REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 26 OF 2018

CHARO KAHINDI ....APPELLANT

VERSUS

REPUBLIC…...RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Appellant in person

JUDGMENT

The appellant **Charo Kahindi** was charged with the offence of committing unnatural offence contrary to Section 162 (a) of the Penal Code in a trial held at **Malindi Chief Magistrates Court in Criminal Case No. 1286 of 2009.** In addition, with this charge the appellant was also charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. With regard to the charge of robbery an appeal was preferred to the High Court and in a Judgment delivered on 24.5.2012 by conviction and sentence being set aside for reasons not very clear appellant did not prefer an appeal in respect to this charge of unnatural offence.

It was stated in this charge that the appellant on 14.9.2009 at [particulars withheld] village, Gede location he had committed carnal knowledge with **EN** against the order of nature.

After a full trial the appellant was convicted and sentenced to 20 years imprisonment. Being aggrieved with the entire Judgment, he preferred an appeal to this court based on the following grounds:

> ***1. That the Learned trial Magistrate erred in law and facts by sentencing me without considering that the prosecution did not prove its case to the required standard of law (burden of proof).***
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> ***2. That the Learned trial Magistrate erred in law and facts by finding my conviction and sentence without considering there were massive contradiction and invariance, from the medical report produced.***
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> ***3. That the Learned trial Magistrate erred in law and facts by finding my conviction and sentence without considering that the sentence meted upon me was harsh and excessive.***
>
> ***4. That the Learned trial Magistrate erred in law and facts by finding my conviction and sentence without considering my defence evidence.***

Background: The case for the prosecution

The star witness in respect with this offence was the complainant **PW 4 – E** who testified that on 14.9.2009 at about 9.00 am a man came to her house seeking that she accompanies him to a Mzungu house who was in need of employing a house help.

The complainant and appellant set out to walk to the house of the proposed employer towards Turtle Bay Hotel. That walk finally ended up into a forest where the appellant ordered the complainant to undress all her clothes including the inner wear. Fearing for her security and safety the complainant in obedience undressed and what followed was appellant removal of his trouser to paveway for his genitalia to penetrate the anal orifice of the complainant.

After the appellant was done with the carnal knowledge act he also robbed the complainant of her Samsung mobile phone. Thereafter, in the

complainant evidence she began to search for an exit pathway out of the forest on the way she came across a man who was fetching water and did seek his help.

The man subsequently identified as **Alex Kenga** testified as **PW 7** in support of the prosecution case. The complainant explained to PW 7 the events of the day and what transpired while in the company of the appellant. The complainant stated that PW 7 offered to assist in providing the first aid to have her find a place to bathe as they trace the foot prints of the appellant.

It emerged according to the complainant, that on parting ways the appellant had also passed through to another homestead. This formed part of the link towards tracing and apprehending the appellant. That is when the complainant and PW 7 came across the appellant drinking at Tiriboni. It was the complainant testimony that she saw the appellant whom he positively identified to PW 7 and other members of the public. He eventually was arrested and taken to the police station at Watamu as confirmed in the evidence of **PW 8, PC (W) Pauline Kibati.**

According to **PW 8**, the complainant and appellant were brought to the police station by members of the public who included PW 7. In PW 8 testimony after brief entries of the report in the occurrence book, she escorted both the complainant and appellant to the hospital. As part of the investigations PW 8 recovered the complainant's clothes– being a pant, black skirt and a blouse which she wore on the fateful day of the carnal knowledge by the appellant.

The complainant was issued with the P3 Form which was filled by **Ibrahim Abdullahi, PW 5.** The clinical officer testimony was that the complainant came in with a history of being sodomised by a man she was able to positively identify through his physical features. According to PW 5, the complainant had suffered anal penetration which was indicative of tenderness and swelling around the anal area. Making reference to the treatment notes and physical examination **PW 3** opined that the complainant suffered actual bodily harm.

PW 9 PC Moses Jahazi stated that while at Watamu Police Station together with other officers they received information of a suspect arrested by members of the public and was at that moment in the home of the area Member of Parliament. The suspect was alleged to have raped a woman PW 9 came to identify as **Everlyne.** He stated that he moved to the scene, came into contact with the complainant and also the suspect duly identified as the appellant. The witness PW 9 also confirmed recovering the cloth wear from the complainant which she wore during the sexual assault.

The evidence of **PW 10 – PC Peter Ekal,** the investigating officer was on the recording of the statements of witnesses who formed the basis of the complaint on robbery and carnal knowledge against the order of nature to be preferred against the appellant.

