REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 152 of 2004

(From original conviction (s) and Sentence(s) in Criminal case No. 184 of 2004 of the

Senior Resident Magistrate's Court at Limuru (Ezra O. Owino – S.R.M.)

SAMUEL WAHINI NGUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant **SAMUEL WAHINI NGUGI** was found guilty and convicted for the offence of **UNNATURAL OFFENCE** contrary to **Section 162 (a**) of the **Penal Code**. It was alleged that on diverse dates between 19th November 2003 and 21st January 2004 at R village, Kiambu the Appellant had carnal knowledge of **GW** against the order of nature. He was sentenced to serve 21 years imprisonment.

The facts of the case are very simple. The Complainant and Appellant lived in the same house. The Complainant's grandmother also shared the home with them. It was the Complainant's evidence that the Appellant had sodomised him repeatedly between November 2003 and January 2004. He reported this to his teachers who then reported to one of them, PW2. PW2 interviewed the Complainant who confirmed the story. PW2 then summoned the Complainant's grandmother who was very hostile and even threatened PW2 and the Complainant that if any action was taken against the Appellant, the Complainant could even be killed. The matter was then reported to the Police. **PW3, DR. NDAKARU** confirmed that the Complainant had been sodomised repeatedly. He also described his physical condition as being of a 12 years old innocent looking young boy who was in fear. The Appellant in his defence denied the offence and said that he had not done anything wrong.

The Appellant has raised four grounds of appeal. In the first ground the Appellant contends that the plea was improperly taken because it had two sets of pleas, one for guilty and the other for not guilty. I have considered this ground. The record is clear that when the charge was read to the Appellant, he admitted the offence. However when the facts were led by the prosecution, the Appellant denied having committed the offence. It is quite in order for the Court to record exactly what the accused person pleaded at every stage of the plea in as near the words used by the accused as possible. The fact the Appellant first admitted then denied the offence is not improper or irregular as contended. Besides, the record is clear that the charge and every element of the particulars and the facts were explained to the Appellant in a language he understood before making his plea. See **ADAN vs. REPUBLIC 1973 EA.**

The Appellant alleged that he was confused in his mind as a result of the manner in which his plea was taken. That consequently the trial was defective and the trial unsatisfactory. He urged court to order a retrial. I have considered the entire evidence adduced before the trial court and the manner in which the trial was conducted. The learned trial magistrate conducted the trial fairly and justly in accordance to the law. The Appellant was given adequate opportunity to conduct his defence throughout the trial. He did not raise any objections throughout his trial. I find no merit in his submission. I am satisfied that the Appellant was accorded a fair trial. The trial was not defective at all. I decline to order a retrial as urged

by the Appellant.

In the filed grounds of appeal the Appellant had raised other issues. He contended that the Complainant's evidence had no corroboration and therefore the conviction was unsafe. Not only did Dr. Ndakaru corroborate the Complainant's evidence that he had been sodomised, the doctor also interviewed the Complainant. In the P3 form he produced in Court as evidence the doctor noted that the Complainant had reported that he had been sodomised by his uncle whom he lived with. The Appellant's submission has no merit and is dismissed.

The Appellant also contended that his defence was not re-evaluated by the Court. I have perused the learned trial magistrate's judgment. The Appellant's defence was given due consideration. The Court rejected it because it was of the view that the prosecution evidence against the Appellant was overwhelming.

MISS NYAMOSI for the Respondent also supported that finding. I agree with learned trial magistrate's findings and the State counsel's conclusion. The trial Court's finding cannot be faulted.

Having re-evaluated the case and having considered the Appeal, I find that the conviction was quite safe. I dismiss the Appellant's appeal and uphold the conviction. The Appellant did not challenge the sentence. It was the maximum provided under the Act. The Appellant is not remorseful for what he did. He committed the offence against his own flesh and blood. The Complainant was a young person who needed his protection and not assault. I find that the sentence was called for and is lawful in the circumstances. I confirm the sentence imposed.

The upshot of this appeal is that it lacks in merit and is dismissed.

Dated at Nairobi this 17th day of June 2005.

LESIIT, J.

JUDGE