REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 379 of 2007

JOHN KARIUKI MUIRURI …..…….. …….APPELLANT

Versus

REPUBLIC……..…….RESPONDENT

JUDGMENT

John Kariuki Muiruri, the appellant herein, was tried on a charge of unnatural offence contrary to section 162(a) of the Penal Code. The particulars of the offence were that on the 12th day of November 2005 at [particulars withheld] village Maragwa District within Central province, had carnal knowledge of CGN against the order of nature. Four witnesses testified in support of the charge while the appellant gave an unsworn statement in his defence without summoning the evidence of any independent witnesses. At the end of the trial, S.M. Mokua the learned Senior Resident Magistrate convicted the appellant and sentenced him to ten (10) years imprisonment. The appellant was dissatisfied hence this appeal.

On appeal the appellant put forward a total of 11 grounds in the petition of appeal filed on his behalf by the firm of Kirubi, Mwangi Ben & co. advocates. However, when the appeal came up for hearing Miss Ngalyuka conceded the appeal on the ground that the appellant's constitutional rights under S. 72(3) of the constitution were breached. It is also said that the appellant was denied the right to recall P.W.1 for cross-examination. Mr. Mwangi, learned advocate for the appellant argued together all the 11 grounds of appeal. The learned advocate urged this court to find that the appellant constitutional rights were breached. He also pointed out that the appellant was convicted on the basis of contradictory evidence. The learned advocate further pointed out that the evidence of child of tender age were not corroborated and that the medical evidence was not produced by the maker.

The case that was before the trial court appear to be short and straightforward. CGN(P.W.2) stated before the trial court that on 12/11/2005 he decided to relieve himself in the toilet of the appellant. The appellant is said to have called P.W.1 to visit his house. The appellant took P.W.1 to his bedroom where he undressed him and subsequently sodomised him. P.W.1 said the appellant covered his mouth while doing the unnatural act. P.W.2 informed his mother, LWN (P.W.1) of what had happened to him. The appellant is said to have thrown P.W.2 out of his house when he heard P.W.1 calling the name of the complainant (P.W.2). P.W.1 said that on the fateful day the complainant (P.W.2) visited the appellant's toilet but she was forced to check on him when it took him more than 30 minutes to come back. P.W.1 reported the incident to Maragua police station where the complainant was issued with a P3 form to take to Maragua District Hospital. Dr. Marani examined P.W.2 before filling the P3 form which was produced in court by Dr. Peter Ngaruiya Mugo (P.W.4). p.c Jared Kamau (P.W.3) said he caused the appellant to be charged with the offence upon receiving the medical report.

The appellant denied committing the offence in his unsworn statement. He claimed he was framed up because there was a family grudge between him and the complainant's family.

Having given in brief the case that was before the trial court, let me now consider the appeal. The appeal is not opposed by the state. In fact it is conceded on the grounds earlier set out in his judgment. The record shows that the appellant was arrested on 11th December 2005 and arraigned in court on 14th December 2005. In short the appellant was held in police custody for 3 days before being presented before a court of law. That was against the provisions of S. 72(3)(b) of the constitution. The appellant should have been taken to court within 24 hours from the time of arrest. There was no explanation for the delay. Where there is no explanation for an accused's breach of a constitutional right, an acquittal will result irrespective of the strength of the case against the accused.

It has been argued that the evidence of P.W.2 was not corroborated. The record shows that the complainant's mother (P.W.1) saw the complainant visit the appellant's toilet. She did not witness the offence take place. The medical

evidence was therefore very crucial to corroborate the evidence of P.W.2. That requirement may not be necessary under the proviso to S. 24 of the Evidence Act so long as the trial magistrate notes that the witness told the truth. In this case it is necessary for the medical evidence to corroborate the evidence of P.W.2 to establish that there was sodomy. The P3 form was filled and signed by Dr. Marani who was not summoned to produce the report. The same was produced by Dr. peter Mugo (P.W.4.). The record does not show how Dr. Mugo (P.W.4) was allowed to produce the P3. yet he was not the maker of the document. A basis must be laid under s. 77(1) of the Evidence Act before such a witness can be permitted to produce such a document on behalf of the maker. It must be shown inter alia that the maker of the document is either dead or that it became extremely difficult to secure his attendance. Dr. Mugo (P.W.4) did not state whether he knew Dr. Marani nor did he state whether he was familiar with Dr. Marani's handwriting and or signature. The medical report (P3) was therefore improperly admitted. The appellant was therefore denied a chance to cross-examine the doctor who examined the complainant. The Court of appeal in the case of Hillary Bwire Wafula =VS=R Cr. Appeal No. 8 of 1996 (unreported) stated as follows:

"*In a criminal case as a rule the prosecution must take all reasonable steps to secure the attendance of any of their witnesses whom the defence might reasonably expect to be present. In a murder trial the defence expects the doctor who performed autopsy on the body of the deceased to be present. The prosecution might not have intended to call the doctor. However, where the prosecution does not intend to calla witness whose evidence is material at a trial they (prosecution) nonetheless have a duty to ensure that that witness is present in court during the trial so that should the defence wish, they may call the witness. The only exception to this rule as to attendance of witnesses is if the witness is absent for reasons beyond the prosecution's control.*

Having said what we have said above and counsel for the State having admitted that the failure to call the doctor left the cause of death unclear, it could not be said that there was no reasonable doubt as to whether it was the appellant's assault on the deceased that caused her death. The benefit of that doubt should go to the appellant. The conviction in this case is unsafe and cannot stand."

In the end I am convinced the appeal was properly conceded. I allow the appeal. The conviction is quashed and the sentence set aside. The appellant is hereby set free unless lawfully held.

Dated and delivered this 13th day of January 2010.

J.K. SERGON
JUDGE

In open court in the presence of Mr. Makura learned State Counsel and the appellant in person.

J.K. SERGON
JUDGE