



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 227 OF 2007

*(From Original Conviction and Sentence in Criminal Case No. 599 of 2006 of the Chief Magistrate’s Court at Mombasa: **B.T. Jaden – Ag. S.P.M.**)*

ROBINSON TOLE MWAKUYANDA APPELLANT
VERSUS
REPUBLIC RESPONDENT

JUDGMENT

The Appellant **ROBINSON TOLE MWAKUYANDA**, had been arraigned before the subordinate courts on a charge of **UNNATURAL OFFENCE CONTRARY TO SECTION 162(a) OF THE PENAL CODE**. The particulars of the offence were that

“On the 13th day of February 2006, at l c location in Mombasa district within the CoastProvince, had carnal knowledge of C O, against the order of nature”

The Appellant also faced an alternative charge of **INDECENT ASSAULT ON A MALE CONTRARY TO SECTION 144(1) OF THE PENAL CODE**. The Appellant entered a plea of **‘not guilty’** to both charges and his trial commenced on 1st November 2006 before the learned Principal Magistrate sitting at the Mombasa Law Courts. The prosecution led by **CHIEF INSPECTOR MSHENGA**, called a total of four (4) witnesses in support of their case. The brief facts of the prosecution case were that on 13th February 2006 at about 6.00 p.m. **NA PW3** left her house in Lilongwe estate to go and fetch water. She left her baby boy aged 6 months **CO** the (victim herein) playing with her seven year old daughter **SSO PW2**. It is alleged that the Appellant came to their house picked up the baby and went away with him. **PW3** came back home to find the baby crying and trembling uncontrollably. **PW2** told her that **‘Rasta’** had taken away the child. In a panic **PW3** began to examine the child. She undressed him and found blood and stool on his napkin. The child was rushed to hospital where a medical examination revealed that he had been sodomized. The matter was reported to police. The Appellant was then later arrested and charged.

At the close of the prosecution case the Appellant was placed on his defence in compliance with S. 211 Criminal Procedure Code. He gave an unsworn defence by which he denied the charge. On 7th November 2007 the learned trial magistrate delivered her judgement in which she convicted the Appellant of the charge of Committing an Un-natural offence and sentenced him to serve ten (10) years imprisonment. It is against this conviction and sentence that the Appellant now appeals.

The Appellant who appeared in person at the hearing of this appeal, chose to rely entirely upon his written submissions which had been duly filed in court. **MR. ONSERIO**, learned State Counsel appearing for the Respondent State, made oral submissions in which he urged the court to uphold both the conviction and sentence imposed by the lower court. As a court of first appeal I am guided by the decision of the Court of Appeal in the oft cited case of **OKENO –VS- REPUBLIC [1972] E.A.L.R. 32**, in which it was held

“It is the duty of a first appellate court to reconsider the evidence and draw its own conclusions in deciding whether the judgement of the trial court should be upheld”

I have carefully considered the submissions made by both the Appellant and the State in this matter. The Appellant in his written submissions has raised the following main grounds for his appeal

- § Defective charge sheet
- § Violation of his Constitutional rights
- § Insufficiency of the prosecution evidence

On the first ground the Appellant submits that the charge sheet was rendered fatally defective by the fact that particulars of the charge did not include the word ‘**unlawful**’ before the words “**carnal knowledge**”. He cites the case of **NGENO –VS- REPUBLIC (2002) KLR 457** in support of this contention. In the **NGENO** case the court did hold that failure to include the word ‘unlawful’ in the particulars where accused faced a charge of Defilement contrary to Section 145(1) of the Penal Code (now repealed) rendered the charge fatally defective. The Appellant argues that this finding is equally applicable to the present charge. However I do not agree with this submission. The rationale behind the insistence of the word ‘**unlawful**’ in the **Ngeno** case was quite clear. It was done to differentiate ‘**lawful**’ as opposed to ‘**unlawful**’ sexual intercourse with a minor. This was in recognition of the fact that in some communities in Kenya girls below the age of majority could legally be taken as wives. In such a case sexual intercourse with that minor would not be unlawful. Now of course following the passage of the Sexual Offences Act 2006 **any** and **all** acts of sexual intercourse with a person under the age of 18 years has been outlawed and is illegal. However in a case where one is accused of having committed an act of sodomy then the above reasoning would not apply. This is because the law does not envisage any eventuality where such an act would be lawful. Homosexual acts even between consenting adults is outlawed by S. 162(a) of the Penal Code. As such the use of the word unlawful would be merely superfluous since any and all acts of sexual intercourse against the order of nature are deemed illegal in this country. The omission of the word ‘**unlawful**’ is not a defect in the charge, which I find to have been properly framed. I therefore dismiss this ground of appeal.

The Appellant submits that his rights to a speedy trial as guaranteed by S. 72(3) of the old Constitution of Kenya were violated in that having been arrested on 14th February 2006 he was not taken to court until 16th February 2006, which was two (2) days later than the 24 hour period provided for by S. 72(3) of the Constitution, which was in force at the time the Appellant was arrested. In my view a mere two (2) day delay is not by any means inordinate and does not amount to a violation of the Appellant’s constitutional rights. This is an issue which has engaged the Kenyan courts over a long period of time with varying decisions on the matter. The Court of Appeal finally settled the matter in the case of **JULIUS KAMAU MBUGUA –VS-REPUBLIC CRIM APPEAL 50 OF 2008** where it was held that a clear distinction must be drawn between trial-related rights and violations to rights of a suspect to personal liberties. Their lordships held as follows

“In our view, 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.”

