REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(*Coram: Ojwang, J.*)

CRIMINAL APPEAL NO. 493 OF 2006

BETWEEN

ELIUD MUGANDI CHONGO…….…….....APPELLANT

-AND-

REPUBLIC ……RESPONDENT

(An appeal from the Judgement of Principal Magistrate Mrs. Wasilwa dated 4th September, 2006 in Criminal Case No. 1930 of 2006 at the Kibera Law Courts

JUDGEMENT

The main charge brought against the appellant herein was: commission of an unnatural offence contrary to s.162(a) of the Penal Code (Cap.63). The particulars stated were that the appellant, on divers dates between 18th March, 2006 and 29th March, 2006 at [Particulars Withheld] , Kibera, within Nairobi Area, had carnal knowledge of ***J K*** against the order of nature. There was an alternative charge: that the appellant had committed indecent assault on a boy, contrary to s.164 of the Penal Code. The particulars were that, on divers dates between 18th March, 2006 and 29th March, 2006 at [Particulars Withheld], Kibera, the appellant unlawfully and indecently assaulted ***J K***, a boy under the age of 14 years by touching his anus.

The trial Magistrate commenced the hearing by conducting a *voir dire* examination for the complainant, a boy of 13 years of age, and attending primary school. The Court formed the impression that ?

> "The witness is intelligent enough to follow proceedings, and understands the importance of being truthful."

The complainant was then sworn as PW1 and gave his testimony in Kiswahili. He stays with his parents and siblings at [Particulars Withheld] in Kibera. The appellant herein was a neighbour, and went to the same Church as he and his family. The appellant lived alone in his house.

PW1 recalled that on 18th March, 2006, at night, there was contretemps between him and his mother who beat him up and forced him out of the one-room family abode. He found his way to the appellant's house, where he arrived at 8.00pm, seeking a place to step. The appellant prepared food for himself and his guest, and after they had eaten, they went to sleep, sharing one bed. Soon after, the appellant started

touching the complainant's anus; and he then took vaseline jelly, applied it to the complainant's anus, and started inserting his penis thereinto. He was able to wedge his penis into the complainant's anus, telling the complainant to remain quiet. The complainant did not resist. When he returned to his parent's abode the following morning and met his father, the complainant did not disclose the previous night's incident. In the evening he returned to the appellant's house, spending there the following three days.

On the second night he spent with the appellant, the complainant was subjected to a similar sex act. When the appellant repeated this act on the third night, neighbours became aware, and they expressed disgust by hurling stones at the appellant's door. This annoyed the appellant so much, he came out of the house wielding a machete, and cut one of the neighbours on the hand. In this commotion, the complainant left the appellant's house, accompanied by his father, neighbours, and the appellant. They went up to the District Officers office, and later to Kilimani Police Station. The complainant disclosed to the D.O. the details of the anal-sex incidents. The complainant was taken to hospital for medical attention, while the appellant was detained at the Police station. PWI testified that he had sought refuge for several nights in the appellant's house as he knew the appellant, and they went to the same Church.

On cross-examination, PW1 said he had been crying when he first sought refuge in the appellant's house, at night. After the second night he slept in the place of refuge, the appellant personally washed the complainant's clothes. On the third night, when the neighbours attacked the appellant's house with stones, the complainant was lying not on the bed, but on the ground. In-examination, the complainant said that he had been asked to sleep on the ground on each occasion, following sessions of anal sex.

PW2, ***W A K***, testified that he works as a watchman, lives at Kibera [Particulars Withheld], and is the father of complainant. When he could not find his son, on 29th March, 2006 at 10.00 pm, he searched the neighbourhood and, subsequently, suspected that PW1 could be in the appellant's house. PW1 and his mother used to go to the Divine Church in the neighbourhood, where the appellant herein was a pastor. After his fruitless search, PW2 returned to his house, but soon thereafter he heard noises outside. This noise came from four neighbours who were frog-marching the appellant, even as the appellant held a machete in his hand. Upon enquiring what was wrong, the four neighbours told him that the appellant had sodomised the complainant. PW2 then went to the appellant's house, and found PW1 outside, in the presence of many on-lookers. PW1 then informed PW2 that the appellant had taken him (PW1) into the house, had supper with him, and then sodomised him. PW2 and the neighbours took the appellant to Kilimani Police Station, Where he was detained. PW2 made a report to the Police, and then took the complainant to Nairobi Women's Hospital for medical attention and for the preparation of appropriate records. The appellant used to frequent PW2's house; and PW1 too used to visit the appellant's house, but PW2 had not known of the kind of relation the appellant kept with the complainant.

