



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 513 OF 2009

DOUGLAS LIYAI CHOMA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No. 3106 of 2008 of the Chief Magistrate's Court

at Kibera by Mr. Maundu – Senior Principal Magistrate

JUDGMENT

The appellant, **DOUGLAS LIYAI CHOMA**, was convicted for the offence of Un-natural Offence contrary to **section 162 (a) of the Penal Code**. Thereafter, the trial court sentenced him to 12 years imprisonment.

In his appeal to this court, the appellant has raised 5 substantive issues, which can be summarized as follows;

(i) The appellants rights under Sections 49 91) (f) (i); 49 (1) (f) (ii); 50 (2) (b) (c) (j) and (m) of the Constitution, had been violated;

(ii) Contrary to section 150 of the Criminal Procedure Code, some essential witnesses did not give evidence;

(iii) The trial court ought to have resolved the material contradictions in favour of the appellant;

(iv) The two medical doctors who examined the complainant, gave contradictory reports;

(v) *The defence was not given due consideration.*

When canvassing the appeal, the appellant submitted that the prosecution failed to offer any reasonable explanation, to justify the delay in bringing him before a court of law, on the first occasion.

The second issue that he raised was that he was not accorded a fair trial. That submission is premised on the fact that the trial court put him on his defence immediately after the court had ruled that he had a case to answer. As far as he was concerned, the court should have given sufficient time to prepare his defence

Furthermore, the appellant submits that his right to a fair trial was violated when **PW 3** testified in English, a language which the appellant does not understand. He says that the court should have ensured that he had the benefit of a Kiswahili interpreter.

The third issue raised by the appellant relates to some witnesses who he deems to have been essential, but who were not called by the prosecution. Those persons included the following;

(a) *Vincent Masinde and Charles Sambo, who escorted the appellant to the police station;*

(b) *Z, a sister to the complainant, who accompanied the complainant to the police station, together with PW 4;*

(c) *The owner of the plot where the incident allegedly took place. It is he who PW 2 reported to, and thereafter he and PW 2 reported the incident to the complainant's mother;*

(d) *The complainant's father, who allegedly arrested the appellant;*

(e) *The complainant's mother;*

(f) *J, a brother to the complainant, who allegedly saw the appellant at a shop, then called his father; who then arrested the appellant.*

The fourth issue raised was in relation to contradictions. In that regard, the appellant says that if the complainant had been sodomised over a period of time, he should have been able to report the incident much earlier.

He also submitted that if there was a hole in the "wall" separating his house from **PW 2's** house, the neighbour should have seen the appellant sodomising the complainant much earlier.

In any event, the appellant believes that **PW 2** cannot be believed because she allegedly recorded her statement at Satellite Police Station on 31st month of September 2008, whereas the month of September has only 30 days.

And whilst one doctor found evidence that the complainant had been sodomised, the other doctor found no such evidence.

Finally, the appellant faulted the learned trial magistrate for rejecting his defence for no good reason. To his mind, the court was wrong to have simply concluded that the defence was an afterthought.

In answer to the appeal, the respondent submitted that the issue of delay was raised before the trial court, which determined it. The trial court, found that the delay in taking the appellant to court was not inordinate.

In any event, the appellant is said to have been arrested on 29th September 2008, as opposed to the date which he gives, as 26th September 2008. Thereafter, the police filed an apprehension report at the Kibera Law Courts. According to the respondent, the step of filing an apprehension report exonerated the prosecution from the alleged delay.

On the issue of essential witnesses who did not testify the respondent said that all essential witnesses did give evidence. In other words, none of the persons cited by the appellant as essential witnesses, were essential.

The respondent believes that the witnesses who testified provided proof against the appellant, beyond any reasonable doubt. Therefore, as far as the respondent was concerned, there was no need for the prosecution to have called any more witnesses.

The prosecution witnesses are said to have included one eye-witness and the complainant, as well as a doctor. The eye-witness saw what took place, whilst the doctor corroborated the evidence of both the eye-witness and the complainant.

As this is the first appellate court, I am enjoined by law, to re-evaluate all the evidence on record, and to draw there from, my own conclusions. In the course of drawing up my conclusions, I will take into account the fact that I did not have the benefit of observing the witnesses as they testified.

The appellant took his plea on 15th October 2008. The record shows that there was interpretation from English to Kiswahili.

On 30th October 2008, when the trial was scheduled to commence, the appellant told the court that he had been arrested on 26th September 2008. He complained that the police beat him thoroughly. He accused the police of torturing him, whilst he was at the police station.

