



REPUBLIC OF KENYA

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

Criminal Appeal 837 of 2002

(From original conviction and sentence in Criminal Case No. 2826 of 2002 of the Senior Resident Magistrate's Court at Kibera: Ms. Siganga, S.R.M.)

ABUBAKAR MOHAMMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant ABUBAKAR MOHAMME Criminal Appeal No. 837 of 2002, from conviction and sentence in Criminal Case no. 2826 of 2002, was charged with UNNATURAL OFFENCE contrary to Section 162(a) of the Penal code. The particulars of the charge were that on the 31st of March 2002 at Kibera Makina within Nairobi area Province, had carnal knowledge of SM against the order of nature.

The appellant was convicted and sentenced to 10 years imprisonment and 6 strokes of the cane and being dissatisfied with both the conviction and the sentence he has appealed in this court on the following grounds:

- 1. The lower court erred in law and fact by convicting the appellant for an offence committed by unknown people as he was in lawful custody in industrial Area Remand Prison.**
- 2. The lower court erred in law and fact in holding that the prosecution had established its case to satisfaction.**
- 3. The lower court erred in law and fact by failing to weigh the evidence of those witnesses who were not at the scene of the crime and the Doctor who proved to be incompetent.**
- 4. The lower court erred in law and fact in ignoring the appellant's defence.**

The prosecution case is that P.W. 1 – SM– a 12 year old boy was, on 31/3/01 at 8.30p.m. playing with other children at Green Hut Bar, Kibera when appellant came and asked him to assist in the search of appellants lost phone, promising to pay P.W. 1 K.Shs.50/- if the phone is not found and 100/- if the phone is found. P.W. 1 followed appellant up to Kibera direction office where they started the search; that upon reaching a place with long grass appellant produced a knife with which he threatened P.W. 1, and appellant removed his trousers and ordered P.W. 1 to do the same, an order P.W. 1 obeyed at knife point. Then appellant applied soap and water to P.W. 1 anus after which appellant proceeded to have sexual intercourse with P.W. 1, severally. After appellant had finished the act at 10.00p.m. he ordered P.W. 1 to sit there as the appellant went to look for anybody on the road. After the appellant had left, P.w. 1 ran back home and reported the matter to his cousin and uncle with whom eh went and reported the incidence to the police who issued P.W. 1 with a P3 form.

P.W. 2 – DMM – who is P.W. 1 Uncle and who lives with P.W. 1 in Kibera, told the court that he was woken up at 9.30p.m. with the information that appellant (Kanji by name) had been seen walking with P.W. 1 towards the Kibera Chief's office. P.W. 2 mobilized neighbours to look for P.W. 1 and found P.W. 1 crying and he told them that appellant had sodomised him (P.W. 1). Later, appellant was arrested and charged with this offence. P.W. 1 was treated for the

injuries and his P3 form filed by Police Surgeon.

P.W. 3, a cousin to P.W. 1 and son to P.W. 2, was one of the people who went looking for P.W. 1 after P.W. 1 disappeared. His evidence is similar to that of P.W. 2.

P.W. 4, AL, a ten year old boy is son to P.W. 2 and cousin to P.W. 1 and he told the court that on the material night, he walked with appellant and P.W. 1 towards Kibera D.O's office, ostensibly to look for appellant's lost cell phone. On the way P.W. 4 learned that appellant was armed with a knife, so he ran away leaving appellant with P.W. 1, He informed his father (P.W.2) of the incident.

P.W. 5 – P.C. Kavin Mwaniki – re-arrested appellant from members of the public and later, appellant was charged with this offence.

P.W. 6 – Dr. Zephania Kamau examined P.W. 1 on 10/4/02, ten days after the incident. He found that P.W. 1 had no physical injuries and his genitals were normal; that P.W. 1 had normal penis and rectum. P.W. 6 thus found that there was no positive finding of sodomy. He filled and signed the P3 form.

In his unsworn statement of defence, appellant called no witness. He said on the material date and time, he was remanded in custody in Makadara – Criminal Case No. 4360/02 on a charge of bond to keep peace; that he was arrested on 7/4/02 and informed of this offence which he denied.

I have carefully re-evaluated the evidence on record from the lower court, in light of the grounds of appeal raised by the appellant against his conviction and sentence.

Ground of appeal number one is effectively that there was a mistaken identity, as appellant alleges that he was in custody at the Remand Prison, Industrial Area at the particular day and time.

My review of the evidence of P.W. 1 and P.W. 4, which corroborated each other shows that the appellant and P.W. 1 went towards Kibera D.O's office ostensibly to search for appellant's lost call phone. P.W. 4 testimony also corroborated that of P.W. 1 that the appellant had a knife with him, and that the appellant was well known to both of them. The lower court found the evidence of P.W. 1 and P.W. 4 truthful and consistent; and that the appellant was the person who was in the company of P.W. 1 when the incident occurred; and that appellant was well known to both P.W. 1 and P.W. 4 prior to incident. There was no possibility that the appellant was mistakenly identified as the culprit.

On whether or not P.W. 1 was sodomised, there is need for corroboration in cases like this. The medical examination did not show that there was any sodomy. But the lower court believed P.W. 1's evidence despite lack of medical evidence. This was on two grounds: firstly the medical examination was carried out ten days after the incident, when P.W. 1 had passed stools and washed, and nothing could be picked by the medical examination, and secondly because the court found P.W. 1 a truthful and honest witness who could not tell lies despite his tender age of 12 years.

I have no basis to disagree with the learned magistrate's finding and conclusion that appellant was properly identified and that P.W. 1 had been sodomised.

This challenge on the basis of identification has no basis and the prosecution evidence sufficiently disposed of the issue.

The most important ground of appeal was based on an ALIBI that the appellant was, at the material date and time, in Remand Prison, Industrial Area, Nairobi, pursuant to Criminal Case No. 4360/02. That defence was shown to be false because when the lower court called for the file Makadara Criminal Case No. 4360/02, the accused there is one VICTOR OWUOR, who is not the appellant. The appellant had told the court that he had been remanded to keep peace. The charge sheet in Makadara Criminal Case No. 4360/02 is one of robbery, contrary to Section 296(1) of the Penal Code.

Clearly the charge in Makadara Criminal Case 4360/02 contradicted the appellant's contention.

On the above reasons, I dismiss the appeal herein as lacking in merit and confirm the conviction by the lower court. On the sentence, I declare the Corporal punishment within the sentence illegal as such punishment no longer exists in our statute books. Otherwise, I uphold the imprisonment term imposed by the lower court.

Dated and delivered in Nairobi this 18th day of May, 2005.

O.K. MUTUNGI

JUDGE