REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 684 of2006

FRANCIS MUKHOYA ……..……....……. APPELLANT

-AND-

REPUBLIC ……..…… RESPONDENT

(An appeal from the Judgment of Principal Magistrate Mrs. Nzioka dated 7th November, 2006 in Criminal Case No. 19086 of 2004 at Makadara Law Courts)

JUDGMENT

The appellant, ***Francis Mukhoya***, faced a main charge and an alternative charge. The main charge was: committing an unnatural offence contrary to s. 162 (a) of the Penal Code (Cap. 63, Laws of Kenya); and the particulars were that on 28th August, 2004 at [PARTICULARS WITHHELD] Village in Nairobi, he had carnal knowledge of ***JC*** against the order of nature. The alternative charge was indecent assault on a boy, contrary to s. 164 of the Penal Code (Cap. 63). The particulars were that the appellant, on 28th September, 2004 at [PARTICULARS WITHHELD] Village in Nairobi, unlawfully and indecently assaulted JC, a boy under the age of 14 years by touching his buttocks.

The learned Magistrate records that she examined the complainant and found him "*very intelligent [and able to speak] on oath which he understands"*. ***JC*** was then sworn, and gave testimony as PW1.

The complainant, a Standard Four pupil at [PARTICULARS WITHHELD] Primary School, testified that on 28th April, 2005[?] during the lunch hour, he passed near the residence of the appellant herein. The appellant, who was known to him by the nick-name "*Soldier*", called PW1 into his house as PW1 walked past. When PW1 responded by entering the house, the appellant asked him to remove his clothes but PW1 declined to do so. The appellant then removed PW1's clothes, and, in PW1's words: "*he put me down on the bed and did to me bad manners. I slept on [my] back and he told me to lie on [my] stomach ……; he put his penis in [my] buttocks and I told him I was feeling pain. He put his penis in my [my] thighs ……. He gave me Kshs.20/=."*

PW1 did not report the incident to his mother when he arrived back home; he was afraid. Then again, on a different day, the appellant called PW1 into his house; he removed PW1's clothes and, in PW1's words: *"he ……did for me bad manners in the thighs. He did not go into my buttocks. He gave me Kshs.20 [and] I bought biscuits."* Once again, PW1 did not report the incident to his mother.

Yet again on another day, the appellant called PW1 into his house and, in the complainant's words*: "he did me bad manners in the thighs and he gave me Kshs.20/= and told me not to tell anyone"*.

Again, on a different day, when playing in the neighbourhood, the complainant met the appellant who asked him to go into the appellant's house. The complainant did; and the appellant removed his clothes and, in his own words, "*did me bad manners again. He finished and turned me [over] and went to [my] buttocks; I felt pain, as he told me to keep quiet so no one [could] hear."* In the end the appellant gave PW1 Kshs.20 and he returned home.

The appellant later called PW1 into his house, for the sixth time, sodomised him and in the end gave him Kshs.20/=. This course of conduct was repeated a seventh time, while the complainant was on his way from Church, and this time the sum of Kshs.100/= was paid, which the complainant used to buy a football.

The football marked the burst of information that led to charges being laid against the appellant herein. PW1's father sought to know how the complainant acquired the football. After resisting the demand for an answer for a while, the complainant told him the football came from "*Baba Willy*" – the appellant herein. The complainant further gave the information that the appellant herein had paid him Kshs.100/= after "*doing bad manners*" to him. The complainant's father reported the matter to the Police at Buru Buru Police Station, and the complainant was taken for medical examination.

On cross-examination by the appellant herein, PW1 testified that the appellant was a father of several children, namely, ***W***, ***M***, and ***M***; and ***M*** went to the same Church as PW1; PW1 was familiar with the setting at the appellant's household, as he used to watch television in the appellant's hotel. The time of day was 1.00 pm when the appellant sodomised the complainant for the last time, and paid him Kshs.100/= which he used to buy the football.

PW2, ***SC*** testified that he realized that his son, PW1, had a new football, on 29th August, 2004 and he wanted to know how this ball had been acquired. His son told him that the money for the purchase of the ball came from "S*oldier*", and PW2 knew "*Soldier*" only by appearance. PW2 testified that when he interviewed PW1, PW1 said the appellant herein used to take him to the appellant's house and to sodomise him. This fact much upset the witness, and he reported the matter to the Police Station; he also took PW1 to Nairobi Women's Hospital for medical attention. "*Soldier* ", who is the appellant herein, was then arrested and prosecuted.

