



No.331/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 118 OF 2010

JAMES MULANG'A KISUNZAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Senior Magistrate's Court Criminal Case No. 989 of 2007 by Hon. E. Juma Osoro, SRM on 28/5/2010)

JUDGMENT

1. The appellant was charged with the offence of doing an unnatural offence contrary to **Section 162(a)** of the **Penal Code**. Particulars thereof being that on the **10th** day of **September 2007** at about **1.00pm** at [*particulars withheld*] **Village, Utooni sub-location, Kyangwithya West Location in Kitui District within Eastern Province** had carnal knowledge with **J M** against the order of nature.
2. He was tried, convicted and sentenced to serve **life imprisonment**. Being dissatisfied with the conviction and sentence thereof he appeals on grounds that:-
 - i. The learned trial magistrate erred both in law and fact by not considering that evidence adduced by the complainant was not corroborated by medical evidence.
 - ii. The learned trial magistrate erred in accepting the evidence of the prosecution witnesses and convicted without having the appellant's DNA analyzed.
 - iii. The learned trial magistrate erred in law and fact by accepting the evidence of the complainant that he was forced into the "*shamba*" yet the prosecution did not adduce the evidence of that particular third party.
 - iv. The sentence imposed was harsh, cruel and unjust considering circumstances in which the offence is alleged to have been committed.
3. According to evidence adduced at trial, **J M** called as the **4th** prosecution witness though indicated as **PW5**, a minor having been taken through *voire dire* examination by the court, testified that the appellant called him into the house. He threatened to cut him with a panga and told him to undress. He complied. He made him lie on the bed facing downwards. He lay on him, inserted his genitalia into his anus. He felt pain. **G D** indicated as **PW2** instead of **PW5** a child aged 13 years found them in the act. On seeing him the appellant stood with his penis fully erected. He threatened to cut him with a panga if he disclosed the incident to anybody. Later on the complainant confided in his grandmother. The matter was reported to the police. The appellant was arrested.

4. **PW4, Dorcas Wanza Munyao** a clinical officer examined the complainant and found him having sustained injuries in the anus which was tender and bleeding. The nature of injuries sustained were consistent with an object being forcefully inserted into the anus.
5. In his defence the appellant stated that people who arrested him were bitter with him because he accepted to work for the complainant's family for a low wage of Kshs. 2000/= . They had demanded money from him that he could not give as he had sent money home. It was his argument that the complainant's maid and teacher did not testify. In stating that he was framed up he said that having not been examined there was no proof that he committed the offence.
6. This being the first appeal, it is the duty of this court to subject evidence adduced at the trial stage to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see witnesses testify (*see Pandya versus Republic[1957] E.A. 336; Okeno versus Republic [1973]E.A. 32*).
7. An evaluation of evidence adduced proves the fact that the complainant's evidence that he was injured in his anus following penetration by the appellant using his genital organ was corroborated by that of the eyewitnesses **G D**. The act was committed in broad daylight. The witness was not mistaken as to what he said. He described the genital organ of the appellants as having been erect and red at the tip. Their evidence was corroborated by medical evidence adduced by the clinical officer who on examining the complainant confirmed the injuries he sustained in his anal hole as a result of the act.
8. The appellant having committed the sexual act of the penile penetration into the anus of the complainant was an act against the order of nature since ordinarily what is expected is penile penetration of female sex organ (vagina). Sodomy is unnatural.
9. It has been alleged by the appellant in one of his grounds of appeal that there was an allegation that the complainant was forced into the shamba. This evidence was not adduced.
10. With regard to the requirement of Deoxyribonucleic Acid (DNA) test on the appellant; DNA profiling would identify a suspect if investigations are carried out properly. In rural areas like Kitui region where the offence was committed, collecting DNA evidence for purpose of forensic examination is not easy as there are no experts. Even if this had been done it must be noted that DNA testing cannot be solely proof of guilt of an accused person, there is need for some other evidence to prove the case. In this case, evidence adduced proving the guilt of the appellant was cogent. There was no need of DNA test upon his person as submitted.
11. With regard to the sentence meted out, the sentence was **life imprisonment**. From the evidence adduced, the complainant did not consent to the offence. He was a child incapable of consenting to such an act. Besides, he was threatened by the appellant who possessed a panga. According to the proviso to the Section under which he was charged he ought to have been sentenced to **twenty one (21) years imprisonment**.
12. From the foregoing, there was no misdirection on the part of the trial magistrate in reaching the decision to convict the appellant. In the premises, I do uphold the appeal. On the part of the sentence which was harsh and not within the law, I quash and set it aside, then substitute it with **twenty one (21) years imprisonment**.
13. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of JUNE, 2014.

L.N. MUTENDE

JUDGE