



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 21 OF 2017

JAMES MURIMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the judgment of Runyenjes Resident Magistrate in which the appellant was convicted of the offence of committing an unnatural offence contrary to **Section 162 (a) of the Penal Code** and sentenced to 7 years' imprisonment.
2. The appellant lodged this appeal through a petition dated 21st March 2017 challenging the conviction and sentence.
3. The appellant's petition is grounded on the following: -

- a) That the learned trial magistrate erred in law and facts by failing to inform the accused of the charges in sufficient detail to enable him reply to the same, which was a violation of the accused's constitutional right.*
- b) That the learned trial magistrate erred in law and facts in conducting the trial in a biased manner by being moved by emotions thus denying the accused a fair trial which amounted to a violation of accused's constitutional right.*
- c) That the learned trial magistrate erred in law and facts in convicting the accused relying on contradictory evidence/ testimony.*
- d) That the learned trial magistrate erred in law and facts by failing to consider the accused's defence at all in that she ignored accused's allegation that he was not taken for medical examination to prove that he had sodomised the victim.*
- e) That the failure by the trial magistrate to order the accused to be taken for medical examination was fatal to the prosecution case as the same would have produced the much needed evidence to clinch the case.*
- f) That the learned trial magistrate misconducted herself in law and fact in ignoring the evidence of the two eyewitnesses that they never saw the accused committing the offence yet there was light in the dormitory/premises.*

4. The parties filed written submissions in disposal of this matter.

B. Appellant's Submissions

5. On ground 1, the appellant submitted that there was no eye-witness to the incident and that the case against him was a frame up as nothing could have prevented PW2 and PW4 from witnessing the incident since they were in the same room as the appellant and PW1.
6. The appellant further submitted on ground 1 that evidence of PW2 was contradictory which makes PW2 a non-credible witness. He submits on PW2 contradictions in stating that he heard a loud bang whereas he had earlier testified that they had spread their mattresses on the floor.
7. On ground 2, the appellant submitted that the findings of PW3 were insufficient to prove the offence. And further that the finding by PW3 that the complainant could have been sodomised due to the fact he seemed to be psychologically disturbed was erroneous. It was further submitted that no medical examination was carried out on him to prove the allegations by the complainant.

8. On ground 3, the appellant submitted that where evidence given is contradictory and inconsistent, the court should not rely on it. He cited the charge sheet which indicated that the incident took place at 12.00am on the 27/04/2016 whereas PW1 stated that the incident happened at 1pm. Further, he pointed out the testimony of PW6 who alleged the accused was identified by the witnesses with help of torches against that of PW2 who alleged that the lights were on during the incident.

9. On ground 4, the appellant submitted that the case wasn't proved beyond reasonable doubt as stipulated under section 111 of the evidence act. On ground 5, the appellant submitted that his defence was not considered by the trial court since he raised defence to all allegations by all the witnesses in court.

C. Respondent's Submissions

10. On ground 1, 2 & 3, the respondent submitted that the charges were read out to the Appellant in a language he understood and he pleaded not "guilty". Further the respondent submitted that the evidence of the prosecution was consistent and uncontroverted.

11. The respondent further submitted that the appellant had not demonstrated the import of emotions into the conduct of the trial as the evidence of PW1 was corroborated by PW2 and PW4 and by that of PW3, the medical expert whose report was consistent with the evidence of PW1.

12. The respondents further submitted that the appellant's defence did not dislodge the evidence adduced by the prosecution witness and that the prosecution had proven its case beyond reasonable doubt

13. On grounds 4 and 5 the respondent submitted that the trial court found evidence that an unnatural act had been committed against PW1 by the appellant as a prima facie case had been established and that there was no need in subjecting the appellant to medical examination. **Section 122A of the Penal Code** was relied on in this regard.

14. On ground 6, the respondent submitted that the evidence of the prosecution witnesses was clear, consistent and well corroborated and further that the appellant had failed to point out the inconsistencies of the prosecution witnesses.