At the close of the prosecution case, the appellant gave a sworn statement in his defence. The appellant testified that he did not commit the offence alleged in charge sheet. That his arrest came about when the complainant asked him to accompany her to **Honorable Mungalo's** home. On arrival, there was an interrogation of whether he knows one **John Kazungu** and his residence. That is when **Mzee Mungalo** telephoned Watamu Police Station to ask them to come for him as a suspect of rape. The appellant further testified that on arrival at the police station, he saw the complainant who alleged that she had been violently robbed of her mobile phone and cash. It was also appellant testimony that what followed thereafter, was his arrest and a visit to Gede dispensary. The medical personnel conducted some laboratory tests and they later went back to the police station.

While at the police station, an identification parade was conducted in respect of the charge of robbery. The appellant denied that he was involved in the design and execution of the offence against the order of nature upon the complainant.

I have considered the record, submissions by the appellant and prosecution counsel **Ms. Sombo** for the state. The key submissions raised by the prosecution counsel was on the age of the P3 Form and the issue on treatment notes. According to counsel, the state cast a doubt on the occurrence of the offence. In her contention she was in doubt whether the complainant was raped for reason that the P3 form was filled many months after the alleged incident.

Analysis

The most important ingredient of the offence of carnal knowledge against the order of nature can be traced to the provisions of Section 5 of the Sexual Offences Act which states as follows:

> ***1. "Any person who unlawfully***
>
> ***(a) penetrates the genital organs of another with any part of the body of another or that person or an object manipulated by another or that person except where such penetration is carried out or proper and professional hygienic or medical purposes.***
>
> ***(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by part of the other person's body, is guilt of an offence termed as sexual assault."***

The Section 162 of Penal Code under which the appellant was charged reads as follows:

> ***"that any person who***
>
> ***(a) has carnal knowledge of any person against the order of***
>
> ***(b) has carnal knowledge of an animal or permits a male person to have carnal knowledge of him or her against the order of***

nature is guilty of a felony."

The intent behind Section 162 is clearly to criminalize offences against carnal knowledge presented to be unnatural and undesirable. It is crucial that in the instant case, the appellant with the complainant was non-consensual. Any person therefore who penetrates the unnatural part of another human being for sexual gratification or viewed as having satisfied, the definition in Section 2 of the Sexual Offences Act which defines penetration as:

> ***"The partial or complete insertion of the genital organs of another person into the genital organs of another person. In the same section genital organs include the whole or part of male or female genital organs and for purposes of this act includes the anus."***

It is deemed improbable to reassign the anatomy of sex organ given at birth and choose to modify it to a different identifiable category and purpose against the order of nature.

The offence of unnatural offence is therefore proved if the prosecution evidence shows that the sexual intercourse against the complainant was concerned by the appellant and founded on non-consent. The only difference is that the attributes of sexual offences occur under the protection of right to privacy as espoused in the Constitution. In the case of **R v Alter 9C8 P31** the Court held:

> ***"That penetration which was not of such depth as to injure the hymen was sufficient to constitute the offence of rape."***

See also the case of **(Daddy Fitchie v People CA. CA NO. 21/2017 ZLR,)** It is true that as a general proposition under Section 124 of the Evidence Act the standard of proof in sexual offences requires corroboration in some material particulars by independent evidence accepted by the court. But it is also true that corroboration is not a necessity in Law and the court may act on evidence of a single witness without any corroboration.

The statement in the persuasive authority from the Supreme Court of Zambia in the case of **Emmanuel Phiri v The people [1982] ZR77** where the court held:

> ***"A conviction may be upheld in a proper case, notwithstanding that no warning as to corroboration has been given if there is in fact exists in the case corroboration or that something more as excludes the dangers referred to. It is a special compelling ground or that something more which would justify a conviction on uncorroborated evidence, where, in the particular circumstances of the case, there can be no motive for a prosecutrix deliberately and dishonestly to make a false allegation against an accused."***

In terms of the case **Roria v R [1967] EA 583** the evidence of PW 4, and complainant shows the vital element of the commission of the offence. The whole evidence demonstrates that the complainant was approached at 9.00 a.m. in the morning by the appellant to accompany him to a job offer by a Mzungu resident at Watamu – towards Turtle Bay. The background facts as told by the complainant are elaborative of the provisions of Section 43 of the Sexual Offences Act on intentional and unlawful acts of the appellant. PW 4 was categorical that when she was approached by the appellant he misrepresented some facts on a job offer of a house help in a certain Mzungu house. The complainant's intention to leave her house in company of the appellant was to pursue the job-placement. The complainant testimony shows the appellant intention was to pursue a specific unlawful purpose of committing the act of rape' albeit against the order of nature.

