REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 63 OF 2018

KMK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CORAM: Justice R. Nyakundi

Ms. Sombo for the State

Appellant in person

JUDGMENT

The appellant **Mason Kiraga** was charged and convicted of two counts for the offence of committing unnatural offence contrary to section 162(a) of the Penal Code. The brief particulars alleged by the prosecution were that on the 12/11/2015 and 13/11/2015 at around 10.00am at Turtle Bay Village – Watamu Location he had carnal knowledge of **JBN** against the order of nature.

After a full trial he was sentenced to 15 years imprisonment on each count.

Being aggrieved with both conviction and sentence he preferred an appeal to this court.

According to the evidence before the trial court, on 12/11/2015 the complainant **PW1** was at Turtle Bay beach when he was called aside by the appellant. The complainant accompanied the appellant towards some thicket and immediately without notice he forcibly undressed him naked, including his under wear. Thereafter the appellant also undressed and used his penis to penetrate the anus of the complainant. Shortly after, when the appellant was done with penetration he gave him Ksh.20 coin as a token of appreciation, presumably for offering his body for sex. When the complainant went home he reported the incident to the police who commenced investigations.

The complainant was accordingly referred to the hospital. Before the dust settled down on what happened on the 12/11/2015, the complainant further told the trial court that the same appellant had also sodomised him on the 13/11/2015 at Turtle Bay Beach. This time the complainant testified that he was given Ksh.11 which he went and used to take a cup of tea. The complainant further explained that on these two occasions of acts of sodomy a P3 form was filled by a Clinician who testified as PW3. In his report, **PW3** opined that though there were no tears to the anus, the complaint could have been sodomised. The P3 form was admitted in evidence as exhibit 5.

PW2 came to the scene by virtue that he received information from his brother **K** that their nephew (PW1) had been sodomized by the appellant. While armed with this information PW2 made arrangements to have the complainant taken to the hospital for treatment.

PW4, PC Keter a police detective attached to Watamu police station in his evidence said that on carrying out investigations he found the appellant culpable for committing the unnatural offence against the complainant. PW4 further evidence was that he preferred a charge of unnatural offence against the appellant which he allegedly committed on the 12 and 13/11/2015. He also produced the sketch map drawings of the scene. Further, PW4 positively identified the appellant as the suspect of investigations and whose report was made to the police. That as a consequence an arrest was effected for him to face the law.

In his defence the appellant said that on 13/11/2015 he was at Turtle Bay when he met the complainant (PW1) with others not before court who started throwing sand at him without any justification. As if that was not enough, the appellant further told the trial court that the same people started the acts of assault. It did not take long before a KWS officer came to his rescue shortly after the incident. According to the appellant together with the complainant they proceeded to Watamu police station. Upon interrogation he learnt that it was being alleged that he had sodomized the complainant; an offence he vehemently denied. He attributed the complaint made by PW1 to a grudge held by the **B men** because he used to only buy food for PW1 leaving them out of the deal. The appellant also alleged that being an HIV victim he could have passed the virus to the complainant if indeed its true he committed the offence.

As evidence to support his claim, the appellant provided a bundle of treatment notes and card as defence exhibit 1. He denied having carnal knowledge against the order of nature with the complainant.

The Learned trial Magistrate in considering the evidence found that the only reasonable and logical conclusion to be inferred was that the prosecution proved the case beyond reasonable doubt.

The learned trial magistrate who had an advantage of hearing the star witness (PW1) further found that all factors being constant it was unlikely that PW1 would falsely fabricate the story on sodomy to implicate the appellant.

In all these the appellant was dissatisfied that indeed the prosecution proved their case to warrant a conviction and sentence passed against him for an offence he never committed.

The appellant therefore brought this appeal based on the following grounds.

