REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 74 OF 2012

(From the original conviction and sentence in criminal case no. 25 of 2010 of the Chief Magistrate's Court at Malindi before Hon. L. W. Gitari – CM)

ADHAN NASSIR ….....….....…..……APPELLANT

VERSUS

REPUBLIC.....….....….....…RESPONDENT

JUDGMENT

1. The appellant was charged with two counts in the Lower Court. In the first count, he was charged with Unnatural offence contrary to Section 162 (a) (ii) of the Penal Code. In that on 8th June, 2010 at the ***[particulars withheld]*** in Kilifi County, he "unlawfully had carnal knowledge of (R.N.H.), a girl aged 16 years".

2. In the second count he was charged with stealing a Nokia mobile phone from R N H on the same date and at the same place.

3. Following a full trial, he was found guilty, convicted and sentenced to serve 21 years imprisonment on the first count, and 2 years on the second. He has now appealed to this count against conviction and sentence.

4. Grounds 2, 4 and 5 challenge the sufficiency of the evidence upon which the appellant's conviction was based. Grounds 1 and 3 consist of legal challenges couched in the following terms:

   "1) That the learned honourable magistrate erred both in law and fact that she convicted the appellant on defective charges.

2. **That the learned honourable magistrate erred both in law and fact in that she did not properly consider the evidence of the prosecution witnesses and the appellant's evidence.**

3. **That the learned honourable magistrate erred both in law and fact in that she shifted the burden of proof of innocence on the appellant."**

5. The appellant was represented by Mr. Gekanana. Through Mr. Oyiembo, the State opposed the appeal. The appellant and the State made written submissions in arguing the appeal. The first appellate court is obligated to re-evaluate the evidence of the trial and to draw its own

conclusions. In so doing the court has to bear in mind that the trial court had the advantage of seeing and hearing the witnesses testify. (See **Okeno v R 1972 EA 322**).

6. The prosecution case was as follows.

RNH was 16 years old in 2010. She was a student at [Particulars Withheld] Primary School where the appellant worked as a teacher. She resided at the ***[particulars withheld]*** with her parents. On 8th June, 2010 RNH was at home alone with her younger siblings. Her parents were not home. At about 7.00pm the appellant telephoned the complainant requesting her to meet him near a toilet in close by because he had something to tell her. She declined, citing the absence of her mother. At 9.00pm he rang again and persuaded the complainant to go out to him. She stepped out of the house and proceeded to the spot near the toilet where she found the appellant waiting. He immediately pounced on her and held her by the throat. He led her to a bush nearby and knocked her down and tore off her underwear before sodomising her.

7. About that same time, a relative and neighbour Y M (PW3) learned that RNH was missing from the house. He went out with a torch in search of her in the direction of the toilet where her siblings said she had gone. When the appellant noted the light flashes, he fled the scene taking with him the complainant's phone and scarf. Meanwhile the complainant ran back home. When PW3 followed her, she narrated to him the preceding events. PW3 waited until the complainant's mother BH (PW2) got home and briefed her. She immediately reported to the manager of the ***[particulars withheld]*** Farm who notified the chairman and headmaster.

8. Eventually the matter was reported to GSU Police at the ranch (Cpl. George Opiyo – PW8). As well as referring the victim for initial medical treatment carried out by Charlo Oscar Kabi (PW6) the GSU officer (PW8) visited the scene of crime. He recovered a used condom which together with blood samples taken from the appellant, and the victims innerwear were sent for analysis by the government analyst, Rhoda Wanjiku Wambugu (PW7).

The accused was arrested by PW8 and eventually charged.

9. When he was placed on his defence, the appellant elected to make an unsworn statement and did not call witnesses. He stated that he was a teacher in the school attended by the victim. He said that until 18th April, 2007 he had a secret affair with PW2, the alleged victim's mother. When he realized she was using him, he terminated the relationship, which angered the said witness. She threatened to “finish” him. She made so many complaints against him to the ranch manager that in March 2009 the appellant decided to quit his job. Due to pressure from other school members, he agreed to resume duties in June 2009 and shortly after, a new farm manager was appointed.

10. On the material date, he went home after work and after supper retired to bed at 9.00pm. When he reported to work on the next day, he heard the ranch guards saying that he had defiled his pupil on the previous night. He stated the specimens that were analysed were not connected with him during the trial.

11. As regards the challenges raised with regard to the quality of the evidence of the trial, I have carefully considered the judgment of the trial court in light of the evidence tendered. The learned magistrate considered the latter in minute detail and concluded that, not only was the complainant a credible witness, but further that her evidence was fully corroborated by inter alia PW 2, 3, 4, 6 and 8 through their oral and material evidence. She discounted the appellant's defence as an afterthought, correctly, in my opinion as the alleged pre-existing grudge between PW2 and the appellant was not canvassed with PW2 or any other prosecution witness. The trial court upon analysing the evidence before her found the charges proven.

12. In the case of **R v Oyier [1985] KLR 353** the court while considering evidential findings of a trial court stated:

"such a finding (based on credibility of witnesses) can only be assailed by an appellate court where it is clear that no reasonable tribunal could make such a finding or the finding is clearly wrong."

Reviewing the evidence of the eight prosecution witnesses, whom the Lower Court found credible, I cannot find any justification to interfere with that finding. Minor contradictions cited by the appellant as regards the red underwear of the complainant; whether it is a biker or inner wear are issues of semantics. That PW2 failed to identify the said torn biker/underwear does not detract from her evidence.

13. With respect to the evidence of PW3, he may not have found the appellant in flagrante delicto, but he said he saw the appellant fleeing from the scene where PW1 said she was molested. That is the same spot from whence the first police officer at the scene, PW8, collected a used condom, confirmed by PW7 to have seminal fluid, and an unused condom. The assertion by the appellant that the officer who recovered these condoms did not testify is incorrect.

