SIFUNA KHISA …….....APPELLANT

AND

REPUBLIC …….....RESPONDENT

{Being an appeal from the judgment of the Resident Magistrate, Hon. A.B. Mongare, dated 14/10/2009 at Eldoret Chief Magistrate's Court in CMCRC No. 4938 of 2008}

JUDGMENT

The appellant, **Sifuna Khisa**, was charged before Eldoret Chief Magistrate's Court (**A.B. Mongare**, Resident Magistrate), with the offence of committing an un-natural offence contrary to section 162 (a) of the Penal Code. It was alleged that the appellant, on 30th September, 2008, at [particulars withheld], Uasin-Gishu District within the Rift Valley Province, unlawfully had carnal knowledge of **V.K.** (hereinafter **"the complainant"**) against the order of nature.

The appellant appeared before **S. Atonga** (SRM) and pleaded not guilty. The trial was however, conducted by **A.B. Mongare**, then a Resident Magistrate. The prosecution called five (5) witnesses and after hearing their evidence, the Learned Resident Magistrate found that the appellant had a case to answer and put him on his defence. The appellant made an unsworn statement in which he alleged that he was framed in order to leave the area where he was staying. He considered himself an internally displaced person.

Upon analyzing the evidence of both the prosecution and that of the appellant, the Learned Resident Magistrate found the appellant guilty as charged, convicted him, and after, regarding the appellant's mitigation, sentenced him to twenty one (21) years imprisonment.

The appellant was not satisfied and has appealed to this court against both conviction and sentence. When the appeal came up for hearing before me on 21st June, 2012, **Mr. Etyang**, learned counsel, represented the appellant whilst **Mr, Chirchir**, learned Senior State Counsel, appeared for the State. In his address to the court, **Mr. Etyang** submitted that the appellant's fair trial rights under the Constitution were infringed because the appellant was arraigned before the court after a seven (7) day delay. Counsel further argued that the appellant was convicted on insufficient and contradictory evidence and that investigation was of poor quality. Counsel further took issue with certain findings of the learned Resident Magistrate which, according to counsel, were not founded on evidence adduced before the court.

Mr. Chirchir on his part submitted that there was no reason to disturb the conviction of the appellant as the same was based on sound evidence presented by the prosecution. He also contended that breach of the appellant's fair trial rights was not raised at the trial and that even if the same was proved, the appellant would be entitled to compensation and not an acquittal.

With regard to conflict of evidence, counsel submitted that the same was curable under the provisions of section 214 (2) of the Criminal Procedure Code. In his view, there was overwhelming evidence against the appellant and the appeal, according to him, had no merit and should be dismissed.

Briefly, the facts were as follows:-

The complainant, then aged about 16 years, on the material date at about 7.00 p.m., went to the appellant's house seeking treatment for pimples. The appellant injected him with some substance which made him drowsy and he slept in the appellant's bedroom. The following morning at about 9.00 a.m., he found himself in the appellant's bed with the appellant sleeping beside him, his legs resting on him. He had no trouser and was lying on his stomach. The appellant had no trouser also. He experienced chest and anal pain and general weakness. His brother **W.K.**, (P.W.4) then collected him from the appellant's house. They went home where the complainant informed their mother, **R.C.** (P.W.2) of the injection he had received and how drowsy he became. She sent the two boys to cut maize. While at the shamba cutting maize, the complaint felt drowsy and fell down. When he went for a bath, he observed a whitish dry substance on his pant which he cleaned. The substance, according to him, looked like dry semen.

On 3rd October, 2008, the complainant still felt unwell and went to Turbo Health Centre where he was told that he had been sodomised. He then went to Turbo Police Station where P.C. **John Macharia** (P.W.5) issued him with a P.3 form. He proceeded to Turbo Hospital where **Dickson Kibet Korir** (P.W.3) examined, treated him and filled the P.3 form. He observed that the complainant had a painful and swollen anal opening and felt pain on defecation.

The appellant was then arrested and charged as already stated.

On being put on his defence, the appellant alleged he had been framed as already stated.

