REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 177 OF 2002

WALLACE KIMURIA KAMUKA……..….APPELLANT

Versus

REPUBLIC……...……RESPONDENT

(Appeal against judgment by F. F. Wanjiku, Senior Principal Magistr ate, in the Senior Principal Magistrate's Court at Muranga, Criminal Case No. 135 of 2002)

Note: Unnatural Offence unnaturally prosecuted

JUDGMENT

The Appellant in this appeal was a co-accused with one Isack Mwangi Wahihia and the two were before the trial magistrate charged that they committed an unnatural offence contrary to *Section 162(a)* of the Penal Code. Particulars alleged that on the 18th January 2002 at [particulars withheld] in Muranga District of the Central Province, the two co-accused persons had carnal knowledge of the complainant **JNN** (male) against the order of nature.

On the first day in the trial court when the plea was taken, Isack Mwangi Wahihia, who was the First Accused, pleaded guilty while the Appellant, who was the Second accused, pleaded not guilty.

There were no further proceedings on that day as the trial magistrate made an order for age assessment and adjourned further proceedings for a mention on 6th February 2002 to fix a hearing date. It is not clear from the order whose age was to be assessed but subsequent proceedings suggest that it was the First Accused's age which was being assessed.

It was not until 8th February 2004 that the prosecutor informed the trial magistrate that the age of the First Accused had been assessed. On that same date, the First Accused changed his plea from guilty to not guilty. Hearing of the case was fixed for 4th March 2002. On that day the changing First Accused decided to change his plea again. This time from the plea of not guilty back to the plea of guilty which he had started with.

The record shows that after he had told the court at the beginning of proceedings that day that he wanted to admit the charge, the court allowed him to change his plea and as a result the magistrate read and explained to the First Accused alone the charge. The First Accused replied pleading guilty and as a result the prosecutor stated facts of the case. It was after that that another unnatural act took place and that was during the prosecution of this unnatural offence case, in that when the learned trial magistrate asked whether the facts as stated to the court by the Prosecutor constituted a true and correct account of what

had taken place, the learned magistrate could not, from that time, remember that he was dealing with the First Accused only. He therefore required the answer from both accused persons.

The First Accused replied:

"That is what happened. I did that."

The Appellant (then Second Accused) replied:

"What has been explained is t rue. We went there and that is what happened."

The magistrate, without remembering that the Appellant's only plea on record was a plea of not guilty, went on to record the following:

"Plea of guilty entered for both accused persons. Conviction on own plea of guilty."

The Prosecutor, who could have reminded the trial magistrate that the magistrate was dealing with the First Accused only, failed to do so and instead stated:

"Accused may be treated as first offenders as I do not have their records."

Then there followed mitigation of each accused person and the sentence whereby the First Accused's case was referred to a probation officer for a probation report as the Appellant was sentenced to serve 14 years imprisonment.

The Appellant subsequently appealed to this court using the irregularity in proceedings against him as the main ground and by the time of writing this judgment, the record in the trial court's case file No. 135 of 2002 suggests that the First Accused has not yet been sentenced because from Probation Report, the First Accused seems to have been referred to Mathare Mental Hospital by the time that file was brought to this court for the purpose of this appeal.

The Appellant served the sentence for sometime before he was released on bail pending the hearing and determination of this appeal. But after being out on bail for sometime, he defaulted in attending the required mentions and has been returned to the prison. An old man said to be over 70 years was alleged to have collaborated with a juvenile of 17 years to commit the unnatural offence against another juvenile also aged 17 years, the old man having been used to lure the victim juvenile to accept what the First Accused wanted to do with the victim juvenile.

During the hearing of this appeal, the learned State Counsel, Mr. Orinda, conceded the appeal citing the irregularity but asked for a re-trial. Mr Ng'eno, counsel for the Appellant, opposed re-trial pointing out that the Appellant has suffered long enough and is an old man.

I note that the Appellant as a layman in court did not contribute to the mistake which the trial magistrate and the prosecutor made. I note that the Appellant has suffered both actual imprisonment and mental torture. I further note that he is said to be over 70 years old and I would not have ordered a re-trial. But looking at the nature of the offence, its seriousness bearing in mind the fact that the victim was a child, I am inclined to order a re-trial. The Appellant may be old but if it is true that he did what is being alleged against him, he should be expected to have been ready to face the natural consequences unless again, he expected the unnatural to happen. The offence is alleged to have been committed on 18th January 2002 and three years to-day I hope witnesses are still available that is why the learned State Counsel is asking for a re-trial. If they are not available, that be the problem of the prosecution and the trial court.

The Prosecution having asked for a re-trial, I give it to the prosecution. But, lest I am misunderstood, I must re-state here that cases in which I have insisted that there never be re-trials under any circumstances are cases where trials are declared a nullity because prosecutors in the trials were not qualified in terms of Section 85(2) of the Criminal Procedure Code. I have been giving reasons to support that stand as can be

seen in the case of Christopher Mutwiri Njoka Vs Republic and the case of Erustus Mugambi Mutegi Vs Republic, High Court Criminal Appeals No. 71 of 2000 and No. 18 of 2001 respectively both cases at Embu consolidated and unreported. The instant appeal is not one of those cases because here the trial was only irregular unfortunately resulting into unnatural justice which happily can be turned into natural justice.

From what I have been saying above therefore, the Appellant's appeal herein be and is hereby allowed, his conviction quashed and the sentence imposed upon him set aside.

There be a re-trial of the Appellant before another magistrate of competent jurisdiction – in the Senior Principal Magistrate's Court, Murang'a.

Dated this 9th day of December, 2004.

J. M. KHAMONI

JUDGE