REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 383 of 2007

KELVIN OCHIENG ANYANGO……..…..…….APPELLANT

VERSUS

REPUBLIC ……..…….RESPONDENT

(From the original conviction and sentence in Criminal Case No. 2111 of 2002 of the Chief Magistrate's Court at Makadara by E. W. Mbugua (Mrs.) – Ag. Senior Resident Magistrate)

JUDGEMENT

The appellant was charged with unnatural offence contrary to section 162(a) of the Penal Code. That on 26th day of March 2006 at [particulars withheld] estate Nairobi had carnal knowledge of **G. K. O.** against the order of nature. He was also charged with an alternative count of indecent assault on a boy contrary to section 164 of the Penal Code. After full trial he was convicted for the main count and sentenced to 21 year imprisonment. The evidence that led to the conviction is that on the material day the complainant PW2 was coming from the supermarket when the appellant called him to his kiosk and sodomized him inside the kiosk. The evidence by the complainant is that he felt a lot of pain and immediately he told his mother PW1 what had happened. He was taken to Nairobi Women hospital and received adequate treatment.

The evidence of PW1 is that she gave her son her money to go and buy a pen from a nearby supermarket but he took longer than usual. She then sent his sister to go and check on him. She told court that when complainant came back he was crying and when he was asked he said that he had been sodomized by the appellant. He then checked on the complainant and found he had bruises on his anus. PW3 is the doctor who examined the complainant on 4th February 2006 and concluded that he had no physical injuries and that his private parts were normal. He produced the P3 forms as exhibit 1 and 2.

PW4 is the arresting officer and she stated that she found the appellant being beaten by the members of the public near where the incident allegedly took place. She then rescued him from the mob and took him to police station where he was later charged with the present offence.

PW5 is the doctor from the Nairobi Women hospital and who examined the complainant on the material day at about 4.30 p.m. In her conclusion the complainant had been sodomized and she concluded that the complaint by the complainant was genuine. She produced her report as exhibit 3.

The appellant on his part stated that on the material day at about while working at his hotel the complainant's mother came and said that he had sodomized his son. He denied and started screaming

attracting members of public. He was later beaten and taken to the chief's camp where he was later transferred to police station and charged with the present offence. In short he denied ever committing the offence that was preferred against him.

It is the case of the prosecution that the appellant is the one who sodomized the complainant on the material day and that there is ample evidence to connect him to the commission of the offence charged. The basis of the appellant's conviction is the evidence by PW2 and PW5. It is clear that the complainant and the appellant were persons known to each other. It is the evidence of PW2 that the appellant operated a kiosk within their neighbourhood and that he used to pay chips and mandazi from him. In essence this is a case of recognition and the law is that recognition is more satisfactory, more assuring and more reliable than the identification of a stranger. In cases where the only evidence against an accused person is the evidence of recognition, the court is required to examine such evidence carefully and to be satisfied that the circumstances were favourable and free from any possibility of error before it can rely on that evidence as a basis for conviction. The law is also that a fact may be proved by a testimony of a single witness. However, there is need to examine that evidence with the greatest care. It is the duty of the court to satisfy itself that in all circumstances it is save to act on the evidence of recognition and the evidence being given by a minor who is the only witness to testify on the event. The trial court examined the evidence given by PW2 and also considered the demeanor of the complainant and concluded that he was an honest boy telling court the truth. It is also the conclusion of the trial court that the evidence of PW2 was corroborated by the evidence of PW3 and PW5. The two doctors who examined the complainant.

The question therefore that arises is whether there is any basis to say that the appellant had been wrongly and improperly convicted. As was rightly pointed out by the trial court the offence against the complainant was committed during broad daylight and there is no basis why the complainant would not have recognized a person who was well known to him and who called him to his kiosk in order for the appellant to assault him. In short I am in total agreement with the trial court that the conviction is proper and is based on cogent and reliable evidence tendered by the prosecution. On my part and having carefully examined the evidence of PW2 together with the medical evidence given by the two doctors, it is my view that the appellant is the one who sexually attacked the complainant on the material day. The evidence is clear and straight forward with no basis for mistake or doubt in my mind. As was also stated by the trial court there is no basis why the complainant and his mother would fabricate a case against the appellant and when such allegation is sported by medical evidence. I therefore make a finding that the appeal against the conviction has no merit and it is hereby dismissed.

On sentence the trial sentence the appellant to 21 years imprisonment. In doing so the trial court considered section 162(a) of the Penal Code together with the amendment No.5 of 2003. It is clear that the appellant was charged with section 162(a) which states;

"***Any person who***

(a) has carnal knowledge of any person against the order of nature is guilty of a felony and is liable to imprisonment for 14 years.

Provided that in the case of an offence under paragraph (a) the offence shall be liable to imprisonment for 21 years if

(1)the offence was committed without the consent of the person who was carnally known or

(2) the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind or by bear of bodily harm or by means of false representation as to the nature of the act."

In my humble view the trial magistrate considered all the relevant factors but did not consider that the appellant was a first offender and that the offence was not aggravated any way. There is nothing to justify a sentence like the one imposed by the trial court unless there is evidence to show that there was

aggravation such as use of aggressive force or infliction or a dangerous injury which has the likely effect of endangering the lives of the complainant. I appreciate the offence committed by the appellant is an act of physical aggression which cannot be underestimated. However, the court also has a duty to consider the age and previous conviction of the person being convicted. The perimeter in meting out a particular sentence is to serve the interests of the complainant, general public and that of the person who will eventually be effected by the sentence being the offender. Taking it into consideration all the factors in this case I think the sentence of 21 years is rather harsh and out of proportion. I therefore set aside the sentence of 21 years and substitute with an order that the appellant shall serve prison term of 10 years from the date of conviction.

Order: The appeal against conviction is dismissed while the sentence is reduced to 10 years imprisonment.

Dated, signed and delivered at Nairobi this 13th day of July 2009.

M. WARSAME

JUDGE