**WILLIAM KAZUNGU KASENA ……..…… APPELLANT**

-AND-

**REPUBLIC…… ……. RESPONDENT**

(*An appeal from the judgment of Senior Resident Magistrate T. Mwangi dated 18th September, 2009 in Criminal Case No. 1215of 2006 at Mombasa Law Courts*)

**JUDGMENT**

The appellant was charged with two counts of unnatural offence contrary to s.162(a) of the Penal Code (Cap. 63,Laws of Kenya). In the first count it was alleged that the appellant, on divers dates between the year 2005 and 10th March, 2006 at unknown times within Mombasa District within Coast Province, had unlawful carnal knowledge of M.N against the order of nature. And in the second count, it was alleged that on divers dates between the year 2005 and 10th March, 2006 at unknown times, in the Kisimani area aforesaid, the appellant had unlawful carnal knowledge of S.Nd against the order of nature.

The complainants (PW1 and PW2) testified that the appellant herein, used to sodomise them in turns, inside his house, during the morning hours when they were on their way to school. On each such occasion, the appellant would be armed with a knife and would threaten to kill the complainants if they did not submit to him. He would caution the complainants not to tell anyone, and he would pay Kshs.20/=, for them to share.

It was ***V.N.O*** (PW4),a teacher at Z Primary School who noticed unusual attendance and behaviour patterns with PW1, and informed PW1's mother, who led to the discovery that PW1 was the victim of frequent acts of sodomy. When PW4 and PW1's mother (PW3) questioned him in school, he said he used to get to school late because while he was on the way to school, somebody (appellant herein) used to send him to buy cigarettes. PW4 had noticed that PW1 emitted odour akin to that of human waste; and in relation to this PW1's mother said PW1 had told him that the man who used to send him for cigarettes, was in the habit of sodomising him. PW1 disclosed that he used to be in the company of PW2, who was also being sodomised by the same man. PW1 and PW2 led PW1's mother to the appellant's house; and the matter was reported to the police.

The learned Magistrate found PW1's evidence to be corroborated by that of PW3 and PW4. ***Dr. Chidgaye Swaleh*** (PW7) filled in the P3 medical-reporting forms in respect of the complainants, and found evidence of penetration on both complainants.

The appellant denied the charges, and said he had never met the complainants until the time of his arrest.

The learned Magistrate observed that the complainants had each given almost identical evidence, showing their experience involving sodomy perpetrated by the appellant herein. The trial Court had been persuaded, after administering the ***voir dire*** examination, that the complainants understood the meaning of a truthful account: and the Court found them to have been truthful witness even though they were unsworn.

Identification of the appellant as the suspect left no room for mistake: the two complainants jointly pointed out the house where the appellant was living. A knock on the door revealed the appellant, in the company of his brother (DW3), inside the house. The appellant was then pointed out by the complainants, and was arrested by the police on the spot. This precise mode of identification

not-withstanding, the appellant's advocate had claimed that there had been mistaken identity, a claim the learned Magistrate thus dismissed:

"….**I do not think there was even the slightest [possibility] of mistaken identity. The evidence of [the] prosecution witnesses was very corroborative. [The] offence was taking place in the same house over a long period of time. It was during the day. Surely even after [taking] into account the ages of the complainants, there was no way they would have failed to positively identify [the] accused. They also identified him in Court and …..even in the Police Station….."**

The learned Magistrate came to the conclusion that the prosecution had proved their case beyond any reasonable doubt. He found the appellant herein guilty as charged on both counts, convicted him and sentenced him to a jail term of five years on each count, the sentences to run concurrently.

In the petition of appeal, M/s Gunga Mwinga & Co. Advocates for the appellant, stated that there had been contradictions in the prosecution evidence; that the trial Court erred in saying there was sufficient corroboration in the prosecution evidence; that the appellant had not been correctly identified as the suspect; that the trial Court failed to do a proper evaluation of the evidence; that the medical evidence on record was insufficient; that the charge was defective, for not showing when the offence had been committed; that prosecution was illegal, for violation of the appellant's constitutional, trial-rights; that the sentence was harsh and excessive; that the cogent case of the appellant had been overlooked; that the Police investigations were inadequately conducted.

The foregoing points of appeal lay at the centre of the submissions made by the appellant's two counsel,

***Mr. Gunga and Mr. Kithi***.

***Mr. Kithi*** urged that the record shows private persons to have been the ones who arrested the appellant in the first place, but it is not disclosed that these persons had any warrant of arrest. Counsel urged that, by s.35 of the Criminal Procedure Code (Cap. 75, Laws of Kenya), the police must immediately come in to arrest any person who has been arrested by private citizens without a warrant; and he submitted that this was not done in the instant case.

