BAKARI ABDALLA MBOYE …….. APPELLANT

- Versus -

REPUBLIC ……...…… RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 2614 of 2005 of the Senior Resident Magistrate's Court at Kwale, Maindi S.S., Resident Magistrate)

Coram: Before Hon. Justice L. Njagi

Court clerk - Ibrahim

Mr. Kenzi h/b for Magolo for appellant

Ms. Konuche for the Respondent

J U D G M E N T

The appellant, Bakari Abdalla Mboye, was charged in the Senior Resident Magistrate's Court at Kwale with committing an unnatural offence contrary to section 162(a) of the Penal Code. The particulars of the charge were that the appellant, on the 5th day of August, 2005, at about 5.00 p.m. at [name withheld] Village, Diani Location in Kwale District within the Coast Province had carnal knowledge of SL against the order of nature. The prosecution called five witnesses including the complainant, and two witnesses, including the defendant, testified for the defence. After the trial, the appellant was found guilty as charged and sentenced to serve 20 years imprisonment. He appealed to this court against conviction and sentence.

At the hearing of the appeal, the appellant was represented by Mr. Magolo while the State was represented by Ms. Konuche. Although in the amended memorandum of appeal the appellant had set out 9 grounds of appeal, Mr. Magolo indicated that he would argue the appeal on the basis of want of jurisdiction; a defective charge; failure to comply with statutory provisions; and that the evidence on record did not support the conviction. I propose to deal with the other issues first, and finally come to that of jurisdiction since the latter touches upon the Constitution.

The first issue relates to the charge. According to Mr. Magolo, the charge on which the appellant was convicted was defective inasmuch as it did not indicate whether the alleged carnal knowledge was or was not without consent. He submitted that failure to amend the charge before the close of the prosecution case in order to reflect that it was preferred under Section 162(a)(i) rendered the same incurably defective and therefore it could not form the basis of a conviction. In response, Ms. Konuche for the Republic submitted that the shortcoming, if any, was curable under Section 382 of the Criminal Procedure Code, and that no prejudice was occasioned to the appellant.

The appellant had seen the complainant at the construction scene where he was ferrying sand in a wheelbarrow. Barring some very serious handicap on his part, I don't think that he could have mistaken the complainant for being anything else other than a child. If, for whatever reason, his personal judgment on the age of the complainant was impaired, the P3 form should have acted as a constant reminder that he

was charged with having carnal knowledge of a person who was only 7 years old. I don't think, however, that any such reminder should have been necessary. No ordinary person would mistake a 7 year old boy for an adult. With the foreknowledge that his alleged victim was only a child of tender years, the appellant is presumed to have known that such a person could not legally consent to be carnally known. The appellant therefore knew that the charge against him fell squarely under section 162(a)(i) and could not possibly fall under subparagraph (ii). This ground of appeal accordingly fails since the failure to add "(i)" did not prejudice him in any way.

The other ground of appeal was that the learned trial magistrate erred in law and fact in failing to comply with statutory provisions with regard to the evidence of minors. Mr. Magolo argued that from the record, there was nothing from which the magistrate could deduce that the complainant knew the nature of an oath since he was never asked about the nature of oaths. He referred to KAZUNGU THOYA BAYA v. REPUBLIC, Mombasa H.C. Criminal Appeal No. 93 of 2000, and submitted that the magistrate did not comply with section 19(1) of the Oaths and Statutory Declarations Act, and therefore the evidence of the complainant must be disregarded. Once that evidence is disregarded, there will be nothing to support the charge or sustain the conviction. He then referred to JOHN KIKUVI v. REPUBLIC, Cr.App,. No. 61 of 1992 and submitted that compliance with section 19(1) of the Oaths and Statutory Declarations Act was compulsory.

In response, Ms. Konuche submitted that the evidence on record was properly obtained, as the finding of the court was sufficient to allow the child to testify. Furthermore, she contended, the victim's mother, who testified as P.W.2, was an eye witness and her evidence was sufficient to sustain a conviction.

In NYASANI BICHANA v. R. [1958] E.A. 190, it was held that whenever the court is handling the testimony of a child of tender years, section 19(1) of the Oaths and Statutory Declarations Act requires the court to satisfy itself that the child understands the nature of an oath. If the finding on that question is in the affirmative, the child can testify on oath. But if it is in the negative, then the court should strive to satisfy itself whether the child is possessed of sufficient intelligence to justify reception of its evidence, and whether it understands the duty of speaking the truth.

On this point, the learned magistrate's notes read as follows –

"Preliminary Test

SL states:- I go to school. I am in class one at Little Roots Primary. I am 7 years old. I go for religious classes. I am taught religion. If you lie you will be burned. I will tell the truth.

