was an adult who was said to be aged 22 at the time he joined the appellant as his employee. It is clear from the record that both the appellant and the complainant met and interacted at the appellant's house and at his retail shop. The evidence of the circumstances of how they met and why they met was not contradicted; if anything the appellant's evidence was consistent with the complainant's testimony in this particular regard. It is also clear from the record, and it was not denied, that the complainant shared the same roof and a bed with the appellant, at least for the fairly short period that they put together. I have not found anything on record that would suggest that the complainant could have been lying in his evidence.

Apart from the complainant's complaint against the appellant, there is no evidence that there was any bad blood or grudge between them; there is no reason apparent from the record why the complainant would have gone to great lengths to leave his home and join the appellant only because he wanted to frame him. My appreciation of his evidence is that he was a truthful and credible witness and his evidence was not only cogent but that it was not shaken at all.

The complainant's evidence was corroborated by his aunt, **PW1**, who testified that she came to the complainant's rescue and sent him money to escape from the appellant and travel back home. She explained how the appellant appeared traumatised when he finally came back home to the extent that he had to be counselled.

Counsel for the appellant argued that the medical evidence in respect of the complainant's complaint did not prove a sexual assault. This may be true but it must be appreciated that unlike in cases of defilement and rape where medical evidence is not only necessary but can also easily establish penetration which is an important ingredient in these offences, the commission of unnatural offence for which the appellant was charged may not leave such a trail or any sort of injury. Afortiori, **section 162(a)** of the **Penal Code** does not suggest that there must be some sort of injury before such an offence is proved; in other words, while medical evidence may be corroborative, it is not a mandatory component of a crime of unnatural

offence as contemplated under **section 162 (a)** of the **Penal Code.**

It is also noted that the trial court had the advantage, which this court does not have, of seeing and hearing the witnesses first hand; looking at the entire evidence on record, I am unable to see how the learned magistrate would have arrived at any other decision besides the conclusion he came to. In this respect, I am persuaded to follow the court of appeal decision in **Criminal Appeal No. 86 of 2004 Mwita versus Republic** in which it was held that an appellate court should decline to depart from findings of fact unless there are compelling reasons for doing so and that such compelling reasons would be, for instance, that no reasonable tribunal could on the evidence adduced have arrived at such findings or that the findings were patently perverse and therefore bad in law. Although the court was referring to the court of appeal as the second appellate court, I find the conditions upon which it can interfere with the findings of fact by the trial court and the first appellate court to be equally relevant to this court whenever it is evaluating the evidence of the trial court.

One other issue raised by the appellant's counsel was the question of duplicity of charges. The applicant faced five counts of committing unnatural offences. According to the particulars of offence in each of the counts the appellant was charged with, the offences were committed on diverse dates though with the same person at the same place. Duplicity, as understood in law, occurs when two or more charges are evident in one count. When numerous charges are worded in an omnibus manner such that it may be impossible for the accused person to tell what exactly he is charged with and therefore make it difficult for him to plead, for instance, autrefois convict or autrefois acquit, where such defence could be available, then a serious question of duplicity of charges arises. This is not what happened in this case and the appellant's appeal on this ground fails.

The last question to consider is whether the sentences meted out by the learned magistrate ought to run concurrently rather than consecutively. Counsel for the appellant contended that the learned magistrate erred in law when he ordered that the sentences against the appellant should run consecutively. The state counsel, while conceding that the learned magistrate erred in this particular regard, said that the maximum sentence provided for a conviction under **section 162 (a) of the Penal Code** is twenty-one years imprisonment and therefore even if the sentences were to run consecutively the cumulative number of years that the appellant would serve is 15 years which still falls short of the maximum sentence.

The argument by the state counsel sounded attractive but it cannot be a sound reason for the learned magistrate to have imposed sentences running consecutively when they ought to run concurrently. If the learned magistrate, in his wisdom and discretion, thought that the appellant should serve 15 years in prison, for each of the three counts the appellant was convicted of he would have expressly stated so as long as those sentences were to run concurrently.

This question of sentences running concurrently rather than consecutively was considered in case of **Odero Versus Republic (1984) KLR 621** where the High Court (Brar, Mbaya JJ, as they then were) sitting in Nairobi held that if a series of acts are so connected together by proximity of time, community of criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction. Accordingly, the court concluded that, in cases where a person has been charged with and convicted of two or more counts involving the same transaction, the practice is to direct that the sentences should run concurrently. The Appellants appeal against sentence was allowed to the extent that the learned magistrate directed the sentences to run consecutively.

I would take cue from the decision in **Odero's case** and find that the appellant's appeal succeeds on sentence. I would accordingly set aside the sentence to the extent that the sentences meted out against the appellant for each of the counts he was convicted of shall run concurrently rather than consecutively. It is so ordered.

Signed, dated and delivered in open court this 4th day of April, 2014

Ngaah Jairus

JUDGE