On the above facts, the learned trial magistrate, who had by then been promoted to a Senior Resident Magistrate, found that the offence of committing an unnatural offence had been proved against the appellant as required in law and convicted him as already stated. She then sentenced him to twenty one (21) years imprisonment as already stated. In convicting him, the Learned Senior Resident Magistrate believed the complainant. In her own words:-

"I believe in what prosecution is saying because the complainant says when he was injected, he lost consciousness till the following morning at 9.00 a.m. I believe when the complainant was unconscious, the accused person took advantage of the complainant's state and sodomised him over night. The complainant found accused person naked and he himself naked in the same bed. I believe the accused person undressed the complainant when the complainant was unconscious. The complainant found his anal opening painful and also his chest… In my view, this is prove(s) (sic) enough that the accused person lied on the complainant from behind forcing his weight on the complainant …"

The appellant was convicted mainly on the evidence of the complainant, (P.W.3) and P.W.4. The complainant testified that at the appellant's home where he had gone for treatment, he was injected by the appellant and immediately felt drowsy. The following morning, he found himself without his trousers in the appellant's bed. The appellant lay beside him also without his trousers. His legs were resting on him. His anal opening was paining and so was his chest. He felt weak. That testimony was not shaken in cross-examination at all.

P.W.4, **W.K.**, found the complainant in the house of the appellant the morning after the incident. The complainant told him that he had spent the night at the appellant's house where the appellant had injected him and that he was in pain. P.W.4 also found the appellant at his house when he collected the complainant. In cross-examination, P.W.4 stood his ground.

Dickson Kabut Korir (P.W.3) testified that he examined the complaint after 8 days of the incident and observed that his anal opening was ruptured, it was also swollen and painful. This testimony is challenged in two respects. Firstly, that qualifications of the witness were not given and secondly that the medical treatment was sought too late. With regard to the first challenge, I indeed note that at the trial, P.W.4 did not state his qualifications. He however signed the P.3 form as a medical officer/practitioner. In my judgment, a medical officer/practitioner is qualified to fill a P.3 form. Besides, the appellant did not

challenge P.W.3 regarding his qualifications at the trial. He (the appellant) introduced himself as a medical doctor at the trial. If he had any doubts about the qualifications of P.W.3, he was best qualified to object. He did not. In the premises, the challenge now raised is, in my view, without merit.

With regard to the late decision to seek treatment, in my view, nothing much should turn on the same. P.W.3 opined that the complainant was depressed. Besides, the appellant did not suggest to the complainant, at the trial, that he had sought treatment late. In any event, even after the 8 days, P.W.3 was still able to observe the injuries the complainant had suffered. In those premises, I have no difficulty in dismissing the challenge raised regarding late resolve to seek treatment. I agree with P.W.3 that the complainant may very well have been traumatized – hence the depression.

The appellant has also raised the issue of the arrest of the appellant. Like the previous challenge, I do not think much should turn on the failure to call the arresting officer. As correctly held in the case of **Emoni Chelakani –vrs- Rep. [(Eldoret C.A. No. 345 of 2007)](UR)**, **"No particular number of witnesses shall, in the absence of any provisions of law to the contrary, be required for the proof of any fact" (**See Section 143 of the Evidence Act Cap 80 laws of Kenya). There is no dispute that the appellant was indeed arrested for the offence for which he was charged.

The appellant further complained that his fair trial rights under the Constitution were infringed. He made that complaint because he was arraigned after a delay of 7 days. He invoked the same decision of **Emoni –vrs- Rep. (Supra)**. I have read that judgment and agree that the same correctly interprets the provisions of section 72 (3) of the old Constitution. The same Court however, differently constituted held, inter alia, as follows in **Julius Kamau Mbugua –vrs- Republic. [Cr. Appeal No. 50 of 2008**]:-

"It is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused".

In this case, the delay complained of was not made at the trial. The prosecution could therefore not offer an explanation for the same. Secondly, the appellant has not alleged that the delay in arraigning him before the court was trial related. So, on the authority of **Mbugua –vrs- Rep. (Supra)**, the appellant's complaint about breach of his fair trial rights under the Constitution as it then applied, is without merit and is dismissed.

I now turn to the appellant's complaint that he was convicted on insufficient and contradictory evidence. It was submitted on behalf of the appellant that the prosecution failed to present a water-tight case because of the following.

- That there was conflict regarding the date of the commission of the offence;
- That the medical evidence adduced did not allude to the initial illness which allegedly took the complainant to the appellant's house;
- That the initial treatment cards were not produced;
- That no analysis was made of the substance which the complainant alleged he was injected with.