> ***1. That the learned trial magistrate grossly erred in both law and facts by failing to consider that the charges were fatally and incurable defective in breach of section 48 and 49 of the Sexual Offences Act No. 3 of 2006.***
>
> ***2. That the trial magistrate erred in law and facts by admitting the evidence of the complainant (PW1) who was then a vulnerable person (with mental incapability) without invoking section 31 (4) (b) (5) (6) (7) of the Sexual Offences at No. 3 of 2006.***
>
> ***3. That the learned trial magistrate erred in law and facts by failing to consider that there was no cogent evidence to link the appellant to the commissioning of the alleged offence.***
>
> ***4. That the learned trial magistrate erred in law and facts by failing to adequately consider my defence which was unrebutted by the prosecution evidence on record thereby creating doubt on the prosecution case.***
>
> ***5. That learned magistrate erred in law in convicting the appellant of the offence of unnatural act notwithstanding that the evidence before the trial court, when properly analyzed and evaluated, did not support the conviction.***

Dealing with the entire appeal appellant accompanied the grounds with written submissions.

What are the issues raised?

In his argument, the appellant first point of attack on the judgement was the fact of mental infirmity of the complainant. In respect of this ground appellant relied on section 2 of the Sexual Offences Act which defines a person with mental disability to mean and include:

> ***"A person affected by such mental disability to the extent that he or she, at the time of the alleged commission of the offence was unable to appreciate the nature and reasonably foreseeable consequences of an act under this Act;***
>
> ***(b) unable to resist the commission of any act or***
>
> ***(c) unable to communicate his or her unwillingness to participate in any such act"***

The fundamental question appellant raised with respect to the charge sheet was that of it being defective when read together with the provisions of the Sexual Offences Act. The submissions on this ground were that section 134 of the criminal Procedure Code is very clear on the manner in which every charge and information shall set out with sufficient details and particulars of the offence as may be necessary to give reasonable information to the accused on the offence charged.

It was contended by the appellant that the learned trial magistrate failed to appreciate the anomaly in order to invoke the provisions of section 214 for the Criminal Procedure Code on amendment of charge sheet before final judgement. His plea and submission was that the offence as charged under section 16 2(a) of the Penal Code was a nullity and therefore the conviction was unsustainable.

In addressing the ground on medical evidence adduced from PW3 the appellant contended that it is a fact (PW1) who was found to be mentally retarded. The appellant argued that by virtue of this medical finding subject to the provisions of the law, it was incumbent upon the learned trial magistrate to secure an intermediary to assist the complainant. That the failure to subject the complainant to a mental assessment examination was therefore fatal to the prosecution case. The case of **Samuel Kingori Mungai v Republic 2016 eKLR** was relied upon by the appellant on the expert opinion and admission of medical reports pursuant to section 48 and 50 of the Evidence act.

The appellant further argued and submitted that the learned trial magistrate erred in law and fact in rendering a determination without making reference to the defence case. Thus, the trial magistrate failed to warn herself on the dangers of convicting the appellant on a testimony of a single witness without corroboration. On this ground the appellant cited section 124 of the Evidence Act and the authorities of **Mohamed Musumba v Republic CR. Appeal No. 299 of 2009.** According to the appellant the manner in which the trial was conducted did occasion prejudice and injustice seeking this court to rectify the situation by allowing the appeal on both conviction and sentence.

The case for the state on appeal

It was submitted on behalf of the state through **Ms. Sombo** – prosecution counsel that there are no issues of ambiguity nor defects in the

charge sheet as argued by the appellant. On the vulnerability and mental fitness of the complainant counsel submitted and cited the mental assessment report which confirmed him to be a fit person to testify before a court of law in any proceedings. Learned counsel submitted that the main principle of the case is whether the prosecution established the elements of the offence and appellant was positively identified as the perpetrator. It is argued by counsel that section 162 (a) of the Penal Code which criminalizes same sex activity between same sex persons was proved by the testimony of (PW1) who was candid and steadfast in his evidence.

