REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 145 Of 2003

DAVID NJOROGE MUGO…….....……APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

JUDGMENT

The appellant David Njoroge Mugo was charged with committing an **unnatural offence contrary to Section 162(1) (actually Section 162(a)) of the Penal Code**. The particulars of the charge were that on the 13th of August 2000 at Njabini Trading Centre Nyandarua District, the appellant had carnal knowledge of WWM*(hereinafter referred to as the complainant)* against the order of nature. He was alternatively charged with attempting to commit an unnatural offence contrary to **Section 163 of the Penal code**. The particulars of the offence were that on the same and in the same place the appellant attempted to have carnal knowledge of the complainant against the order of nature. The appellant pleaded guilty to both charges. After a full trial the appellant was found guilty of the alternative charge of attempting to commit carnal knowledge contrary to the order of nature contrary to **Section 163 of the Penal Code**. He was sentenced to serve four years imprisonment. Being aggrieved by his conviction and sentence the appellant appealed to this court.

In his petition of appeal the appellant raised eight grounds of appeal challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted on uncorroborated and contradictory prosecution evidence. He faulted the trial magistrate for convicting him on uncorroborated evidence of the complainant before the trial magistrate had warned himself of the danger of relying on such evidence. He was aggrieved that the trial magistrate had not considered the appellant's defence before arriving at the said decision against him. He faulted the trial magistrate for convicting him based on insufficient evidence which did not prove the charge to the required standard of proof beyond reasonable doubt. He was finally aggrieved that he was sentenced to serve a custodial sentence which was harsh and excessive in the circumstances.

At the hearing of the appeal, I heard the submissions made by Mr Mariaria Learned Counsel for the appellant and Mr Gumo, the Assistant Deputy Public Prosecutor. Whereas Mr Mariaria made submissions urging this court to uphold the appeal, Mr Gumo made submissions in support of the conviction and the sentence imposed upon the appellant by the trial magistrate. Before giving reasons for my decision, I will briefly set out the facts of this case.

The complainant in this case was aged seventeen years at the material time. He testified that on the 13th of August 2000, while he was at Kinamba Trading Centre, the appellant struck a conversation with him. In the course of the conversation, the appellant convinced the complainant that he was going to secure him a job. But first the appellant promised to secure an identity card for the complainant. The complainant agreed to accompany the appellant to Njabini. According to the complainant, the appellant took him to his house where they slept on the same bed. He told the court that when they went to sleep the appellant told him to remove his clothes and sleep naked. At night, while he was asleep he felt the appellant attempting to have intercourse with him through his anus. The complainant struggled but was overpowered. He testified that the complainant then inserted his penis in his anus and had sex with him. The complainant testified that the appellant was able to overpower him by threatening to stab him with a knife. He said that the appellant threatened that he would stab him with the knife if he screamed. Later during the night members of the public came to the house and rescued him.

PW3 and PW4 testified that on the material night while they were at Njabini Trading Centre, at about 9.30 p.m., they saw the appellant taking the complainant to his house. PW4 testified that he became suspicious because he had heard rumours that the appellant was a sodomiser. Similarly PW3 testified that he was suspicious why the appellant wanted to sleep with the complainant. They went to the house of the appellant and knocked the door. They asked for the complainant. The appellant answered them that the complainant was not in the house. After a while the complainant answered that he was inside the house. PW3 and PW4 then locked the house from the outside and went to Njabini Police Station where they informed PW5 PC Simon Murage about their suspicions. PW5 accompanied them to the house of the appellant where he was able to arrest the appellant together with the complainant. The appellant was detained at the police station while the complainant was taken to Njabini Health Centre. He was examined by Samuel Kimomera (PW7), a Clinical Officer. His examination of the complainant on 14th of August 2000 did not reveal anything incriminating on the part of the appellant. PW7 wrote a P3 which was produced in evidence. The said P3 revealed that there was no evidence that the complainant had been sexually assaulted through his anus.

