



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 64 of 2003

(From original conviction and sentence in Criminal Case No. 99 of 2002
of Senior Resident Magistrate's Court at Nanyuki P.C. TOROREY –
S.R.M.)

WILSON MUCHOKI MUTUAAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Wilson Muchoki Mutua, hereinafter referred to as the Appellant was tried by the Senior Resident Magistrate Nanyuki for the offence of Unnatural offence contrary to section 162(a) of the Penal Code with an alternative charge of indecent assault on a boy contrary to Section 164 of the Penal Code. He was convicted of the alternative charge and sentenced to serve 7 years imprisonment and to suffer 5 strokes of the cane. He has now appealed against his conviction and sentence.

The evidence adduced against the Appellant before the lower court was that on 6th January, 2002, the complainant who was about 14 years old was with his brother DM and a friend Godfrey Murigo when the Appellant asked the complainant to accompany him. The appellant then gave complainant some bread. He thereafter took him to some lonely path produced a knife and ordered complainant to lie down. He ordered complainant to remove his shorts. He also removed his shorts and sodomised the complainant for about 5 minutes. He thereafter got up and left. The complainant went back to his brother and Godfrey . He informed Godfrey what had happened. They went home and after about a week Godfrey told his brother DM who in turn informed the complainant's father what had happened . The complainants father reported the matter to the police who arrested the Appellant and recovered a knife from him. He was subsequently charged .

In his defence the Appellant denied any knowledge of the offence charged. He claimed that he was arrested because of a quarrel between the complainant and his mother. The trial magistrate found the evidence of the complainant consistent but inconclusive to prove the sodomy charge since there was no medical evidence. She therefore found the appellant guilty of the alternative charge of indecent assault.

Learned State Counsel Mr Obuo has conceded this appeal on two grounds. First because complainant who is a minor was not subjected to a *voire dire* examination before his evidence was taken. Secondly because of the insufficiency of the medical evidence.

From the alternative charge it is apparent that the complainant was stated to be a child under the age of 14 years. It was therefore incumbent upon the trial magistrate to comply with the provisions of Section 19

of the oaths and statutory Declarations Act (Cap 15) by carrying out a voire dire examination so as to establish whether the complainant understood the nature of an oath.

In this case the trial magistrate failed to carry out a voire dire examination but proceeded to receive the evidence of complainant as sworn evidence. This was a fatal irregularity.

The Magistrate also misdirected herself by failing to look for corroboration with regard to the complainants evidence as required by Section 124 of the Evidence Act. The evidence of the complainant could not be corroborated by that of his friend Godfrey as he was also a minor. Moreover Godfrey did not witness the actual assault and could not therefore offer corroboration in that regard.

The fact that the complainant did not report the incident to his parents who only came to know about it after 7 days from the complainant's friend also makes the credibility of the complainant questionable . The Appellant's conviction for the alternative charge cannot therefore stand in the light of the above.

As regards the sentence, the trial magistrate imposed the then maximum penalty of 7 years even though the Appellant was treated as a 1st offender. This was obviously excessive . I do therefore allow this appeal quash the conviction and set aside the sentence.

The appellant shall be set free unless otherwise lawfully held.

Dated Signed and Delivered at Nyeri this 19 th December, 2003 .

H.M. OKWENGU

JUDGE