In addition, counsel contended that the issue of HIV positive on the part of the appellant and the negative status of the complainant did not constitute a defence that sodomy did not take place on 12/11 and 13/11/2015. To this end, counsel placed reliance on the case of **Anjononi v Republic 1980 KLR 89** on recognition evidence of a defendant to a criminal case. In **Keter v Republic 2007 IEA 135.**

In respect to the provisions of section 143 of the Evidence Act which provides that no particular number of witnesses shall in the absence of any provisions of the law to the contrary be required for the proof of a fact.

Learned counsel contended the fact of the matter that is the evidence for purposes of section 162 (a) of the Penal Code, stands to remain compelling and watertight that the appellant committed the offence. By adopting the evidence, learned counsel urged this court to dismiss the appeal in its entirety.

Analysis

I have considered the charge, evidence and submissions on appeal from the principles laid down in **Okeno v Republic 1972 EA 32** and **Kiilu v Republic 2005 KLR 174.** It is trite that an appellate court on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination and the appellate court to reach its own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. In doing so, it should give allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

In determining this appeal, I am fully aware guided with the above principles the duty of the law that has to impact clearly on exercise of discretion to quash or confirm the appeal. The court has to draw the distinction on the well-known rule that any such discretion to interfere with the decision of an inferior court must be exercised judiciously to inspire confidence in the justice system.

In considering this appeal, it is as matter of law first I consider whether the prosecution discharged the burden of proof beyond reasonable doubt against the appellant for the offence under section 162 of the Penal Code. The burden of proof which rests with the prosecution is as set out in the Landmark case of **Woolmington v DPP 1935 AC 462 and Miller 1942 AC**

In Miller's case the court held as follows on the phrase of proof beyond reasonable doubt ***" It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt. But nothing short of that will suffice."***

This is the standard of proof which will be tested against the circumstances and facts of this appeal.

On the basis of section 162 (a) of the Penal Code its application involves evidence that the offender voluntarily and intentionally had carnal knowledge against the order of nature with the complainant.

A reading of section 162 (a) of the Penal Code interprets the provisions under section 2 of the Sexual Offences Act on what constitutes penetration. For purposes of sexual intercourse or carnal knowledge section 2 defines genital organs to include the whole or part of the male or female genital organs and also the anus. Whereas penetration means the partial or complete insertion of the genital organs of a person into the genital organ of another person.

In the offence of this nature it is essential that partial penetration is sufficient to constitute carnal knowledge with the complainant necessary to prove the offence beyond reasonable doubt.

In the instant case, the trial court accepted evidence from PW1 that sexual intercourse had taken place on 12/11/2015 and 13/11/2015 at Turtle Bay which involved the appellant as the perpetrator. The explanation offered though from a single witness adequately addressed the circumstances of the offence. PW1 testified that he has known the appellant prior to the commission of the offence by virtue of his stay at Turtle Bay Beach in Watamu. He stated that the appellant did sodomise him on 12/11/2015 when he forcibly pulled him to the bush. PW1 also confirmed that the following day on 13/11/2015 the same unlawful act of canal sexual assault took place. During cross-examination by the defence counsel PW1's testimony remained unchallenged and he confirmed that the appellant had intimate sexual intercourse on both occasions.

The principles governing the exercise on visual identification of a single witness to a crime were laid down in the case of **Republic v Turnbull and others 1976 Chancery division or 3 ALLER at page 549.** The principles in Turnbull were adopted with approval by the Court of Appeal in **Wamunga v Republic 1989 KLR 424** where the court concluded that:

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examined such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction." See also the case of Anjononi & Others v Republic 1976-80 1586.***

Section 143 of the Evidence Act also buttresses the rule on a single testimony of a witness to a crime to prove the fact in issue beyond reasonable doubt unless the contrary is shown by the defence. The sexual conduct of the appellant against the complainant is also constitutional right to privacy under Article 31 and under Article 28 on the right to human dignity and the right to have that dignity respected and protected.

The sense of mental disability of the complainant alluded to by the appellant did not take away the right to privacy or his human dignity which he took advantage of to have carnal knowledge on the diverse dates stated in the charge sheet.