With regard to the conflict of evidence regarding the date the offence was committed, I note indeed that P.C. **John Macharia** (P.w.5) at the trial said that the complainant gave him 31st December, 2008 as the date the offence was committed which sharply differed with the date in the charge sheet. It must be remembered that P.W.5 was recalling an explanation which he was given by the complainant. In my view, the recall was incorrect. I say so because, P.W.5 is the officer who issued the complainant with the P.3 form and he did so on 3rd October, 2008. In that form, he indicated the date of the alleged offence as 30th September, 2008. In the premises, the conflict regarding the date of commission of the offence was not fatal to the case presented by the prosecution. The conflict did not, in any event, occasion a failure of justice.

With regard to the initial complaint of the complainant that pimples made him seek treatment from the appellant, I observe that **Dickson Kabut Korir** (P.W.3), who gave the medical evidence, never mentioned pimples. That however, does not surprise me at all as he did not treat the complainant for pimples. He had before him the complainant whose major complaint was pain at the anal opening and pain on defecation. The anal opening was also swollen. In my judgment, the failure to testify on the initial complaint the complainant had, did not weaken his testimony. It must be remembered that, the case which faced the appellant was not failing to treat pimples but committing an unnatural offence with the complainant.

With regard to the failure to investigate the substance with which the appellant was allegedly injected, I hold the considered view that the same was not also fatal to the case which the prosecution presented. There was the testimony of the complainant himself that after the injection, he became drowsy and realized the next morning that he had slept in the appellant's bed with the appellant. There is then the testimony of **R.C.** (P.W.2), the mother of the complainant, that when the complainant was brought by **W.K.** (P.W.4), the morning after the ordeal, he looked drunk and had brown eyes. Finally, there is the testimony of the said **W.K.**, (P.W.4) that when he found him the next morning at the appellant's house, the complainant was weak and he even fell down when they went to cut maize together. In those premises, there was no necessity to chemically analyze the substance the complainant was injected with. It is also on the record that by the time **Dickson Kabut Korir** confirmed the sodomy, precious time had been lost and I doubt whether further investigation of the substance the appellant injected the complainant with would have been useful or fruitful.

The appellant also challenged the finding by the learned Senior Resident Magistrate that the appellant undressed the complainant and was found lying on the back of the complainant. With all due respect to the appellant, those findings were inevitable once the Learned Senior Resident Magistrate believed the testimony of the complainant. The findings flowed from the evidence adduced before the learned Senior Resident Magistrate. Having found that the complainant had been sodomised, it goes without saying that the sodonomy could only have taken place when the complainant was undressed. The complainant was injected by the appellant. The complainant found himself on the appellant's bed in the appellant's bedroom. There was no other person in the house. Indeed, when the appellant woke up the next morning, the appellant was lying beside him with his legs resting on him. In my view, that evidence irresistibly pointed at the appellant and it was safe to convict upon the same notwithstanding that the complainant washed the pant he had on the material night.

For all the above reasons, the appellant's defence was properly rejected. I also concur with the Learned Senior Resident Magistrate that at the time of the offence, post election violence had ended. I also agree with her that the complainant, a young boy approaching adulthood, would not stigmatize himself with such an incident for the mere purpose of framing the appellant.

For all the above reasons, I find and hold that the appellant's appeal against his conviction is without merit and is dismissed.

With regard to sentence, I observe that the Learned Senior Resident Magistrate imposed the maximum sentence permitted under section 162 (a) of the Penal Code. The maximum sentence is reserved for the worst offender. The Learned Senior Resident Magistrate appeared to be of the view that she had no discretion to award a shorter prison sentence. That, with respect was a misdirection. She clearly, had a discretion. The appellant in mitigation, stated that his father had just passed on and that he had dependants. He further stated that he had, the previous year (2007), had an accident which had affected him. He was also remorseful. In the premises, in my view, he did not deserve the maximum sentence. I am therefore entitled to interfere. I accordingly set aside the sentence of 21 years and substitute the same with a sentence of imprisonment for six (6) years with effect from when the appellant was convicted.

The conviction is otherwise upheld.

Orders accordingly.

DATED AND DELIVERED AT ELDORET

THIS 26TH DAY OF JULY, 2012.

F. AZANGALALA
JUDGE

Read in the presence of:-

Mr. Etyang for the appellant and **Mr. Kabaka** holding brief for **Mr. Chirchir** for the respondent State.

F. AZANGALALA
JUDGE
26/7/2012.