The clinical officer who testified as PW 5 examined the complainant and found tenderness and swelling to the anus on the face of the medical examination clear evidence of penetration had taken place in terms of Section 2 of the Sexual Offences Act. The P3 report by PW 5 based his findings from both physical examination and treatment notes. His evidence was acceptable by the trial Magistrate. A perusal of the record shows the offence was committed on 14.9.2009 and the P3 Form was filled on 8.3.2010 based on the treatment notes.

I have considered the grounds advanced by the appellant and submissions in the form of a rejoinder where the prosecution counsel urged this court to allow the appeal. **Ms. Sombo** for the prosecution argued and made the disturbing submissions that the complainant was 'raped' on 14.9.2009 whereas the P3 Form was filled on the 8.3.2010. Her main contention was that the P3 Form was filled six months after the alleged offence was committed.

This line of submissions caused me much concern. The position as I see in PW 5 testified pursuant to the provisions of Section 48 of the Evidence Act on expert opinion Evidence, the task of which was to proof the facts in issue at the trial court.

The medical evidence being discarded by the prosecution counsel was tested in court under oath as on cross examination as basis which it was to provide proof on the issues in dispute in the charge against the appellant. There was no rebuttal on the part of the appellant in regard to prima facie medical evidence.

Expert medical evidence and opinion was in favor of the complainant as having been 'raped' against the order of nature. On the fact of it therefore the appellant without the consent of the complainant subjected her to intrusion to have carnal knowledge.

It is therefore clear from the reading of the evidence of **PW 4, PW 5, PW 7** and **PW 8** draw in escapable inference that the complainant was on 14.9.2009 taken out by the appellant from her house. Being a sexual offence the Learned trial Magistrate appreciated the importance of direct and corroborative evidence with regard to the charge on unnatural offence. There was no need for the Magistrate to warn herself of any danger of uncorroborated testimony serve, that criteria was duly satisfied that the appellant was the one who committed the offence. In regard to the charge, the record shows the following, the complainant testimony shows that she was not a stranger to the appellant.

As for identification evidence, the prosecution satisfied the ingredient by the testimony of the complainant. Having considered the evidence as a whole including the defence and submissions made in this appeal, I draw attention to the principles in the case of **Abdalla Bin Wendo & Another v R [1953] EACA 166, Roria v R [1967] EA 583.** Further in **Kariuki Njiru & 7 Others –vs- R Criminal Appeal No. 6 of 2001** the Court stated:

> ***"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error."***

Applying the above principles to the instant case, there was sufficient evidence from the complainant on recognition as she explained that she stayed with the appellant from 9.00 a.m. to 5.30 p.m. She later reported the matter to PW 7, and gave the description of the appellant which formed the basis of the search party was to trace and arrest the appellant.

The appellant in his sworn testimony gave a completely different scenario on how his arrest was effected avoiding to controvert the testimony of **PW 4, PW 7, PW 8** and **PW 9**. On the evidence accepted by the Learned Magistrate there was irresistible inference likely drawn that the carnal knowledge did take place against the complainant and both direct and circumstantial evidence pointed only to the guilty of the appellant.

For the reasons given, I find the grounds of appeal on conviction lacks merit.

Sentence

Further to the foregoing the appellant was sentenced to serve 20 years' imprisonment for this offence way back in 23rd November 2010. I take cognizance that he has spent part of his youthful life in prison custody including one year spent in custody awaiting trial for this offence and for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was later to be acquitted with the offence of robbery with violence but remained serving sentence for the current charge in which he was found guilty and later convicted by the trial court.

It is the law under Section 333 (2) of the Criminal Procedure Code to take into account the period spent in remand custody. The court has also noted that the appellant is a first offender and is capable of reformation and reintegration. As a consideration of balancing the objective of criminal law of punishing crime the court has to serve the interest of justice bearing in mind the victim, the offender and society at large. The aggravating factors in respect of the offence remain real for it involved the right to privacy and human dignity of the victim, the severity of the injuries and psychological trauma of having carnal knowledge with a female against the order of nature is in itself an aggravating factor sometimes inexcusable in the ordinary course of natural events. All these go to show the appellant intentionally and unlawfully committed the offence against his victim.

In the light of the above, I have given weight to both the mitigation and aggravating factors to enable me exercise discretion as to the appropriate sentence with special focus on the rehabilitation of the offender. As sentencing also takes into account the personal circumstances of an offender as whole, I am persuaded to exercise a measure of clemency in favor of the appellant that the sentence of nine years imprisonment be considered as fair and just for the offence. The upshot of this, the appellant is to be released from prison custody to continue community based reintegration.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF NOVEMBER 2019.

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R. NYAKUNDI

JUDGE