14. The medical evidence adduced through PW6 the medical officer who saw PW1 on 11th June, 2010 and that of PW4 is consistent with PW1's narrative. PW4 stated that he observed a laceration on the anal orifice of the complainant and formed the impression that defilement was possible. This was clearly in reference to anal penetration.

15. Earlier RNH had been examined by a clinical officer based at Galana Ranch (PW6), some 19 hours since the alleged assault. He said that he observed a small laceration on the rectum and was shown the used condom by PW8 (GSU officer). He spoke to the complainant who stated that she was forced to have (anal) sex with her teacher, the accused. It is unclear in light of his first statement made to the effect that there was no evidence of vaginal penetration, what he meant by the second statement that he did not get "evidence of penetration" or even what that evidence constituted according to him. Be that as it may, his evidence confirms a rectal laceration which the medical officer at Malindi District Officer (PW4) stated to be consistent with defilement (anal).

16. These pieces of evidences were considered in detail in the judgment of the trial magistrate. Whether the penetration was full or partial does not affect her findings on this aspect. She did not assume or surmise as submitted by the defence that the anal laceration was "tantamount to penetration...yet there wasn't any evidence from PW7 to support her assumption." In this regard the learned trial magistrate upon analysing the relevant evidence stated:

"I find that the evidence of the complainant is corroborated by (the) medical report that she was penetrated through the anus. The evidence gathered at the scene (used condom) shows beyond reasonable doubt that there was sexual activity....the complainant was penetrated in the anus against her will."

17. That the seminal fluid in the used condom was not analysed for comparison with the appellant's blood samples etc, is deplorable. It seems that PW7 carried out a routine examination of the samples without much care after noting that there was no semen on the biker/underwear. There could not be if the condom was used. However, the fact that the used condom was not directly connected to the appellant cannot be a basis for rejecting or dismissing the rest of the prosecution evidence. It would have been different if the used condom and the appellant's samples were examined and confirmed not to be related. In this case, no such examination was done.

18. The trial court carefully addressed itself to the identification of the assailant noting the fact that the appellant was the complainant's teacher; that he had telephoned her twice that evening to meet him at the spot of the assault, that he was in a lit area when they first met; that he was spotted by PW3 fleeing the scene upon PW3 approaching the scene, and finally that his denials were an afterthought.

19. RNH's credibility is underscored by the consistency of her report made to other witnesses immediately after the assault including PW3, her mother and to PW6, a few hours later, as well as police (PW8). She named the appellant as the culprit. Indeed the appellant said that on arriving at school the following day, he found that the guards were aware that he had been named as the culprit of the sexual attack on the school's pupil. In view of the foregoing the findings of the trial court on the facts were well grounded and proper.

20. It is the legal challenge concerning the framing of the charge itself that has caused this court some concern. Evidently the statement of the offence was drawn in accordance with Section 137 of the Criminal Procedure Code save that the particulars omitted the words "against the order of nature"

21. Under Section 137 of the Criminal Procedure Code it is not necessary to use technical terms or to give detailed particulars. However, the omitted words in this case serve to complete the element which constitutes the offence of unnatural offence. The unnatural aspect refers to the act of sodomy evidently. The trial magistrate grappled with this omission and concluded that the appellant did not suffer prejudice as he understood clearly the nature of the charges facing him. I agree with that conclusion especially upon looking at the cross-examination of PW6 by the appellant.

22. Secondly, it is not correct to state as the appellant has done, that the defect suggested that he was charged with defilement. That is neither deducible from the statement of the offence or the evidence itself. At any rate, if indeed an offence of defilement was disclosed as argued, under the Sexual Offences Act no distinction is made between penetration through the anus or the vagina of the victim. All unlawful penetration of a minor constitutes defilement – Both are sexual assaults/offences.

23. Following the enactment of the Sexual Offences Act all previous provisions prescribing sexual offences must be read within the context of the Sexual Offences Act (See Section 48 of the Sexual Offences Act). The failure in this case to specifically use the words "against the order of nature" cannot be a basis for rejecting the charge as defective. This is because Section 1 and 2 of the First Schedule (Transitional Provisions) of the Sexual Offences Act state:

> **"1. Notwithstanding the provisions of any other Act, the provisions of this Act shall apply with necessary modifications upon the commencement of this Act to all Sexual Offences.**
>
> 2. **For greater certainty, the provisions of this Act shall supersede all existing provisions of any other law with respect to Sexual Offences."**

The definition of genital organs in the Act includes 'anus'. Further penetration is defined to include all genital organs. The charge of unnatural offence must be read in that context therefore.

24. Charges are sufficient if they disclose the "a statement of the offence with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged". (See Section 134 of the Criminal Procedure Code).

25. Moreover, as the State has submitted any defect is cured by Section 382 of the Criminal Procedure Code which states:

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision in account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**

provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

26. Reviewing the record of the trial, I would agree with the trial magistrate's conclusion that no failure of justice resulted from the defect. It is not the appellant's case that he understood his original charge to be other than unnatural offence and neither was such objection raised when evidence was led in that regard.

27. I therefore find that the legal issue taken during the appeal regarding the propriety of the charge cannot be sustained.

All considered I am of the considered view that the appellant was properly convicted and sentenced. I will dismiss the appeal in its entirety. I confirm both conviction and sentence.

Delivered and signed at Malindi this **18th** day of **December, 2013** in the presence of the appellant, Mr. Gekanana for him, Miss Mathangani for the State.

Court Clerk – John

C. W. Meoli

JUDGE