He then asked that the Bond sum of Kshs.100,000/-, with one surety, be reduced. Finally, he asked the court to have the trial start on that date.

Although the prosecution had 2 witnesses in court, the court first ordered the prosecution to explain the issues of delay and torture.

Thereafter, the trial commenced, with **PW 1, SULEIMAN MAHERO** giving evidence. He was the complainant.

PW 1 was a boy of 13. He said that on 28th September 2008, at 5.30p.m, he was at home, within Riruta Satellite. **PW 4**, who is a friend of

PW 1, arrived at the complainant's house and told him that the appellant wished to have **PW 1** deliver to him, the cigarettes which the appellant had sent **PW 4** to buy.

PW 1 went to deliver the cigarettes, whilst **PW 4** went to play football.

When **PW 1** was inside the appellant's house, the appellant inserted his penis into the complainant's anus. The appellant

warned **PW 1** not to tell anyone about what had happened.

However, **PW 2, ANN MPUSI CHACHA**, had seen the appellant sodomising **PW 1**. She is the next-door neighbour to the appellant. And she saw the incident through a hole in the wall, which is made of iron-sheets.

By the time **PW 1** reached home, he found that **PW 2** had reported the incident to his mother. When confronted by his mother, **PW 1** confessed. Immediately thereafter, **PW 1** was escorted by his mother, to the house where the appellant lived, but he was not in.

PW 1 testified that on the next day (29/9/2008), his brother, J, saw the appellant at a shop. J went home and informed his family, whereupon his father went and arrested the appellant.

The appellant was tied with ropes, and escorted to Riruta Satellite Police Station.

According to **PW 1**, that was not the first time for the appellant to sodomise him. He said that the appellant first sodomised him in January 2008. On that first occasion, he was threatened with being either poisoned or stabbed, if he did not do as instructed.

Between January 2008 and 28th September 2008, **PW 1** had been sodomised repeatedly. Each time the appellant threatened to cut-off **PW 1's** head or to eat his private parts, if **PW 1** revealed what was taking place.

The appellant told **PW 1** that he, (the appellant), had witches at home, who would make **PW 1** forget what to say, if **PW 1** tried to report the incidents.

By 28th September 2008, **PW 1** had known the appellant for almost 2 years. That is because **PW 1** first got to know the appellant in January 2007.

PW 2 testified that she witnessed the appellant sodomising **PW 1**. She rushed and informed her landlord. Thereafter, **PW 2** was accompanied by the landlord when she went to report the incident to **PW 1's** mother.

PW 2 went to report the incident at the Satellite Police Station on 31st September 2008; and it is on that date that she recorded her statement.

PW 3, DR. Z. KAMAU examined **PW 1** on 14th October 2008. He found that **PW 1** had no physical injury. His genitals were normal, and his anal opening had no injuries or discharge.

PW 4, P.K., was a 14 year old boy. He was sent by the appellant to buy 2 cigarettes. However, he was to give the cigarettes to **PW 1**, who would deliver them to the appellant.

After giving the cigarettes to **PW 1**, **PW 4** went back to the compound of Victory School, where he was playing football.

PW 5, DR. KETRA MUHOME, was attached to the Nairobi Women Hospital. **PW 1** told her that he had been sodomised several times by one Douglas. **PW 1** told **PW 5** that he was last sodomised on 28th September 2008.

On examination, **PW 5** found **PW 1** with healing scars in his anus. However, she found no spermatozoa or sexually transmitted disease (STD). **PW 5** formed the opinion that **PW 1** had been sexually assaulted.

PW 6, PC JARED OSUMBA, recorded **PW 1's** statement at Riruta Police Station, on 13th October 2008. On the next day, he escorted **PW 1** to **PW 3**, for examination.

According to **PW 6**, the appellant was arrested on 28th September 2008.

Although **PW 6** was instructed to investigate the case of alleged sodomy, he did not visit the scene of crime.

PW 6 also testified that the delay in taking the appellant to court was due to the fact that **PW 1** was unwell, and could not record his statement.

PW 7, PC DAVID KIMATHI MWEMA, was at the Riruta Police Station on 29th September 2008, when the appellant was escorted to the station, by members of the public. The said members of the public included Vincent Masinde and Charles Sambo. Also present were **PW 1** and the appellant.

PW 7 noted that **PW 1** was limping. And when he talked to **PW 1**, he learnt that he had been sodomised by the appellant.

After the appellant was put to his defence, he gave an unsworn defence. He said that he lived within the same compound as **PW 1**.

He lent KShs.1,500/- to the complainant's mother, but she delayed in repaying the loan. When he demanded repayment, **PW 1's** mother threatened him; that was on 26th September 2008.