On cross-examination by the appellant, PW2 confirmed the complainant's occasional visits to the appellant's house, but he had not suspected that anything improper took place between PW1 and the appellant.

PW3, ***Alex Mudegu Gazemba***, testified that he was a shopkeeper and lived at Kibera [Particulars Withheld]. When PW3 returned home from work, on 29th March, 2006 at 6.00pm he saw an unfamiliar boy, the complainant, in a neighbour's house. Then later, at 10.00 pm, as PW3 went to the latrine he heard hissing sounds coming from the house of the said neighbour, the appellant herein. This neighbour's door was locked, and there was no light visible from the outside. As the hissing sounds persisted, PW3 heard the voice of the appellant, silencing somebody else, who from a sound he made, appeared to be a boy. PW3 called another neighbour, by the name ***Ben,*** who also heard the goings-on at the appellant's house, was revolted and hit the appellant's door. ***Ben*** called out other neighbours. The appellant was slow to open, and when he did, came out with the machete and cut ***Ben*** on the hand. As the appellant followed ***Ben*** out of the compound, stunned neighbours inquired of PW1 why he was in the appellant's house, but he responded by silence. The neighbours took out PW1's underwear, checked his private parts, and saw he had been sodomised; PW3 is one of those who witnessed this evidence of sodomy, which had left the boy wet in the anus. The neighbours sought to know PW1's home, and they took him there, finding his father who they brought over to the *locus in quo*. The sodomy report left PW1's father in shock; and he had his neighbours took the appellant to Kilimani Police Station before taking PW1 to a

doctor for examination and medical reporting.

PW3 testified that the appellant was a neighbour who had lived with PW3 in the same plot for a relatively short period of time. PW3 had on an earlier occasion seen PW1 in the plot where his and the appellant's houses were located.

On cross-examination, PW3 said that on the material night PW1 had been making a hissing sound as he endeavored to suppress sound, and the appellant was urging him not to cry. The latrine is located near the appellant's house, and as PW3 headed there he had heard the incident then being enacted in the appellant's house. PW3 said he had had no grudge against the appellant, and it was the appellant himself who had led the way to the complainant's parents' house following the night sodomy-incident. PW3 testified that questions put to PW1 after the discovery of the sodomy-act had elicited the answer that this was the third occasion he had been sodomised, and that the appellant had been rewarding him with gifts of money.

PW4, ***Dr. Zephania Kamau***, testified that he was a Police surgeon walking in Nairobi. On 4th April, 2006 he had examined the complainant for unnatural offence suffered. PW1 had no injuries, but had a healed bruise on the anal opening. PW1 already had been seen at Nairobi Women's Hospital, which found a bruise on the anal opening.

PW5, Police Force No.56547, ***Corporal Penina Nzioka*** testified that she worked at Kilimani Police Station, and on 30th March, 2006 the appellant had been brought before her by members of the public. PW5 recorded the complainant's statement and the statements of others who had been in the arresting party; and the appellant was held in custody. PW5 charged the appellant with the offence of sodomy.

The appellant gave a brief sworn statement in which he said he did not commit the offence charged. He also said there had been a disagreement between himself and the complainant's parents. The appellant testified that he had not been arrested and taken to the Police station, but he had gone there of his own volition.

From the evidence, the learned Principal Magistrate reached her conclusion as follows:

> "I have examined all [the] evidence on record from both parties. PW1 is a witness who I found open, brave and consistent. He said on three different occasions [the] accused sodomised him. PW3 witnessed a strange [hissing] noise…..from [the] accused's house. He became suspicious and called neighbours ….. They hit at [the] accused's door, and the accused came out in anger. They interrogated the boy and he confirmed he had been sodomised. PW4 who examined him also found a healed bruise at the complainant's anal opening. This evidence is corroborative of the commission of this offence. Accused's defence is denial, and he says he had disagreed with the complainant's parents. This I found not to be true, as it was never brought out by [the] accused, even to PW2 .....in cross-examination. [The] accused was [the] complainant's pastor, hence the trust the boy had in him. I found [that] the defence does not shake [the] prosecution case which I find water-tight. I find [that] the prosecutions have established their case against the accused beyond reasonable doubt. I find the accused guilty as charged, and I convict him under section 215, CPC."

