

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.128 OF 2000

(Being an appeal from Original Conviction and Sentence in Criminal Case

No.3819 of 1999 of the Chief Magistrate's Court at Mombasa – B. Maloba, SRM)

MAKIO MUSYA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with the offence contrary to Section 162(a) Penal Code. He was convicted and sentenced to 14 years imprisonment plus 8 strokes of the cane. He now appeals against conviction and sentence. His complaints are that conviction was against the weight of evidence. The evidence was insufficient and inconsistent and there was intention to frame up the appellant in a bid to avoid paying his salary owed to him by the complainants' parents. He also complains that the sentence is excessive and harsh.

I have perused the record and I have considered the submissions of the appellant and of State Counsel. The record shows that the court certified that the 11 year old complainant qualified to testify under oath. His evidence is consistent and clear. He was sodomised in May and on 4th November and on 15th November 1999. On 25th November the complainant's mother noticed that the complainant was wailing in an abnormal manner. She inquired what had happened and the mother eventually took the complainant to the doctor, PW.5, who confirmed that the complainant had been sodomised. The doctor also said the complainant was mentally retarded and that the child has suffered repeated unnatural acts. The appellant did not cross examine this doctor.

In his defence the appellant said the parents of the complainant had framed him because they had not paid his salary. He did not say how much salary was outstanding. Evidence shows that the appellant has worked for this family for 4 years. The allegation that he had not been paid his salary is not proved. He did not even cross examine the father or mother on this issue of non-payment of salary. Otherwise the appellant simply denies the offence.

Upon considering the whole circumstances surrounding this case I find the prosecution proved its case beyond reasonable doubt and I find no reason to interfere with the conviction. On the issue of sentence the appellant was said to be first offender. He had already been in remand since 26/11/99, a period of 4 months. The maximum sentence is 14 years imprisonment with or without corporal punishment. In this case the trial magistrate gave the maximum punishment of 14 years and 8 strokes of the cane. The trial magistrate has the discretion to mete out sentence after conviction. It is a discretion rarely interfered with unless it is obvious that the discretion was not judicially exercised.

In this case I am of the view that the magistrate failed to exercise discretion judicially. She failed to notice that the appellant was a first offender and that he pleaded for leniency. In the circumstances I find that the sentence is harsh and excessive. I hereby set the term of imprisonment aside and substitute with one of 8 years imprisonment and 8 strokes. The appeal is otherwise dismissed.

Dated at Mombasa this 3rd Day of October, 2001.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Read in Court Before: Ms. Kwena, State Counsel Appellant.

J. KHAMINWA

COMMISSIONER OF ASSIZE