REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal No. 77 of 2004

JULIUS WAWERU PLENSTER…….....……..APPELLANT

VERSUS

REPUBLIC…….....……...…RESPONDENT

JUDGMENT

The appellant was charged with committing an unnatural offence contrary to Section 162(a) of the Penal Code the particulars of the offence being that on the 17th day of September, 2003 at Kinamba trading centre in Laikipia District within the Rift Valley Province he had carnal knowledge of DWM against the order of nature. He was convicted and sentenced to 18 years imprisonment. He was aggrieved by the said conviction and sentence and he appealed against the same.

The prosecution case can be summarised as follows: - The complainant, PW1 was on the material day, the 17th September, 2003 at about 6.00 p.m. sleeping in his rented house which he had locked with a nail. The appellant forced himself into the house and he hit PW1 with a whip and covered his face with a cloth. He pushed another piece of cloth into the complainant's mouth and carried him outside on his shoulders and took him into his house. The complainant was given food and was threatened that he would be knifed it he made any noise.

The appellant then asked the complainant to go and sleep with him but the latter refused. He was then hit twice on the back, his hands were tied and his eyes covered with a cloth. He was then dragged to the appellant's bed and his pair of trousers and jacket were removed. His shoes and socks were also removed. The appellant then took some cooking fat and smeared it on the anus of the complainant. He also applied the same fat on his own penis then he pushed it into the anus of the complainant and had sex with him. Thereafter the appellant held a knife against the complainant and told him not to tell anybody. The appellant then opened the door and the complainant ran out – then he realised that his rectum was coming out. Thereafter he reported the incident to the police and was issued with a P3 form which was filled by PW3, Clinical Officer at Wakomo Health Centre.

The complainant later took police officers to the appellant's house where they found him. According to the complainant, the appellant's penis still had sheet and the beddings had blood. The complainant's

clothes and keys were recovered from the appellant's house. The appellant was then arrested and taken to a police station. The complainant said that he had known the appellant quite well prior to the material date.

PW2, a Police Officer who was then attached to Ngarua Police Station testified that he was at the station when the complainant went to the station without a shirt and a trouser and reported that he had been sodomised by a person known to him. The complainant's rectum was hanging from the anus. PW2 took the complainant to a health centre where he was treated. The complainant later led PW2 and other police officers to the appellant's house where they found him. The police recovered the complainant's clothes from the appellant's house as well as the cooking fat which he had used as he committed the offence. These items were produced during the trial as exhibits. The appellant was also taken to hospital where he was examined and a P3 form filled.

PW3, a Clinical Officer told the court that the complainant was taken to the health centre on 17/9/03 with a history of having been sodomised. He had pain in his anus and a swab was taken from the anus and tested in the laboratory. It was found to have pus cells which was a sign of infection and there was wear and tear of his rectum. PW3 also examined the appellant and found that he had pus cells in his urine.

In his defence, the appellant said that on the material date he was drunk and did not know what was happening. He denied having seen the complainant on the material date and also the fact that the complainant's clothes were found in his house. He further said that he had given some Kshs.350/- to the complainant so that he could withdraw the matter from the court but the appellant refused to do so.

In his appeal, the appellant argued that the evidence that was tendered before the trial court was not sufficient to warrant his conviction. He therefore faulted the trial magistrate for convicting him on insufficient evidence. He said that the complainant testified that after he was sodomised, he went to the house of the appellant's neighbour called Peris and told her what had been done to him but he wondered why the said lady was not called as a prosecution witness.

The appellant further argued that PW3, the clinical officer who testified in court, was not the one who examined him when he was taken to the health centre.

However, PW3 testified that he was the one who examined both the complainant and the appellant. From the proceedings, the appellant did not challenge the evidence of PW3. If he thought that PW3 had not examined him at the health centre, he should have raised with him that issue during his cross examination but he never did so. The appellant cannot now seek to challenge the evidence of PW3.

Regarding sufficiency of the prosecution evidence, the complainant knew the appellant prior to the material date when the said offence was committed. There was therefore no possibility of mistaken identity on the part of the complainant. There was no allegation of any grudge that existed between the two as would have caused the complainant to frame up the appellant.

The complainant explained in graphic details how he was sodomised. His evidence was not disputed by the appellant. When the police went to the appellant's house together with the complainant, the complainant's clothes were found in the appellant's house as well as the cooking fat that he applied on the complainant and on himself before he committed the offence. All these things were produced in court as exhibits. The appellant did not challenge that evidence or give any explanation as to why the complainant's clothes were found in his house shortly after the offence was committed. There was also ample medical evidence that the complainant had actually been sodomised.

When the appellant was placed on his defence, he said that on the material day he was drunk and did not know what he did. He denied having seen the complainant that day and also having been examined by PW3. He also denied that the complainant's clothes were found in his house. That notwithstanding, he said that he had given some money to the complainant as an inducement to cause him to withdraw his complaint.

In my view, the said defence was not only untenable but was also self incriminating. If the appellant believed he was innocent, then why was he inducing the complainant to drop his complaint?

The appellant had told the court that he was too drunk to know what he did on the material day. How could he then dispute what was sufficiently proved to have been done by him? I am satisfied that the appellant was properly convicted of the offence as charged and the sentence that was handed down to him was appropriate. I therefore dismiss the appeal in its entirety.

DATED at Nakuru this 28th day of February, 2005.

D. MUSINGA

JUDGE

28/2/2006

Judgment delivered in open court in the presence of Mr. Koech for the state and the appellant.

D. MUSINGA

JUDGE

28/2/2006