Court: The complainant understands the meaning of an oath and can give evidence on oath."

The complainant was then sworn and testified on oath. Although Mr. Magolo submitted that the learned magistrate failed to comply with section 19(1) of the Oaths and Statutory Declarations Act, and therefore the evidence of the complainant should be disregarded, I do not subscribe to that view. In my opinion, the witness displayed adequate intelligence to justify, at the very least, the reception of his unsworn evidence. Indeed, the appellant cross-examined him and did not shake even an iota of his evidence. Instead, the boy's mother, who was an eye witness to this obnoxious affair, corroborated the boy's evidence. And to give it an even bigger punch, the doctor also corroborated it. I don't think that such evidence deserves to be disregarded.

The third point raised by Mr. Magolo was that the medical examination of the complainant was done three days after the event, and that anything could have happened in between. This observation is not factually correct. Even though the P3 form was completed on 8th August, 2005, the medical notes on record show that the medical tests commenced on the day the boy complained that he was assaulted, and continued the following day. As for the contention that the sperms found were not linked to the appellant, that is, with respect stretching our criminal justice system too far. At this stage of the country's development, I don't think that we can afford the time and expense involved in the conduct of such complex scientific tests without causing untold delays in the system, and asking taxpayers to dig deeper

into their pockets. It is not therefore practicable to do what the defence counsel was suggesting should have been done at this time and day.

The last point in this appeal is on the jurisdiction of the trial court. It is two pronged. It relates to the person of the trial magistrate as well as to the conduct of the trial itself. With regard to the trial magistrate, the problem is that she is severally referred to in the proceedings both as a District Magistrate II as well as a Resident Magistrate. If she were a District Magistrate II, she clearly had no jurisdiction to try this matter. Counsel for the appellant went a step further and said that even if she were just a Resident Magistrate, she could not try the matter.

The court records disclose that as a matter of fact, the trial magistrate was a Resident Magistrate. Section 4 of the Criminal Procedure Act prescribes that an offence under the Penal Code may be tried by the High Court, or by a subordinate court by which the offence is shown in the fifth column of the First Schedule to the Code to be triable. The fifth column to the Code shows that offences under section 162 of the Penal Code are triable by a subordinate court of the first class. A magistrate's court of the first class is defined in section 2 of the Magistrates' Court Act to mean the Resident Magistrate's Court, or a district magistrate's court held by a district magistrate … Since the trial was conducted by a Resident Magistrate, she had the necessary jurisdiction to do so. Nothing turns on that.

The second limb of this point is that at page 3 of the proceedings, the learned trial magistrate used a language which, according to the appellant's counsel, suggests that she had found the appellant guilty after hearing two witnesses only. If so, she ceased to be an independent court and therefore ceased to have jurisdiction. Arising out these concerns, I note that section 77 (2)(a) of the Constitution states -

"Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty."

The appellant in this case was first arraigned in court on 10th August, 2005, when he pleaded not guilty. He was released on bond with a surety for Kshs. 30,000/=. The trial commenced on 13th September, 2005. Two witnesses testified – the complainant and his mother. After their evidence, the prosecutor applied for an adjournment to facilitate the calling of 2 other witnesses. The adjournment was granted and the case fixed for further hearing on 15th September, 2005.

Immediately after that, the trial court's notes read –

"Accused bond cancelled. Surety not sufficient for offence committed. Accused to get another surety."

The record does not indicate what prompted this reaction at the instance of the court itself.

Since no reason is given for the cancellation of the bond, we are left merely to surmise. The words "offence committed" could possibly mean that the magistrate had already reached a conclusion that the appellant had committed the offence. Nevertheless, I think, the probability was that she was addressing the gravity of the offence with which the appellant was charged. It is elementary law that a trial court should always warn itself of the danger of concluding that an accused has committed any offence until the last witness in the trial has testified. Should such a conclusion be reached before the end of the trial, the presumption of innocence as enshrined in section 77 (2) of the Constitution would be eroded; and so also would be the impartiality of the court as demanded by section 77(1). In the circumstances of this case, however, the fact that the trial magistrate proceeded to order that appellant get another surety is a strong indicator that she was directing her mind to the gravity of the offence charged, but not that she had already predetermined that the appellant was guilty.

Considering the evidence on record, I find that the same was overwhelming and that the conviction was well merited.

Finally, the wording of the proviso to the section under which the appellant was charged suggests that a sentence of imprisonment for twenty one years is mandatory. He was sentenced to a lesser term of 20

years. I don't find that I can interfere with that sentence.

For the above reasons, the appeal is accordingly dismissed.

Dated and delivered at Mombasa this 31st day of May, 2007.

L. NJAGI

JUDGE