After treating the appellant as a first offender, the Court accorded him an pportunity to make a mitigation address; and he said he is an old man, who was orphaned when he was only three-months old. The appellant also pleaded that he was the bread-winner for his nephews whose parents had died. The learned Principal Magistrate imposed a ten-year term of imprisonment.

The appellant contests the trial Court's Judgment, setting out his grounds as follows:

(i) that the sentence imposed was too harsh;

(ii) that the trial Court failed to accord the appellant herein benefits of doubts in the evidence;

(iii) that the appellant was not subjected to any medical examination to ascertain if indeed, he had committed sodomy;

(iv) that the evidence of PW1, PW2 and PW3 implicating the appellant in crime, was uncorroborated;

(v) that the appellant was convicted on the basis of hearsay evidence;

(vi) that the charge was not proved beyond reasonable doubt;

(vii) that the defence evidence was not taken to account by the trial Court.

The appellant further advanced the foregoing grounds in written submissions, which he offered as the core of his case on appeal.

Learned State Counsel ***Ms. Gateru*** contested the appeal, and urged that the prosecution had proved their case to the required standard. Counsel urged that reliable evidence had been given by the complainant, who after passing the *voir dire* examination conducted by the learned Magistrate, testified that he had been sodomised on several occasions by the appellant herein. Counsel submitted that PW1 had positively identified the appellant, a person well known to him, as the perpetrator of the offence.

Ms. Gateru urged that the ten-year sentence of imprisonment imposed upon the appellant by the trial Court was a very lenient one, as a maximum of 21 years' imprisonment was provided for by law. She urged that the conviction be sustained, and the sentence affirmed.

I have reviewed the evidence taken before the trial Court in detail, in keeping with the principle stated by the Court of Appeal in ***James Otengo Nyarombe and Two Others v. Republic***, Criminal Appeal No. 184 of 2002:

> ".....a court hearing a first appeal .....has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so, the first appellate court would give allowance for the same."

The learned Magistrate after conducting a *voir dire* examination of the young complainant, rightly (I believe) came to the conclusion that the complainant was intelligent and understood the values of truth; and on that basis the complainant was sworn and he gave testimony that has turned out to be the centrepiece of the prosecution case. Not only was it the clear opinion of the trial Court that the complainant was a truthful witness, and I am fully in agreement, but his testimony was further corroborated by other witnesses, more particularly by PW2, PW3 and PW4. I therefore reject the contention of the appellant that he had been convicted on uncorroborated evidence.

It follows, as I can see from the evidence on record, that the lines of testimony in the trial were so clear-out, they left hardly any doubts which the appellant can properly claim were not resolved in his favour. I would, therefore, dismiss the appellant's contention in that regard. It also follows, as I find, that the appellant's claim he was convicted on the basis of hearsay evidence, is entirely unfounded, and must be rejected. I find that the very cursory defence was properly taken into account by the learned Magistrate, who rightly found that the prosecution had proved their case beyond reasonable doubt.

The appellant has challenged the sentence imposed upon him as being harsh. However, such contention is not, in my view, valid, since, as pointed out by the learned State Counsel, the appellant was subjected to less than half of the maximum sentence provided by law. This Court has no legal basis for interfering with the sentence thus imposed. The Court of Appeal for Eastern Africa, in ***Ogalo s/o Owoura v. Reginam*** (1954) EACA 270 had clearly set out the principles upon which an appellate Court would be justified in interfering with sentence imposed by the trial Court; in that Court's words:

> "The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge....."

Similarly there is no basis for interfering with the jail term imposed by the trial Court in this case.

I hereby dismiss the appellant's appeal, uphold conviction as determined by the trial Court, and affirm sentence as imposed by that Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 13th day of February, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Ms Gateru

Appellant in person