***Mr. Kithi*** also submitted that there had been a breach of s.72(3)(b) of the Constitution because the appellant had been kept in police detention for longer than 24 hours, before being arraigned in Court: in this regard counsel sought to rely on a High Court decision, ***Ann Njogu & 5 others v. Republic, Nbi H.Ct. Misc. Crim. Application No. 551 of 2007*** in which the following passage occurs:

"***I dare add that the Section is very clear and specific – that the applicants can only be kept in detention……for up to 24 hours. At the tick of the 60th minute of the 24th hour, if they have not been brought before the Court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants"***

Learned respondent's counsel, ***Mr. Monda***, contested the appeal, on the ground that the evidence on record placed the appellant squarely at the scene of crime, and the complainants had recognized the appellant so well, that the question before the Court was no longer that of identification. Counsel urged

that there was no mistaken identity, and that the appellant was clearly identified as the suspect.

Counsel submitted that sufficient medical evidence had been adduced showing that the complainants had been subjected to sodomy - and this evidence corroborated the account of the complainants.

***Mr. Monda*** urged that the constitutional-rights question had been raised quite belatedly, during submissions; but the Learned Magistrate took it up and addressed it. The trial Court's remarks are set out in the judgment as follows:

"***Another aspect [of the] submission is …. Violation of [the] human rights of [an] accused person. Nowhere in [the] evidence did [the] accused, throughout his evidence, explain when he was arrested and … if he remained in custody. Submissions of counsel amount to evidence from the bar. It gave [the] prosecution no room to respond on the same. This was an ambush ….***"

***Mr. Monda*** urged that the ground of appeal based on S.72(3)(b) of the Constitution be dismissed, as conditions were not in place for giving fulfilment to other terms of that provision – particularly the provision that the prosecution may explain how a prolonged detention of a suspect became justified.

Counsel submitted that the offence charged was a cognizable offence as defined in s.2 of the Criminal Procedure Code (Cap.75, Laws of Kenya); and therefore, by s.34 of that statute a private person may effect an arrest for a cognizable offence. By 1st schedule to the Criminal Procedure Code, arrests may be effected without warrant for unnatural offences (S.162 of the Penal Code).

***Mr. Monda*** urged that the prosecution had properly discharged its burden of proof, and that no material witness had been left out of the list of witnesses. Counsel urged that both PW.1 and PW.2 had been clear in their testimony: the offence took place in the house of the appellant. And only these witnesses and the appellant were in that house at the material time.

Counsel urged that two five - year terms of imprisonment, running concurrently, for the offence in question, was not a harsh or excessive punishment; and he urged that the appeal be dismissed.

This review of the evidence, and the manner in which the trial Court handled it, leaves me in no doubt that the two complainants were repeatedly sodomised; this was done by none other than the appellant herein; the complainants were truthful witnesses whose evidence was well corroborated by that of adult witnesses; it was the appellant's threats that made it difficult for information to come out regarding his unlawful acts, but the information came out after the school-teacher (PW.4) repeatedly observed certain strange signals, and confirmation of the link between those signals and acts of sodomy was soon received; and this confirmation also revealed the acts of sodomy against the second complainant. It is fool-proof evidence of the identity of the man - the appellant – who subjected the complainants to the experience of sodomy.

The only remaining question is whether there are constitutional grounds which would spare the appellant the burden of criminal sanctions. I do not think so. Section 72(3)(b) of the Constitution, upon which the appellant seeks to rely, is not a panacea against conviction in all circumstances. Section 72(3)(b) of the Constitution is to be read against the background of the terms of s.70 of the constitution; and S.70 grants rights such as those now claimed by the appellant, ***subject*** to respect for the rights of others, and subject to the public interest. I hold that the public interest demands that the offence of sodomy committed against infant school children ought, as far as possible, to be curtailed by trying and appropriately punishing the culprits. I am also, in this regard, mindful of the very sensitive constitutional rights of children so young (the evidence is that each complaint was just about ten years old). This matter should, besides, have come up early in the course of trial, so that the prosecution may have an opportunity to file depositions explaining the circumstances in which any delay in conducting prosecution might have taken place. I dismiss this ground of appeal.

In the result, I hereby dismiss the appeal; uphold conviction; and affirm sentence as imposed by the trial Court.

***Orders accordingly.***

DATED and DELIVERED at MOMBASA this 30th day of November, 2009.

**J. B. OJWANG**

**JUDGE**

Coram: Ojwangi , J.

Court Clerk: Ibrahim

For the Appellant: Mr. gunga; Mr. Kithi

For the Respondent: Mr. Monda