



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

Criminal Appeal 669 of 2006

(From Original Criminal Case 101 of 2005 (Kikuyu) Decision by M.W. Murage PM)

GEORGE THUO WARIARA.....APPELLANT

V E R S U S

REPUBLIC.....REPUBLIC

J U D G M E N T

George Thuo Wariara (*the appellant herein*) was charged with two counts of unnatural offence contrary to Section 162 (a) of the Penal Code that on the 17th day of January 2005 at Kiambu District within Central Province, had carnal knowledge of J M N against the order of nature. The second charge of similar nature relates to offence against HKK. He faced two alternative charges of indecent assault on a boy contrary to section 164 of the Penal Code that on the 17th day of January, 2005 at Kiambu District, within Central Province, unlawfully and indecently assaulted HKK, a boy under the age of 14 years by removing his shorts and fondling his buttocks. The 2nd alternative charge relates to J M N. The appellant denied the charges and the matter proceeded on trial. P.W.1 J M N, aged 10 years described how the appellant found him in the house with his brother, SN. Appellant requested for water, sent SN for cigarettes then closed the door. Appellant ordered P.W.1 to remove his shorts – P.W.1 refused – appellant removed the shorts forcefully, and put P.W.1 down, then removed his trouser. P.W.1 was lying on his stomach, and appellant lay on P.W.1's back and sodomised him. P.W.1 says it was painful and he screamed but appellant covered his mouth using his hand and warned him that if he screamed again he would kill him. Then P.W.1's grandmother called out while outside and appellant opened and hit her and she fell. Appellant ran away. People came and P.W.1 told them what appellant had done. P.W.1 was bleeding – P.W.1 did not know appellant before. Appellant left a bicycle which he had had with her and was produced as exhibit in court. Appellant also left his shoes as he fled. Since then appellant has been feeling pain in his anus. P.W.2 MNM is the grandmother to P.W.1 and confirms that she lives with both P.W.1 and N. When she got home at 5.00 pm she knocked the door as P.W.1 was nowhere in sight and it is appellant who opened the door, knocked her door and fled. She is known to appellant for eight years and she names him as Thuo. She noticed that P.W.1 was bleeding and his clothes had blood.

P.W.3 (SN) confirms that the appellant sent him for cigarettes and he went leaving appellant and P.W.1. P.W.4, H K K is a 13 years old boy who narrated an encounter he had with appellant who had demanded that he kisses him and how appellant eventually sodomised him several times between 6.30 upto 845 pm. This was after persuading P.W.4 to accompany him to a quarry discuss an allegation that P.W.1 had said he would beat appellant. They ended up in an unoccupied house where appellant forcefully removed

P.W.4's shorts and sodomised him. P.W.4 describes the experience as painful. P.W.4 has known appellant since birth. P.W.4 was then taken to hospital. AW (P.W.5) lives with P.W.4 and confirms that on 17/1/05, P.W.4 got home late at about 8.30 pm and upon inquiring why he was late, he informed her about the incident wherein he named the appellant (who was also known to P.W.5).

So upon report being made to P.W.6, Police Constable John Kanyi, he sent the complaint to a Doctor and collected their clothes, the bicycle and appellant's shoes. Incidentally that bicycle which appellant left at the scene as he fled belonged to P.W.7 David Nganga, who is his cousin. P.W.7 confirms that appellant had borrowed the bicycle from him because his place of work was far. He identified the bicycle to police and in court. Doctor G.K. Mwaura (P.W.10) who examined HKK and produced the P.3 form stated that the patient had swollen upper leg and right cheek, there were bruises and wounds in the anus, the injuries were half a day old and were consistent with sodomy. He also examined JMN who had scratches on the left cheek and left neck, wounds and bruises on the anus. The injury was 2 days old and features were consistent with sodomy.

In his unsworn defence, the appellant dwelt on the events of the day he was arrested and said he knew nothing about the charges. He says this is a family matter where only family witnesses testified and that there was malice on their part. The learned trial magistrate upon considered the evidence stated that appellant did not challenge the evidence of P.W.1 which was supported by evidence of the Doctor and corroborated by evidence of P.W.2 who testified that she found accused with complainant and the latter was bleeding. P.W.7's confirmation about the bicycle being lent to appellant as described by the learned trial magistrate as overwhelming against the appellant. The learned trial magistrate also noted in her judgment in relation to count 2 that P.W.4 knew appellant well and the evidence was confirmed by that of the Doctor (**P.W.10**) and that P.W.4 had no reason to lie against appellant. The appellant was thus convicted on the main charges of unnatural offences and acquitted on the alternative charge. He was sentenced to a prison term of 14 years on both counts, to run concurrently. Appellant was dissatisfied with the sentence and conviction and he appealed stating that:-

(1) The prosecution case was not proved beyond reasonable doubt.

(2) That the evidence was not sufficiently trustworthy and the learned trial magistrate failed to put into account that the witnesses had been coached on what to say in court.

(3) That his defence was not properly taken into account.

At the hearing of the appeal, the appellant further submitted that the ends of Justice will not be violated if a lesser sentence is awarded as he has developed heavy health complications after his incarceration and wonders why other people referred to by P.W.2, who came to the scene were never called as witnesses.

