REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

Criminal Appeal 169 of 2006

DUKE KENYATTA AUTA ………………………….. APPELLANT

VERSUS

STATE ……………….……………….……………….. RESPONDENT

(From original conviction and sentence of the Senior Resident Magistrate's Court at Nyamira, Criminal Case No.784 of 2003 by Mr. K. W. Kiarie Esq., P.M)

JUDGMENT

The appellant was charged with committing an unnatural offence contrary to section 162(a) of the Penal Code. The particulars were that on the 31st day of July, 2002 at Nyaramba sub-location in Nyamira District within Nyanza Province, the appellant had carnal knowledge of R. K. against the Order of nature.

After a full trial, the appellant was convicted and sentenced to fourteen years' imprisonment. He was aggrieved by the said conviction and preferred an appeal to this court. In his amended petition of appeal filed through M/S. Nyamweya Osoro & Nyamweya Advocates, the appellant listed 12 grounds of appeal. The appellant had filed another appeal arising from a different case, **High Court Criminal Appeal No. [.....]**at Kisii, where he was also represented by the same advocate as in this one, Mr. Bosire. In the said appeal, the appellant had appealed against conviction on a charge of defilement of a girl contrary to the provisions of **Section 145(1)** of the **Penal Code**.

Both Mr. Bosire for the appellant and Mr. Kemo, Senior Principal State Counsel, chose to adopt their submissions in Criminal Appeal in No.[....]. Looking at the amended petition of appeal filed in respect of this appeal, it is obvious that some of the grounds are misplaced and do not make any sense herein, I believe they were intended for the appeal aforesaid.

The evidence that was tendered before the trial court briefly stated is as follows:

R. K., PW2, a girl aged 13 years, testified that on 31/7/2002 at about 5 p.m. she was alone on her way home. She met one of her teachers known as Mr. Reuben Kibonga. He greeted her and she continued with her walk. Shortly thereafter, she saw the appellant seated near a place where a tractor was being repaired. The complainant knew the appellant very well. They were living in the same village. After a short while, the appellant called PW1 from behind and told her that the teacher she had earlier met wanted her to go and collect a letter to take to her mother. She believed him and they walked together towards a

certain road. The appellant told PW1 that the teacher was in a house that was in the vicinity. They proceeded to the house and he forced her to get in. He held her mouth to prevent her from screaming. He put her on a bed, removed her underpants and inserted his penis into her anus. Thereafter he told her to dress up and go home.

On her way home, PW1 met her sister, M. N; PW3. She told PW2 what the appellant had done to her. Thereafter the two girls went to look for their father who was in a tea-buying centre and told him about the incident. PW2 told her father that it was the appellant who had sodomised her. They also reported the matter to Administration Police Officers at Nyaramba on the same day. PW2 was thereafter taken to Ekerenyo health centre. On the following day the matter was reported at Nyamira Police Station where PW2 recorded her statement. Shortly thereafter the appellant disappeared from his home.

PW3 corroborated the evidence of PW2 in all material aspects.

Juliet Manyaga, PW1, a Clinical Officer at Nyamira District Hospital testified that on 1/8/2002 the complainant, PW2, was taken to the said hospital, where she was examined. She had bruises around the neck and was slightly bleeding from the mouth. She was limping while walking and was unable to sit because she had pain in the anal area. She also had a whitish discharge from the anal orifice. The anal opening was swollen, reddish and very tender. When the fluid that was coming from the peri-anal area was taken for microscopy, dead spermatozoa were seen. There was overwhelming evidence of anal penetration.

Francis Kimemia, PW6, a police officer who was stationed at Nyamira Police Station, told the court that when the complainant went to the station on 1/8/2002 to make a report, she gave the name of her assailant as Duke Kenyatta Auta. PW6 issued an arrest order addressed to Nyaramba Administration Police Post. The appellant went into hiding until 1/10/2003 when he was arrested and taken to the police station.

In his brief defence, the appellant merely denied having committed the alleged offence.

This being the first appellate court, it is mandated to examine a fresh the evidence that was tendered before the trial court, evaluate the same and reach its own conclusion. The court must however bear in mind that it did not have the benefit of seeing the witnesses as they testified and must therefore give due allowance for that, see NJOROGE VS REPUBLIC [1987] KLR 19.

The alleged offence was committed in broad day light by a person who was well known to the complainant. PW2 had seen the appellant shortly before he called and tricked her to go to the house where he sodomised her. Immediately after the ordeal she told her sister what the appellant had done to her. She specifically named the appellant. She gave the same information to her father. This was a case of recognition of the appellant as opposed to identification. Evidence of recognition is much more reliable than evidence of identification, see ANJONONI VS REPUBLIC [1980] KLR 59.

A day after commission of the offence, PW1 was examined at Nyamira District Hospital. It was established beyond doubt that anal penetration had taken place. The evidence that was adduced by PW1 was very detailed.

It corroborated the evidence of PW2.

The complainant had no reason to lie that it was the appellant who had sodomised her. The appellant went into hiding shortly thereafter. If he had remained at his home he would have been arrested on 1/8/2003 or a few days thereafter since an arrest order had been issued against him.

Having carefully re-examined the entire evidence, I am satisfied that the appellant was properly convicted.

One of the grounds of appeal raised by the appellant is alleged breach of his constitutional right under

Section 72(3) of the **Constitution**. It was alleged that he was held by the police for five days before he was arraigned in a court of law. That issue was not raised before the trial court where the prosecution would have had an opportunity to explain the cause of the delay.

In **ELIUD NJERU NYAGA VS REPUBLIC,** Criminal appeal No.182 of 2006, the Court of Appeal held that not every delay amounts to a Constitutional breach thus resulting in automatic acquittal. Where unreasonable delay in arraigning an accused person before a Court of law is alleged, the matter should first be raised before the trial court so that the prosecution can have an opportunity to give an explanation for the same. I reject that ground of appeal.

Having considered the totality of the evidence that was adduced before the trial court against all the relevant grounds of appeal, I am satisfied that the appellant was properly convicted. The sentence that was passed is not excessive, considering that the maximum sentence for such an offence is twenty-one years. I dismiss the appeal in its enterity.

DATED, SIGNED and **DELIVERED** at **KISII** this 13th day of June, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Nyakundi H/B for Mr. Bosire for the appellant

Mr. Kemo, Senior State Counsel for Republic

D. MUSINGA

JUDGE