REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HCRA NO. 19 OF 2017

MESHACK KITONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original **conviction** and **sentence** in **Mutomo***

Senior Principal Magistrates** court **Criminal Case** No. **209** of **2016

*by **Z.J. Nyakundi SPM** on **18.4.2017)***

JUDGMENT

1. **Meshack Kitonga**, the Appellant was charged with ten (10) Counts of **Committing an unnatural offence** Contrary to **Section 162(a)** of the **Penal Code.** He was tried, acquitted of **nine (9)** of the **counts** and **convicted** of the **first count**. Particulars of the stated charge were that on diverse dates between the month of **January 2016** and **20th May 2016** at **[particulars withheld]** village, **Athi Location** in **Ikutha sub-county** within **Kitui County** had carnal knowledge of **KM** against the order of nature, a child **aged 13 years**.

2. Facts of the case were that the Appellant a Salvation Army Pastor approached PW10 **VMK**, a guardian of the complainant, PW1 **KM** and requested to stay with the complainant. He promised to provide basic requirements for the complainant with the permission of his biological mother. The complainant moved to stay with the Accused in the month of **February 2016**. He was also staying with another child **M** who was a second complainant. The three (3) of them used to sleep on the same bed. He was violated sexually. Subsequently he divulged the information. On **22/5/2016** he met **PW10** and opened up to her. The matter was reported to the area chief who reported to the police. He was examined by a **Clinical Officer** who classified the nature of violation of the complainant as **sodomy.** The Appellant was arrested and charged.

3. When put on his defence the Appellant stated that in the month of February 2016 he was transferred to **Mwambaesyoku** Salvation Army. There was a school sponsored by the Salvation Army. That from **18/2/2016** he used to go for devotion on Friday and Sunday from 7.00pm - 9.00pm. On **22.5.2016** he discharged his usual duties, he went for Sunday School from 7.00-9.30 a.m and the main service from 10.30 am to 12.30 pm. He stayed at the house until 7.00p.m. when he went for devotion until 9.30p.m. He returned to the house. Fifteen (15) minutes later he saw the chief **Isaack Nako, PW1** and **PW10** and two (2) other people. They took him to the Police station. Subsequently he was charged. Denying having committed the offence he stated that PW10 used to seek sexual favours from him but he refused as a consequence she threatened to ensure he was at a place where he could never preach.

4. The learned trail Magistrate considered evidence adduced, convicted him and sentenced him to serve **seven (7) years imprisonment**.

5. Aggrieved by the conviction and sentence he appealed on grounds that:

- He was detained in the police cells for more than the required time in violation of the constitution.
- The charge was defective.
- Evidence on the P3 Form was contradictory and could not enable the prosecution to prove the charge to the required standard.

- The Age of the complainant was not proved.

- His strong alibi defense was rejected.

6. The Appellant canvassed the appeal by way of written submissions. He urged that he was detained for 15 days prior to being arraigned in court which was in violation of his rights. Evidence adduced by the prosecution was contradictory which made the charge defective, examination done to prove defilement was questionable. There was no conclusive proof of the age of the complainant.

7. That the court failed to caution itself of the charges of accepting a single witness evidence and no satisfactory reason was given for rejecting his alibi defense.

8. The state through the learned state counsel, **Mr. Mamba** opposed the appeal. He reiterated facts of the case as presented by the prosecution and stated that the sentence meted out was correct.

9. This being a first appellate court, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. **(See Okeno vs. Republic (1973) EA 32).**

10. The Appellant faced a charge Contrary to **Section 162 (a)** of the **Penal Code** that provides thus:

> **"*Any person who—***
>
> **(a) has carnal knowledge of any person against the order of nature;**
>
> **or**
>
> **(b) ……..**
>
> **(c) ……..**
>
> **is guilty of a felony and is liable to imprisonment for fourteen years:**
>
> **Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if—**
>
> **(i) the offence was committed without the consent of the person who was carnally known; or**
>
> **(ii) the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act".**

11. A charge can only be defective if it does not allege an essential ingredient of the offence **(See Yosefa V. Uganda (1969) EA 236 and Sigilani V. Republic (2004) 2 KLR 480**. A charge should disclose the offence an individual faces to enable the person understand why he is before the court of law so as to prepare his defence. The particulars of the offence as stated are in a simple language which expressed the allegations of the state against the Appellant. The wording as framed captured the ingredients of the offence as stipulated by statute. The cross examination done by the Appellant was extensive which was an indication of a person who understood what he was accused of. He did defend himself appropriately which was evidence of having prepared his defence. In the circumstances the charge was not defective.