In his testimony, the father and the mother of **PW 1** arrested him on 27th September 2008, as he was going to his place of work, at Victory Abode Academy. The two demanded that he admits having sodomised **PW 1**, but he refused. They then took him to the police station.

From the foregoing evidence, it is clear that the appellant was not a stranger to the complainant. Therefore, there is no possibility of any mistaken identification.

The complainant had first met the appellant in January 2007. However, it was not until a year later that he was first sodomised.

But the complainant never reported the incidents. Indeed, even when he was sodomised on 28th September 2008, it is **PW 2** who first reported the incident to the complainant's mother. When his mother confronted him with the information, **PW 1** confirmed it.

Should the complainant be disbelieved because he had not reported the incidents for about 8 months? I do not think that that should be necessarily so, because the complainant was laboring under the burden of threats. Not only was he threatened with physical harm, but he was also warned that if he should decide to report, the witches of the complainant would cause him to forget what he should be saying.

To my mind, if the Investigating Officer had visited the scene of crime, he would have provided the court with a clear picture as to the size and position of the hole-in-the-wall, through which **PW 2** witnessed the incident. But that does not mean that the incident did not happen or that there was no hole through which **PW 2** could see what was happening inside the appellant's house.

PW 5 examined the victim and noted that he had been sexually assaulted. The doctor examined **PW 1** on 29th September 2008,

which was one day after the latest incident of sodomy. She found healing scars in **PW 1's** anus. The wound had not healed.

But **PW 3**, who examined **PW 1** on 14th October 2008 found no injuries around the anal opening.

To my mind, the fact that the wound in **PW 1's** anal orifice was already healing by 29th September 2008, when **PW 5** examined him, would explain why **PW 3** found no signs of injury two weeks later. The absence of any injuries on the anus of **PW 1**, some 2 weeks after he was sodomised, does not mean that Dr. Kamau (**PW 3**) contradicted the testimony of Dr. Muhombe (**PW 5**).

However, I would have expected **PW5** to offer a medical explanation, when she was given the opportunity to do so. But she turned down the request for a comment on Dr. Kamau's medical report.

Had that been the only issue, I would have been inclined to overlook it. However, I also note that whereas **PW 1** said that he was sodomised on the appellant's bed, the only eye-witness (**PW 2**) categorically stated that the appellant had no bed. She said that **PW 1** was sodomised on a blanket spread out on the floor.

Thirdly, although **PW 6** asserted that **PW 1** was too unwell to record his statement immediately after the incident; thus delaying the arraignment of the appellant before a court of law, **PW 1** and **PW 7** both testified that the complainant was at the police station on 29th September 2008, when he reported the incident. And **PW 5** testified that she was told by **PW 1** about the incident in which the appellant sodomised him.

Surely, if **PW 1** was able to report to the police, and to thereafter give to **PW 5** his story about what had transpired, he cannot also have been too unwell to record his statement with the police on that same date or soon thereafter.

In conclusion, although it appears that the appellant may have sodomised **PW 1**, the investigations by the police left a lot to be desired. Furthermore, the prosecution failed to produce evidence to show that the police had filed an apprehension report at the Kibera Law Courts, on the day after the appellant was arrested.

Before concluding this Judgment, I feel obliged to comment on the manner in which the trial court handled the defence.

The court held that the defence was false and an afterthought. Of itself, the conclusion may be accurate. However, it is always prudent for a court that has reached that conclusion to explain the said conclusion further. For instance, in this case, I think that the conclusion was arrived at because;

(a) The trial court had believed the contrary evidence tendered by the prosecution witnesses; and (b) The appellant did not, during his cross-examination of the prosecution witnesses, suggest to them the "facts" establishing his defence. He ought to have asked PW 1 whether or not he was aware that his (PW 1's) mother had threatened the appellant when the appellant demanded the repayment of the loan of KShs.1,500/-.

That line of questioning ought to also have been put to the Investigating Officer (PW 6).

By so doing, the appellant would have given to the prosecution an opportunity to respond to his defence.

As he did not ask any of the prosecution witnesses questions that would later form his line of defence, the court would be entitled to conclude that his defence was an afterthought.

However, the burden of proving the guilt of the accused always vests on the prosecution. It never shifts to the accused person,

to prove his innocence.

In the result, I find that it would be unsafe to uphold conviction herein. I therefore allow the appeal; quash the conviction and set aside the sentence.

I order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered, at Nairobi, this 18th day of May, 2011.

.....

FRED A. OCHIENG

JUDGE