The appeal is opposed, and the learned State Counsel Mrs Kagiri has submitted that there is overwhelming evidence to support the charges. She submits that P.W.1 and P.W.10 gave clear and consistent evidence as to how this offence was committed. In both cases the offences were committed in daylight, towards evening and complainants were able to see and identify the appellant. The learned State Counsel also points out that when the appellant was committing the offence against P.W.1. P.W.2 who is P.W.1's grandmother caught them red handed and this is corroborated by P.W.2. She further submits that the evidence of P.W.1 and P.W.2 is strengthened by that of the Doctor (P.W.10), who indeed noted that P.W.1 had been sodomised.

The learned State Counsel also pointed out to the presence of bicycle and how P.W.7 and P.W.8's evidence clearly linked appellant to that bicycle. Mrs Kagiri submitted that the evidence of identification and recognition together with the circumstantial evidence of the bicycle and the independent evidence of the Doctor, points to no other person except appellant and that there is nothing on record to suggest that there could have been a mistake on identity. The learned State Counsel also urges the court not to interfere with the sentence saying for an offence which carries a maximum of 21 years imprisonment, 14 years cannot be said to be harsh or excessive taking into consideration the impact the offence has had on

the complainants who are young boys.

Appellant's response is that he is not satisfied with the Doctor's evidence as he only examined the boys and not appellant. What was not sufficiently trustworthy about the evidence of the witnesses? This is not specified but I suppose it was to do with the family link that the appellant has alluded to. Would that make it not worthy of trust.? Both P.W.1 and P.W.4 were subject to tests by the learned trial magistrate to establish whether they understood the requirement that they speak the truth and indeed P.W.1 on re-examination said "**What I have told the court is what I was done. My grandmother told me to tell the court all that was done to me.**" - that surely cannot be interpreted to mean coaching. Appellant says there was a grudge with the Chief as the Chief had wanted him to teach his sons how to cut stones. There is no evidence whatsoever to suggest that the Chief was related to the complainants so as to further the interests of the family with the existing grudge. Indeed the trial magistrate considered the appellant's defence and noted that appellant "told the court that this case was framed with the help of the Assistant Chief who had a grudge with him" She however noted that P.W.1 and P.W.2 were able to identify the appellant and from the record I note that P.W.4 did recognize appellant as someone he had known since his childhood. She further noted that "Accused in his defence merely denied that charge but had not clarified P.W.4's evidence what was the nature of this purported grudge - did appellant refuse to teach the Chief's sons how to cut out stones? That is not clarified by appellant who is the one making the allegation and indeed he never raised it when cross-examined P.W.8 the Assistant Chief - Isaiya Kinyanjui. Appellant also complained that only family members testified yet P.W.2 had referred to other people coming to the scene, yet they were never called to testify. However P.W.2 on cross-examination clarified that -

"**When people came, you had left**" So really those people would not have added any value to the prosecution case. The appellant also complained that he was not examined by the Doctor. That is true and there is no medical evidence linking appellant to the offence because he wasn't taken for medical examination, but that is not fatal, as there is direct evidence of P.W.1 and P.W.2 (who saw him bolt out of the house having P.W.1 bleeding from the anus. Indeed this court is alive to the fact that the medical evidence is only corroboration of the fact that P.W.1 and P.W.4 were sexually assaulted but not corroboration of the perpetrator; but the circumstances go further than just the medical evidence- it is coupled with what P.W.2 said regarding P.W.1 and the appellants presence and conduct plus the state of P.W.1's clothings and body opening. The commission of a sexual offence can be properly corroborated by circumstantial evidence - a view that was held in the decision of **Lawi Ongweya -Vs- Republic 1964 E.A. at page 129** and the fact that appellant was not subjected to a medical examination is therefore not fatal - this is buttressed by the decision in **Makeya -Vs- Republic E.A.L.R. (2002) 2 E.A. 482 page 483** where the accused was not medically examined, yet the Court of Appeal upheld the conviction on rape. The evidence of P.W.6 P.C. John Kengi on cross-examination is that appellant had disappeared and was arrested later - which would thus explain why the appellant was not taken for medical examination i.e. the lapse of time would not have preserved the kind of useful information required in an incident of this nature.

The witnesses were consistent and their evidence was cogent. There could be no question of mistaken identify as the offences occurred during the day and the witnesses clearly saw, identified and recognized the appellant.

Section 162 of the Penal Code; which was the basis of this charge reads:-

"Any person who-

(a) has carnal knowledge of any person against the order of nature; or

(b) permits a male person to have carnal knowledge of him of her against the order of nature.

is guilty of a felony and is liable to imprisonment for fourteen years:-

Provided that, in the case of an offence under paragraph (a) the offender shall be liable to imprisonment

for twenty-one years, if –

(ii) the offence was committed without the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of some bodily harm.....

From the evidence on the record, those legal requirements were completely fulfilled in the scenario narrated by P.W.1 and P.W.4. and the trial magistrate indeed took note of the corroborative evidence of P.W.2, P.W.10 and even to some extent P.W.5 (**AW**). Subsequently, my finding is that the conviction was based on proper evidence and is thus secure and I uphold it. The sentence meted out, taking into consideration the nature of the offence, is in my view not harsh or excessive at all and there is no need to interfere with it. The same is confirmed. Consequently the appeal is dismissed.

Delivered, dated and signed this 7th day of April, 2008.

H. A. OMONDI

JUDGE