12. It is urged that the Appellant was detained in custody in violation of **Article 49 (1) (f**) of the **Constitution** that provides thus:

> **"(1) An arrested person has the right -**
>
> **(*f*) to be brought before a court as soon as reasonably possible, but not later than—**
>
> **(i) twenty-four hours after being arrested; or**
>
> **(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day; ''.**

13. A scrutiny of the court record shows that the Appellant was arrested on the **22nd May 2016** and arraigned in court on the **6th day of June 2016**. This meant that he was in custody for a duration of fifteen (15) days prior to being produced in court. It is established that the Appellants constitutional rights were infringed but it does not entitle him to an acquittal. He has recourse to a civil remedy.

14. Further, the contention of the Appellant is that the evidence of the complainant was contradictory to the evidence of PW16. It was the evidence of PW1 that the Appellant started sodomizing him from the time he moved to stay with him. **PW16** adduced in evidence a **P3** filled by his colleague **Teresia Mbula**. On examination by the Clinical Officer the complainant's rectal walls were inflammed. The anus was

reddish and tender. The fact that the complainant was examined on the 23rd May 2016, having stated that the last episode of defilement was on the 20th day of May 2016 is not a contradiction as alleged by the Appellant. Evidence adduced by the medical practitioner confirmed the fact that the complainant sustained injuries as a result of penetration to his anal hole whereby the rectal wall was affected. This was no contradiction as alleged.

15. The prosecution adduced in evidence an age assessment report for the complainant prepared by the medical Superintendent which indicated his age as thirteen (13) years. Medical evidence is paramount when it comes to determination of the age of the victim in sexual offenses. The medical Doctor herein used the expertise he was seized of to determine the age. The determination having been done professionally and the magistrate having observed the minor, age was proved to the required standard.

16. The learned trial Magistrate is faulted for rejecting the alibi defense put up by the Appellant. In his testimony he stated that he would go for devotion on Friday and Sunday night from 7.00- 9.00 p.m. and in particular on the 2nd day of May 2016 he finished his pastoral work at 9.30 p.m. In disregarding the defense put up the trial Magistrate opined that the Appellant lived with the complainant and the episodes of sodomy were taking place over a period of time.

17. The burden of providing the falsity of the appellant's defense of alibi lay on the prosecution (**See Karanja V. Republic (1983) KLR 501).** And the prosecution did adduce evidence that proved that the Appellant was sleeping in the same bed with the complainant therefore had the opportunity of doing the act he was accused of and that per the evidence of the complainant he actually did it.

18. The Appellant was stated to have done an act of sexual penetration of the complainant, a male child through the anus which is against the order of nature. The learned trial magistrate had the privilege of hearing the complainant and observing his demeanor. In reaching his decision the trial magistrate cautioned himself of the danger of relying on evidence of such single witness. He took note of the fact that the complainant was consistent in his testimony therefore believable. The proviso to **Section 124 of the Evidence Act** stipulate thus;

> **"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth……..".**

19. This was a criminal case that involved a sexual offence. The complainant's testimony on being accepted by the trial magistrate, he gave reasons that prompted him to do so. Therefore he cannot be faulted in reaching a finding that he did.

20. Regarding the sentence meted out it is within the law as prescribed for that particular offence.

21. In the result, I find that the conviction of the appellant was safe and the sentence imposed was lawful. **Therefore Appeal fails and is hereby dismissed.**

22. It is so ordered.

Dated, **Signed** and **Delivered** at **Kitui** this **4th** day of **October, 2018.**

L.N. MUTENDE

JUDGE