



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO. 152 OF 1998**

**(From Original Conviction and Sentence in Criminal Case No. 764 of 1996 of the**

**Senior Resident Magistrate's Court at Voi –( Nduku Njuki –Ag. SRM).**

**KATERIA CHOPHI NGALA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**J U D G E M E N T**

This is an appeal against both conviction and Sentence on a charge of committing unnatural offence contrary to Section 162 (c) of the Penal Code. Appellant also faced an alternative charge of indecent assault on a boy contrary to Section 164 of the Penal Code. He was convicted as charged on the first count and sentenced to 7 years imprisonment plus 5 strokes corporal punishment.

He has listed 4 grounds in his Memorandum of Appeal namely:-

- 1. That the trial Magistrate erred in both law and fact by convicting him on a single evidence without any corroboration.***
- 2. That the magistrate erred in law on relying on the evidence of a minor who never swore in court.***
- 3. That the Trial Magistrate erred in failing to put into consideration the P3 form on which the expert never came to give evidence in court and lastly,***
- 4. That the Trial Magistrate erred in Law by failing to give consideration to his defense evidence.”***

The facts of this case are well recorded in the judgement of the trial court and from the testimonies of the complainant and his father. The boy was at the material time, 12 years of age and attended Jaffrey Primary School standard six. He was old enough to give unsworn evidence: He (PW1) says

***“On 15 th I spent the day in school. At 1.00 p.m. I headed for lunch at home. I was alone. I met the accused herein, Kateria. I met him on the way. It was far from home. He was coming from***

***the side of Maili Kumi. I was about to get to the main road. He was headed for their home. He was alone. He then told me to accompany him to get the speaker of NM from where it was in the bush. NM is my brother and I was to take the speaker home. When we got to the bush he then said he wanted to check whether I was circumcised. He then lowered my trousers and saw my manhood. He then lifted me removed my trousers and then sodomised. When he was through he led me to the main road and I went home. I got my father and I told him I had been sodomised by the accused. I knew him because he had been a student at the same school I am schooling. My father took me to Mackinon Police Post and the Health Centre. The next day I was brought to Voi Hospital.”***

The boy's father PW2 takes up the story:-

***“On 15/8/96 at about 2.00 p.m. the complainant who is my son came home crying. I questioned what was up. He then told me he had been sodomised by Kateria Chuphi Ngala. I knew him when he was named. I then took my son to Police Post Mackinon Road. We were sent to the Health Centre. He was checked in my presence. I knew the accused before as he also comes from Mackinon Road.”***

The Appellant was known to both PW1 and PW2 and a report was made to the Police who after sometime arrested him. P.W.3 a Police officer visited the scene of crime and told the court that the scene was disturbed and he found a paper which appeared to have been used to wipe a male organ after ejaculation. A government Chemist Report produced in court indicated that the paper contained spermatozoa. P3 form was issued, completed by a doctor and also produced in court.

Cross examined by the appellant the witness (PW3) said that the boy, when brought by his father to the Police Station was crying and was unable to stop his excreta.

In his defence the appellant denied knowing the complainant nor his father and also denied having committed the offence he was charged with. He also said, he did not know why the officer arrested him. The magistrate however found that the offence had been committed by the appellant and that he was known by both the complainant and his father, very well, both having given his full names and besides he had attended the same school where the complainant was then attending.

On appeal to this court the appellant stated that he wished to rely on the grounds he had put forward. He challenged the evidence of the complainant which he said was not enough to convict him.

The trial court had no doubt that the boy was capable of identifying the appellant as he knew him well and the offence was committed in broad day light. There was no question of confusion with another person. There is no reason why the victim would have picked on the appellant. His evidence is well corroborated by the testimony of his father and the medical evidence. Both his defence at trial and his submissions before court cannot convince this court that the appellant is innocent of the offence with which was charged. The conviction, therefore stands and consequently his appeal against conviction is dismissed. I have considered his plea on the sentence and order that he be released immediately unless otherwise legally held as he has been in custody for a long time and appears ready to return to a normal life in Society. The sentence of imprisonment is reduced to a term he has been in custody save that the corporal punishment of 5 strokes will stand.

Orders accordingly.

**Dated and Delivered this 31st Day of December 2002.**

**L.P. OUNA**  
**J U D G E**