The court finally concluded as follows

“... Breach of S. 72(3)(b) entitled the aggrieved person to monetary compensation only”

In other words putting it plainly a delay in bringing a suspect to court may amount to a violation of his constitutional rights but, such violation does not fall under the purview of a criminal trial or appeal court. Such a breach does not nullify subsequent court proceedings. A suspect is at liberty to seek monetary damages for this breach. On this basis I hereby dismiss this ground of appeal.

I will now proceed to consider the evidence on record. The Appellant is charged with committing an Un-natural Offence. This is defined as the act of ‘**sodomy**’ or the penetration by the male organ into the anus of another human being. The victim in this case was a young baby aged only six (6) months old. He obviously could not tender evidence on his own behalf. **PW3 N A** is the mother of the child. She gives a

heart-rending account of the injuries sustained by her baby. At page 19 line 21 she states

“I undressed the baby. I found the napkin was bloody and the baby had also passed stool”

She goes on to state as page 20 line 4

“The baby’s legs were also attached and seemed to move out of their normal place. The baby has been treated for a long time”

PW3 told court that the child was admitted at St. Hillary Clinic in Chaani for two (2) weeks undergoing treatment. It is not normal for a 6 month old baby to have tears in the anus and to be releasing blood and stool continuously. This is clear evidence that there had been some interference with the child.

More conclusive evidence is given by **PW1 DR. LAWRENCE NGONE**, a medical officer based at Coast General Provincial Hospital. He confirms having received the baby’s medical treatment notes from St. Hillary’s clinic. **PW1** filled and signed the P3 form which he produces in court as an exhibit **Pexb1**. Upon examination he found

“The baby had a deep cut (tear) on the rectum”.

His conclusion was that the child had been sodomized. This is professional medical evidence which remains uncontroverted by any other evidence. I find as a fact that this child ‘**Collins Otieno**’ was indeed sodomized on 13th February 2006.

The next crucial question is the identity of the defiler. **PW2 S O** told the court that she was with her baby brother on the evening in question. She states that the Appellant whom she knew as ‘**Rasta**’ came and picked up her baby brother and took him away. He later returned the child and blood was noticed on his napkin. **PW2** though a minor aged 7 years gave her evidence in a clear and consistent manner. She narrated the events of the day in detail was disarming in her obvious pride at having skipped class 3. At page 7 line 14 she states

“I was in Std 2 then before I jumped Std 3 and went to Std 4”

No doubt she was a very intelligent child. **PW1** remained unshaken under cross-examination by the Appellant and when her mother **PW3** returned she told her that it was Appellant who had taken the baby away.

The incident occurred between 5.00 p.m. and 6.00 p.m. It was still daylight and visibility was good. **PW2** had ample time and opportunity to see the Appellant well. The Appellant was not a stranger to **PW2**. She states at page 17 line 14

“I used to see the accused passing by the road near our house.”

This then is not evidence of visual identification alone – there is clear evidence of recognition which has been held to be more credible, more reliable and more assuring than visual identification alone (see **ANJONONI & OTHERS –VS- REPUBLIC [1980] KLR 59**)

This evidence of **PW2** is corroborated and strengthened by the evidence of **PW3**, who told the court that upon her arrival home she found the Appellant holding the baby in his arms. At page 19 line 15 **PW3** states

“I found ‘Rasta’ who is the accused with the baby in his arms. The accused was standing at the door in my house with the baby in his arms. I asked the accused why he was carrying the baby. I took the baby from the arms of the accused”

PW3 caught the Appellant red-handed with the baby in his arms. She too has positively identified the Appellant as the man she found holding the child. I am satisfied that there has been a clear and positive identification of the Appellant as the man who took the baby away from his home.

Why would the Appellant take a 6 month old baby away from their home in the absence of the child’s mother? What did he want with the child? The Appellant was not a relative or care-giver to the

child. He took the child away for a few minutes and upon return the child is found to have been sodomised. Only one logical conclusion can be drawn from this set of facts and that is that it is the Appellant who sodomized this baby. No other reasonable hypothesis can be drawn from this circumstantial evidence.

In his defence the Appellant claims that the charges arise out of a disagreement which he had with **PW3** over a plot. This was put to **PW3** in cross-examination and she vehemently denied the allegation. More so even if **PW3** may have had a grudge against the Appellant, no reason is given why **PW2** a mere child would identify him as the culprit. This defence has no merit and the learned trial magistrate was quite right to dismiss it.

On the whole I am satisfied that the prosecution did adduce clear, reliable and cogent evidence which met the required standard of proof. The guilt of the Appellant was proved beyond a reasonable doubt. I do hereby uphold this conviction.

After his conviction the Appellant was allowed an opportunity to mitigate after which he was sentenced to serve ten (10) years imprisonment. The Appellant committed a heinous, dehumanizing act on a young baby causing serious injury. His act caused the worst kind of agony on a defenceless innocent baby. The wounds and trauma will remain with the child forever. The trial magistrate sentenced the Appellant to serve ten (10) years imprisonment. Under S. 162 of the Penal Code, the maximum sentence for this offence is fourteen (14) years imprisonment. The maximum sentence is ordinarily reserved for the worst possible manifestation of an offence. To my mind this act of sodomy on a 6 month old child is indeed the worst possible manifestation of this offence. The ten year sentence was in my view too lenient in the circumstances. I hereby set it aside and substitute a sentence of fourteen (14) years imprisonment to run from the date of his conviction in the lower court. This appeal fails in its entirety.

Dated and Delivered in Mombasa this 10th day of November 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Appellant in person
Mr. Onserio for State

M. ODERO
JUDGE
10/11/2010