REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.328 OF 2001

(Being an appeal from Original Conviction and sentence in Criminal Case No.306 of 2001 of the District Magistrate's Court at Taveta –T.L. ole Tanchu, DM.II)

GREEK MWANYASI MUNYAKA ……..……. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

J U D G M E N T

The Appellant in this Appeal Greek Manyasi Muyaka was charged with the offence of Committing unnatural offence, contrary to Section 162(a) of the Penal Code in that on 27th and 28th day of June 2001 between 6.00 p.m. and 6.00 a.m. at [name withheld] Village in the Taita/Taveta District within Coast Province he had carnal knowledge of a juvenile TO against the order of nature. He was convicted and sentenced to seven (7) years imprisonment and to receive five (5) strokes of the cane. He appealed against both conviction and sentence but during the hearing of this appeal he abandoned the appeal against conviction and proceeded only with the appeal against sentence. The learned State Counsel, Miss Kwena did not support conviction.

I have on my own perused the record of the lower court including the judgment. A number of matters arise in this appeal which are rather disturbing. First the complainant in the case below was said to be an imbecile but there was no evidence to that effect. He however gave evidence that was completely incoherent. His age was not proved but he was referred to as a young person.

His evidence was in respect of a sexual offence and required corroboration. That independent corroboration on material aspect was completely lacking, as even the Doctor's evidence was not certain as to what actually took place with the Doctor preferring to say only that "there was a high probability of sodomy, and that the peeling of the skin was caused by friction in the anus and "it is likely that it was caused by a penis." He also said that no spermatozoa was found in the body of the complainant, yet the offence took place in the night of 27/28th June 2001, and he examined the complainant on 29th June 2001. The second disturbing aspect of this case is the entire judgment delivered by the learned Magistrate. The Judgment is disturbing because first the learned magistrate on several occasions in his judgment relied on matters not on record. He stated for instance at one point as follows in his judgment: "In my judgment, herein I may allude to things which were said or done during the trial in my presence but which I did not record in the proceedings but I clearly remember them."

This in effect, means that the judgment incorporated and considered matters not in the record. That is an error. If anything was said and/or done during the trial, the learned magistrate had a duty to record it and could only rely on what was on record otherwise, it becomes difficult for anybody to appreciate the grounds for the conviction if some of the same reasons are only in the learned magistrate's mind and not on record. He further states as follows in the same judgment:

"He lifted up his sweater and removed his pants and showed where the accused "married" him. He pointed at his buttocks. On showing these he made a similar sound as I had already mentioned hereinabove. He also pointed the front private parts of his body. I cannot imagine what he was doing to him but my wild guess is that the accused was fondling PW.1's private parts. --------. I would also like to point out that this court understood PW.1's "alioa mimi to mean having carnal knowledge of him."

All these parts of the judgment were on matters not on record and not strictly canvassed by the parties before the court. They were on what the learned Magistrate conceived the facts to be. The law is now well settled and it is found in the case of ***OKETHI OKALE & OTHERS VS. REPUBLIC (1965)EA page 555*** where it was held inter alia as follows:

"(I) In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial ju dge to put forward a theory not canvassed in evidence or in court speeches."

Here the learned Magistrate clearly based hid judgment on matters he confessed were known to him but were not on record. He also alluded to matters that he arrived at through what "he called his wild guess and his own interpretation of certain clauses in evidence" This was wrong. There are several instances in the judgment where the learned magistrate relied on matters not canvassed before him such as what the owner of the house told him whereas that owner of the house was not a witness at all.

The third aspect of the judgment which is again worrying is the procedure adopted in visiting the scene of the alleged crime. The learned Magistrate in his judgment relied so much on the evidence adduced during the same visit and the conduct of the complainant during the same visit. However, in the proceedings, this visit seems to have taken place after the complainant had given evidence and had completed his evidence and the second Prosecution witness also had given evidence. No application was made for such visit and the record shows the same visit was possibly done through the court's own motion. That was not improper, but having visited the same, the complainant is shown to have given evidence without his having been recalled to do so and even worse, his evidence at that time was not subjected to any cross examination by the accused. This was not proper and that meant that the judgment proceeded on an aspect of evidence in which the Appellant never participated. If the court wanted to visit the scene, it should have ideally done so when the complainant was still giving evidence in chief. The complainant should have then at the scene shown the court whatever the court wanted to see. The hearing should have been adjourned to court room where the accused should have been afforded opportunity to cross-examine the complainant in his evidence as a whole including the visit aspect. If however the court conceived that idea later after the re-examination of the complainant, then the complainant should have been formally recalled (in which case the Appellant given opportunity to object or not to object the recall) and having been recalled, a visit to the scene should have taken place but the complainant should have been subjected to cross-examination after the visit to the scene on his evidence at the scene.

The further matter that calls for comment and which would have in its own been enough to dispose of this appeal is that in the entire judgment the learned Magistrate does not appear to have considered the Defence at all. In fact he did not allude to it in his judgment except where he stated that he asked the Appellant whether the alleged scene of crime was his bedroom and he said the Appellant admitted that it was his bedroom. That was not the Appellant's defence. The learned Magistrate had a duty to consider the defence that was adduced in the case and to either accept it or reject it with reasons. He could not ignore it completely as he did here. Section 169(1) of the Criminal Procedure Code is clear. It says:

"169(1) Every such judgment shall except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the

point or points for decision and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."

In my mind, one cannot say a judgment such as is in this case contains point or points for decision when it clearly does not incorporate in its decision the Defence adduced by the Appellant.

Lastly, I also note that the learned Magistrate seems to have accepted in his judgment that the complainant was a young man under 14 years of age. He also accepts that the complainant was an imbecile. There is nothing to show that the complainant was sworn or gave a sworn evidence. There is nothing to show that the learned Magistrate examined the complainant to enable him decide whether he could understand enough to appreciate the meaning of telling the truth. He gave unsworn statement. The learned Magistrate relied on the same without warning himself that such evidence required corroboration.

I do not need to say any more. Although the Appellant did not pursue the appeal on conviction, I do think it the duty of this court to nonetheless peruse the record before it, and see if despite such approach by the Appellant who is unrepresented, there was still proper evidence in law and to see if the correct legal procedures were followed to convict him. I have on my own done so and I do with respect agree with the learned State Counsel that the record before me cannot allow the conviction to stand.

The appeal is allowed, conviction quashed, sentence set aside. Appellant released forthwith unless otherwise legally held. Judgment accordingly.

Dated and delivered at Mombasa this 27th Day of August, 2002.

J.W. ONYANGO OTIENO

JUDGE