On cross-examination, PW2 testified that he knew the appellant only as "*Soldier*", and he was aware that the two of them lived in the same village. The fact of PW1 coming home with the ball is what led to inquiry into the sodomy incidents, as it became apparent that the boy had access to unknown sources of money. To PW2's knowledge, PW1 had been to the appellant's house seven times, during each of which he was sodomised by the appellant herein.

PW3, ***EW*** testified that she had endeavoured to find out the source of the money which her son, PW1, used to buy a new football; and the son told her "*Soldier*" had given him Kshs.100/= which he used to buy the ball. When she sought to know why "*Soldier*" would give her son Kshs.100/=, PW1 told her that "*Soldier*" had been taking him to his (appellant's) house, giving him money, and "*doing bad manners*" to him. "*Soldier*", PW3 testified, was the appellant herein.

On cross-examination, PW3 named the preceding Saturday of the week as the last occasion of sodomising PW1 by the appellant, and she said she got this information from PW1. PW3 had seen the ball which PW1 had purchased, and she believed her son to be telling the truth regarding the source of funds for the purchase of the ball. PW3 was not aware of any grudge existing between her husband (PW2) and the appellant herein.

PW4, ***Dr. Zephaniah Kamau***, the Nairobi Area Police Surgeon, had examined the complainant who had presented with a history of sodomy, on 3rd September, 2004. PW4 found no physical injuries; PW1's genitals were normal, and erectile examination was also normal. PW1 had already been seen at Nairobi Women's Hospital where an anal swab had been taken and examined, but presence of spermatozoa was not detected.

The appellant herein made his defence by sworn evidence, as DW1, and said that he had learned on 10th September, 2004 that "*SC*" (PW2) wanted to have him arrested by the Police. When, thereafter, DW1 met PW1 and asked about the intended arrest of him (DW1), PW1 ran away. Later, PW2 came with the Police, and identified the appellant who was then arrested and taken to the Police Station. The appellant denied that he had sodomised the complainant, and attributed the case to frame-up occasioned by business competition between himself and PW2.

After a careful review of the evidence, the learned Principal Magistrate reached a finding as follows:

"***I find that there is no evidence to support the charges in count 1, as the doctor's evidence is in the negative. As regards the alternative court, I find that the accused lured the victim – complainant on several occasions, and indecently assaulted him ….. I find that the accused committed the offence. I dismiss his defence of grudge over business as an afterthought. He never even put it to the witness during cross-examination …….. I find the accused guilty as charged on the alternative count, and I accordingly convict him."***

After considering the appellant's mitigation statement, the trial Court sentenced him to a five-year prison term.

In his appeal, the appellant states as his grounds: that the prosecution had adduced evidence that was insufficient to support conviction; that the prosecution evidence was contradictory; that the doctor (PW4) had found no evidence of anal penetration on the complainant; that the investigating officer had not come to testify; that sentence was harsh and excessive.

While developing the foregoing points by oral testimony, the appellant contended that the trial Court had denied him a hearing, as he did not call witnesses to support the defence case. He also maintained that the case against him had been a frame-up arising from business competition.

Learned counsel ***Ms. Gakobo*** contested this appeal, and submitted that the prosecution had adduced sufficient evidence to sustain a conviction. Counsel urged that there was sufficient evidence showing that on several occasions, the appellant had called the complainant into his house, removed his clothes, and indecently assaulted him by touching his thighs and buttocks. On each occasion, the offence took place in broad daylight, and the appellant was well known to the complainant as "*Soldier*". The ball which had been bought with money supplied by the appellant, counsel urged, was a reliable identification-link connecting the appellant to the offence charged.

After carefully considering all the evidence, I find myself in agreement with the learned Principal Magistrate that the very specific and detailed evidence given by the complainant, cannot be fabricated evidence, and in this regard I have accepted the trial Court's assessment of the demeanour of the complainant as a witness.

The complainant, I believe, bore truthful personal witness to the several incidents of indecent assault, to which the appellant had routinely subjected him. This evidence is reinforced by the testimonies of PW2 and PW3, and more particularly by the circumstantial evidence of the purchase of a football, which turned out to have been funded with moneys paid by the appellant, as the price for his criminal escapades. I am convinced that the appellant was properly convicted, on the basis of proof-beyond-reasonable-doubt. I am also in agreement with the trial Court that conviction should be on the alternative count rather than the main count. I do not consider the prison term imposed, of five years (out of a possible total of 14 years) to have been in any way excessive.

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

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 5th day of March, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Ms. Gakobo

Appellant in person