When the appellant was put on his defence, he denied that he had had unnatural sex contrary to the order of nature with the complainant. He testified that the people who went to his house on the material night had a grudge against him because of his activism against people who were '*grabbing*' government forests. He testified that the said people who included PW3 and PW4 were sent by timber merchants who were opposed to his activism. He testified that he had taken the complainant to his house so that he could take care of the same as his family was not at the time staying at his said house at Njabini. He denied that he had the intention or attempted to have unnatural sex contrary to the order of nature with the complainant.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced by the witnesses before the trial magistrate's court in order to arrive at an independent decision whether or not to uphold the decision of the trial magistrate in convicting the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified. *(See* **Njoroge –vs- Republic [1987]IKLR 19**). The issue for determination by this court is whether the prosecution proved its case against the appellant on the charge of attempted carnal knowledge contrary to the order of nature contrary to **Section 163** of the **Penal code** to the required standard of proof beyond reasonable doubt. I have carefully considered the submissions made before me by Mr Mariaria for the appellant and Mr Gumo on behalf of the State. I have also re-evaluated the evidence adduced by the prosecution witnesses in the trial before the trial magistrate. The evidence that was adduced by the prosecution to support its case against the appellant is that of the complainant.

According to the complainant, the appellant took him to his house and invited him to sleep with him on the same bed. He testified that the appellant told him to remove his clothes. While he was asleep he felt the appellant inserting his penis in his anus. The complainant struggled but was overpowered by the appellant who according to him proceeded and had sex with him through his anus against the order of nature. He testified that the appellant achieved this after he had threatened to stab him with a knife. After the appellant had sodomised him people came and were able to arrest the appellant.

The evidence that was adduced by PW7 the Clinical Officer who examined the complainant on the following day was to the effect that the claim made by the complainant that he had been sodomised was untrue. PW7 found no evidence of penetration when he examined the anus of the complainant. Now, the issue that this court is required to determine is whether this evidence is sufficient to prove the charge. The law as regards the evidence of uncorroborated evidence of complainants existing then was to the effect that a court of law would not convict an accused person based on the uncorroborated evidence of a complainant in sexual offences without the court warning itself of the danger of convicting an accused person based on the said evidence. As was held in **Margaret –vs- the Republic [1976] KLR 267** at page 268 by Trevelyan & Sachdever JJ

"***It is not a rule of law that a person charged with a sexual offence cannot be convicted on the uncorroborated evidence of the complainant, but it has long been the custom to look for and require corroboration before a conviction for such an offence is recorded. There are many cases in the reports saying so, such as Njuguna s/o Wangurumi –vs- R. (1953) 20 EACA 196. Nonetheless, there are certain cases where convictions may yet be entered even though there is no corroboration of the complainant's evidence. As Law JA put it at page 723 in Chila's case to which reference has already been made: "the law of East Africa on corroboration in sexual cases is as follows: the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice"."***

The law in Kenya has since changed as regard the evidence of complainants who are children of young and tender age. **Section 124 of the Evidence Act** was amended in 2003 by the **Criminal Law (Amendment) Act, (Act No.6 of 2003)** where courts no longer would require corroboration in cases involving children if the courts are convinced that the said evidence by the complainant is the truth. The law as regard adult complainants in sexual offenders has not changed. The position in the above referred decision of Margaret is still applicable.

In this case, it is obvious that the complainant did not tell the truth when he said that he was sodomised by the appellant. The evidence adduced by PW3 and PW4 clearly established that if indeed the complainant had been sodomised he could have screamed for help immediately PW3 and PW4 went to the house of the appellant. He did not do that. Instead he waited until after they had been arrested by the police that is when he made the allegation that he had been sodomised. PW3 and PW4 haboured a grudge against the appellant. They went to the appellant's house and made a report to the police based on rumours and unsubstantiated claims that the appellant was a sodomiser. Indeed it is clear that because of the allegations made, the complainant went on with the story in order to avoid being charged with the appellant for having been a participant in the commission of unnatural offence.

The trial magistrate had not warned himself of the danger of convicting the appellant based on such flimsy and uncorroborated evidence of the complainant. I agree with the appellant's counsel that the prosecution did not prove its

case against the appellant to the required standard of proof beyond reasonable doubt. The evidence adduced by the appellant in his defence could have raised doubts in the mind of the trial magistrate that the allegations made against him were indeed false and actuated by malice. It is apparent that PW3 and PW4 were settling scores with the appellant.

In the circumstances of this case therefore, I will allow the appeal and quash the conviction of the appellant by the trial magistrate. The sentence imposed on the appellant by the said trial magistrate is therefore set aside. The appellant is ordered acquitted and set at liberty unless otherwise lawfully held. In the event that he paid any bond to secure his release on appeal pending the hearing and determination of this appeal the said amount shall be refunded to him.

DATED at NAKURU this 24th day of February, 2006.

L. KIMARU

JUDGE