In assessing the evidence given by PW1 the engagement by the appellant with the complainant did not involve consensual sex. In both instances, PW1's testimony was categorical and candid that as a result of the violation, the appellant paid a token of Ksh.20 and 11 respectively to appease him for the services rendered though unlawfully procured in particular by the appellant.

PW1 evidence that the appellant had sexual intercourse was admissible as the complaint was made contemporaneously with the occurrence of the offence. The circumstantial evidence by PW2 though not at the scene was part of res gestae and is an exception to the hearsay rule.

The trial court grounded its reasoning on the basis of demeanor of PW1 and the issue of credibility which became the decisive factor in convicting the appellant. Notwithstanding the observations made by the Clinical Officer, PW3, in the P3 form the core issue on penetrative sex was adequately dealt with in the sworn evidence of the complainant. There is evidence of intention and unlawful act of carnal knowledge against the order of nature. I also agree with the learned trial magistrate that absence of a tear or laceration is not a ground to vitiate penetration of the anus. From the narration of the record the supreme Court of Zambia when confronted with such set of facts held as follows in the case of **Emmanuel Phiri v the People 1982 ZR 77** held that:

> ***"A conviction may be upheld in a proper case notwithstanding that no warming 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 and compelling ground on that something more which could justify a conviction on uncorroborated evidence, where in the particular circumstances of the case there can be no motive for a prosecutor deliberately and dishonestly to make a false allegation against an accused."***

It is my conclusion that from the perspective of the prosecution as weighed with the appellant's defence, unnatural carnal knowledge by the appellant against the complainant was proved beyond reasonable doubt.

The appellant was also dissatisfied that the charge sheet was defective. The object and framing of charge sheets is provided for in section 207 of the Criminal Procedure Code.

The salient features that go to show a properly drawn charge sheet or information is to be found in section 134 of the Criminal Procedure Code. As correctly stated in the above provision, a charge sheet would be considered defective for want of an essential averment, particulars or ingredient.

The purpose of a properly drafted charge sheet is to put the accused on notice as to what to expect with respect to the evidence against him on the crime alleged to have been committed. It is also to satisfy the constitutional right to a fair hearing under Article 50(2)(b) on the right to be informed of the charge with sufficient details to answer it.

It is mandatory that under section 134 of the Criminal Procedure Code as read with section 137 of the Criminal Procedure Code a charge sheet availed by the prosecution must describe the statement of the offence, make reference to the applicable section of law which has been breached creating the offence.

In describing of the brief particulars of the offence it is expected the indication as to time, the date, location and elements of the offence that accused is called upon to answer must be clearly stated. As in **BND v Republic 2017 eKLR**, the court held that:

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence."***

In this case, I have examined the submissions made by the appellant on this issue and incorporated section 134 and 137 of the Criminal Procedure Code. The precise circumstances surrounding the offence under section 162 (a) of the Penal Code are clearly stated in the allegations on what I do refer as paragraph (b) of the charge sheet.

However, since the complainant testified in minute details as to what constitutes carnal knowledge against the order of nature. The appellant in his submissions raised a defective nature, of the offence to be in regard with the Sexual Offences Act and the provisions of section 162 (a) of the Penal Code. For purposes of having carnal knowledge of any person the streams of evidence involve penetration by use of genital organ to another person. The device of penetration is therefore a penis. The essential element of the Criminal Offence under section 162 (a) is penetration. On the fact that the words penetration and anus were omitted to the indictment did not occasion prejudice or injustice to the appellant. The prosecution satisfied this element of the indictment as the charge was properly laid before the appellant. The defect alluded to did not deprive the appellant his right to a fair hearing under Article 50 2(b) of the constitution nor occasion prejudice and injustice at the end of the trial.

The real threat to the fairness and integrity of the trial could have occurred if the appellant was not supplied with witness statements. The overwhelming and uncontroverted evidence shows that the appellant was aware of the nature of the offence being advanced by the state. Under the legal test from the view of an indictment in section 162 (a) of the Penal Code if the conditions on penetration and defined genital

organ are met. There is no serious defect to affect the fairness of the criminal proceedings. That means therefore, the appeal fails on this ground.

