REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 262 of 2010

JOHN MBURU…………………………………………......APPELLANT

VERSUS

REPUBLIC ..…………..……………………………........RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case No.3 of 2009 by Hon. B.M. Kimemia on 22/9/2010)

JUDGMENT

The appellant, **John Mburu** was charged before the Principal Magistrate's Court at Kitui with the offence of unnatural offence contrary to section 162 (a) of the Penal Code, particulars being that on 15th November 2009 at about 3.am at G.K. Kitui Prison, township sub location in Kitui District of the Eastern Province, he willfully and unlawfully had an act which caused penetration to M.M. aged 20 years against the order of nature. The appellant denied the offence and was soon therefore tried.

The case for the prosecution in a nutshell was that on the night of 14th and 15th November at about 3am, **M. M.** "*the complainant*" and an inmate at Kitui G.K. Prison was asleep when the appellant sexually assaulted him through the anus. In an attempt to restrain the appellant, he parted him but the appellant warned him to keep quite. He was able to see the appellant as he slept next to him and the electricity light was on. The following day, the complainant reported the incident to the incharge. He was then taken to Kitui General Hospital where he was examined by **Davis Nyamai**, a clinical officer. He noted that the complainant's pair of shorts were torn and had dry seminal fluid on the outside. Anus examination revealed tenderness and mucontic inflammation. The conclusion was that there was evidence of forceful penetration causing blunt trauma on the anal mucosa. He assessed the degree of injury as grievous harm on the basis of interruption of anal muscle. **Corporal Ahron Makau** was the incharge of early shift at Kitui G.K. Prison. On 15th November, 2009 at about 7.15 am, the complainant reported to him that he had been sodomised by the appellant. He showed him the torn pants and the semen which had been ejaculated on it. He is the one who took the complainant to hospital subsequently. Following the medical report, the appellant together with the complainant were escorted to Kitui Police Station where they were received by **P.C. Joseph Musomba**, the investigating officer in the case. After carrying out further investigations in the case, he preferred the charge against the appellant.

Put on his defence, the appellant elected to give a sworn statement of defence and called no witness. He claimed in his defence that he did not commit the act and that he was framed with the case. He stated that on a day he could not remember, the complainant woke up and claimed that he had been sodomised and pointed an accusing finger at him. He was beaten at the office and complainant was taken to hospital. Otherwise he did not commit the offence since no one saw him do it.

The learned magistrate having carefully considered the evidence on record both for the prosecution and defence, found the case for the prosecution proved, convicted the appellant and sentenced him to 15 years imprisonment. The conviction and sentence aforesaid triggered this appeal. The appeal is hinged on the grounds that the prosecution case was full of inconsistencies, hearsay, there was no prove medically that the substance observed on the complainant's short trouser was spermatozoa nor was there evidence of penile penetration of the complainant; that the magistrate failed to consider that there was plenty of light in the ward with 130 inmates who did not notice the incident.

When the appeal came before me for hearing on 12th July, 2012, the appellant orally submitted that he was not given statements by prosecution witnesses before the trial commenced, the court did not record correctly the proceedings, the evidence regarding holes on the shorts was contradictory. It was impossible to commit the offence in the room with over 120 inmates, the complainant never screamed for help, none of the other prisoners were called to testify and finally, PW2 and complainant had a grudge against me.

In response, **Mr. Mukofu,** learned State Counsel submitted that the appellant was positively identified in the act by the complainant, from the medical evidence, it was clear that the complainant had been sodomised, there was no evidence of a frame up nor did the appellant raise the issue in cross-examination of the complainant and PW2. For all the foregoing reasons, the State urged for the dismissal of the appeal.

This being a first appeal, it is a requirement of law that I subject the evidence tendered before the trial court to a fresh and exhaustive examination and evaluation so that I can reach my own conclusion as to whether the findings and conclusions of the trial court are sustainable.

From the evidence on record, it is common ground that the complainant was sodomised. This comes out clearly from the medical evidence tendered by PW1, the clinical officer who examined the complainant the following day after the incident. He came to the conclusion that there was evidence of forceful penetration of the anus causing blunt trauma on the anal mucosa. This evidence was not seriously challenged by the appellant. The question then is who caused that injury.

To the complainant, it was the appellant. However, the appellant proclaims innocence. In so far as he is concerned the case was a frame up. I have no doubt at all in my mind that the appellant committed the act complained of given the evidence of identification on record. The appellant has conceded that he shared the prison cell with the complainant. The appellant too has conceded that there was plenty of light in the cells. Indeed in ground 4 in his petition of appeal, he states categorically that

"… the learned trial magistrate misdirected himself against both the law and facts when he failed to consider that there was plenty of light in the ward with one hundred and thirty inmates…"

So the question as to whether the cell was lit or not is a non-issue. The appellant and complainant knew each other. Indeed on the night in question, the appellant and complainant were sleeping next to each other. This was the testimony of the complainant. When the appellant inserted his penis in his anus, the complainant in a bid to resist parted the appellant, but he warned him to keep quite. This clearly shows that the appellant and complainant were in close proximity. In those circumstances, there is no way that the complainant could have mistaken the appellant for another person.

The appellant has raised the issue that the appellant could have screamed for assistance if indeed he was being sodomised. That may well be true. However, the complainant has stated that when he tried to raise the alarm, the appellant told him to keep quite. He has further explained that he could not scream because the prisoners would have mistaken it for an attempt to escape from prison with dire consequences. These are plausible reasons. I have no doubt at all that they represent the truth. In any case, the complainant stated under cross-examination that he was only 3 weeks old in the institution. That may well explain his naivety. The trial court too appreciated the circumstances under which the complainant was compelled not to raise the alarm and correctly so in my view. The trial court noted that this could be explained owing to the nature of prison custody. He could have been mistaken for an escapee.

The appellant too has raised the issue of a frame up. However, there was no evidence of such frame

up. There was no motive for the complainant to raise against the appellant a false complaint. Nor did the appellant raise the issue in his cross-examination of the complainant and the prison warden (PW2) nor in his defence. The issue has only cropped up in his submissions before this court. To me therefore it is an afterthought. In any event, I do not think that the appellant could have gone to the extent of injuring himself in the anus merely to frame the appellant.

The appellant too has raised the issue of not being supplied with statements by the prosecution witnesses. The record shows that indeed he made the request for statements. However, the appellant never pursued. If anything the record shows that the appellant engaged the court in a ping pong game, seeking stall the case for as long as he wanted. This game plane forced the court at some point to commence the trial, his protestation notwithstanding. In any case, the appellant never raised the issue with trial court once the trial commenced. He cross-examined the witnesses called. I do not think therefore that failure to avail to him witness statements occasioned him a miscarriage of justice. With regard to the complaint that the trial court did not record correctly the proceedings, there is no such evidence. In any event, the appellant has not pointed out what was it that was not correctly recorded. With regard to failure to call other prisoners to testify, the evidence of the investing officer is that those prison witnesses had been released by the time the case was being heard. In any event, if they did not witness the incident, what were they coming to testify about?

In my view, the prosecution case was clear. It was not doubtful. The evidence placed the appellant at the scene of crime and the commission thereof. This appeal therefore lacks merit and it is accordingly dismissed in its entirety.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **28TH** dayof **SEPTEMBER 2012.**

ASIKE MAKHANDIA
JUDGE