Finally, the appellant submitted on the mental capacity of the complainant at the time the offence was committed and subsequent evidence tendered in court in support of the charge. According to the appellant based on his part the complainant falls under the category of vulnerable or persons with disability. The mental impairment did not affect the function of the complainant's mind or brain to communicate or recall events.

A perusal of the record shows that the complainant had capacity to give evidence during the trial. It is also important to note that the same appellant was present when his counsel subjected PW1 to vigorous cross-examination. If in giving evidence the complainant had exhibited signs of mental disability or appeared to mentally distressed, the extent and accuracy could not have escaped or met the threshold stated by the learned magistrate in her judgement.

I presume that no witness can be brought to take a witness stand unless and until he is mentally capable of rendering himself as a competent and compellable witness. The decision regarding fitness of a witness is ultimately a matter of the trial court. I take cognizance if indeed the contention by the appellant is true and complainant became incoherent or refused to answer questions the learned magistrate could have taken an appropriate action. In the case of **R v Watts [2010] E WCA Criminal 1824** the Court of Appeal held as follows on the competency test of witness

> ***"That the competency test is satisfied if the witness is able to understand all the questions put to him or her and give answers to them which can be understood. Furthermore, those who are competent to give evidence should be assessed to do so, for example with the assistance of intermediaries."***

In the instant case, I have read and reviewed the record of the trial court the appellant never raised the issue of insanity with the Learned trial Magistrate. As to whether the complainant (PW 1) was presumed to be insane and capable of being a competent witness for the prosecution was a matter to be decided by the Learned trial Magistrate.

In another series of decisions on this issue the Court of Appeal in **R v Sed [2004] 1 WLR 3218** the court held that:

> ***"the test of competence set out in Section 53 did not require a witness to understand all the questions put to her and for all her answers to be understood. It was a matter for the Judge to determine competence, taking into account, the effect of the witness's performance as a whole and whether there was a common comprehensible thread in her responses to the questions."***

In this regard, the appellant did not demonstrate on a balance of probabilities that when the complainant testified he suffered from a mental disease affecting his mind and thought processing and through it he was incapable of being a competent witness for purposes of giving evidence and for responsibility to tell the truth before the trial court.

There is no evidence that the trial court misdirected itself in exercising discretion to admit (PW1) as a competent witness. Accordingly, this ground also fails.

Consequently, the offence against the order of nature which the appellant was tried before the lower court was proved beyond reasonable doubt. Essentially, there are no remarkable features made by the appellant to warrant this court exercise discretion to fault the learned Magistrate that she misapprehended the law or applied the wrong principles to the case. The appeal on conviction is therefore dismissed.

On sentence the wording of Section 162 (a) as read with 162 (c) an offender found guilty of the offence under this Section is liable to imprisonment for a term of 21 (twenty one) years. From the record the appellant was arraigned before court on 16th November 2015. He was remanded in custody pending trial which was concluded on 26th October 2018. During that period, under Section 333(2) of the CPC the learned Magistrate was under duty to take into account of the period spend in custody by the appellant.

Further, the record confirms that the appellant had no previous conviction relevant to the offence he was being tried and convicted by the trial court. In this case, I have considered the surrounding circumstances more specifically the seriousness and the gravity of the offence of the appellant having carnal knowledge with his victim against the order of nature. The peculiarity of this case and its post-traumatic experience the complainant may have suffered is in itself on aggravating factor. I am on the view, the mitigation offered by the appellant failed to diminish or outweigh the aggravating factors.

The only variance in the sentence of the trial magistrate was a failure not to discount the sentence pursuant to the provisions of Section 333(2) of the CPC.

In all and upon due consideration of the law and facts of this appeal I do not hesitate to interfere with the sentence of 15 years by the trial court as being punitive and do substitute it to a period of 12 years imprisonment with effect from the 16th November 2015.

As a consequence, the appeal on sentence partially succeeds.

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

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R. NYAKUNDI

JUDGE