15. In conclusion the respondent submitted that the prosecution did prove its case beyond reasonable doubt and thus prayed for the court to dismiss the appeal

D. Analysis of Law

16. This being a first appeal, this court is mandated to analyze and re-evaluate the evidence afresh in line with the holding in the case of **Odhambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that: -

"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

17. Moreover, a first appellate court could not interfere with those findings of the lower court which are based on the credibility of witnesses unless no reasonable tribunal could make such findings or where it is shown that there existed errors of law (**Republic vs. Oyier [1985] KLR 353**).

18. On ground 1, the appellant pleaded that his constitutional right was violated as he was not informed of the charges against him to enable him reply to the same. The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in the decision in **Adan v Republic [1973] EA 445 at 446**:

"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, off course, be recorded."

19. The first point for analysis is an important point of departure. It was held in the case of **Ombena v Republic 1981 KLR 450** that whether a guilty plea is unequivocal or not depends on the circumstances of the case. Differently put, an appellate or a revision court must take the totality of circumstances into account in determining the equivocality or otherwise of a guilty plea. With this totality of circumstances test in mind, the following observations are appropriate from the proceedings of lower court.

20. It is clear on the record that the charges against the accused were read and explained to him and he answered in the negative. I further note that the appellant's response was noted verbatim. There was an interpreter in court in the language the appellant understood. Consequently, I have concluded that the appellant's plea was unequivocal.

21. The appellant argued that the trial magistrate was moved by emotions and thus denied him a fair trial. It is my view that the appellant has not demonstrated that the trial magistrate was emotional or did an act that portrayed emotions.
22. It was further contended that the appellant was convicted on contradictory evidence. He cited the charge sheet, which indicated that the incident took place at 12.00am on the 27/4/2016 whereas PW1 stated that the incident happened at 1pm. Further, he pointed out the testimony of PW6 who alleged the witnesses with help of torches against that of PW2 who alleged that the lights were on during the incident identified the accused.
23. I have perused the court record, the testimony of PW1 is in my view corroborated by that of PW2 and PW4 who despite being minors gave detailed testimonies which on the occurrence of the offence. Both said it was at night after they went to sleep. The time of 1.00pm was an error and ought to have been recorded as 1.00am.
24. It is noteworthy that contradictions in time of the incidence in the charge sheet and the statement of PW1 on the same are not sufficient to impeach the testimonies of the prosecution witnesses. In **Erick Onyango Ondeng' v Republic [2014] eKLR** the Court of Appeal stated that not every contradiction would cause the evidence of witnesses to be rejected. There would need to be more to the contradiction. The Court cited with approval the findings in Court of Appeal case **Twehangane Alfred vs. Uganda, Crim. App. No. 139 of 2001, [2003] UGCA.**
25. As noted by the Uganda Court of Appeal in **Twehangane Alfred vs. Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6** it is not every contradiction that warrants rejection of evidence. As the court put it:
- “With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”***
26. I find that there were no contradictions between the evidence of PW1, PW2 and PW4 who were the key witnesses in the trial.
27. It is clear from the judgment that the trial court considered the defence of the appellant but found it wanting weighed against the prosecution evidence. It is noteworthy that the appellant’s defence does not address the issues raised by the complainant during the trial. Further to this, the appellant pleaded that he was not examined to which the respondent submitted that the same was not necessary as the trial court found evidence that an unnatural act had been committed against PW1 by the appellant. This is the legal position that the accused need not be examined medically in a case of this nature.
28. The medical examination revealed that the complainant had been the victim of some physical interaction with somebody who was identified as the appellant. The medical report by PW3 was consistent with the complainant’s testimony. In fact, the medical evidence corroborates the evidence of the complainant. There is no legal requirement that the perpetrator of the offence of defilement should discharge seminal fluids onto his victim as the appellants put it.
29. The appellant argued that the trial court ignored the evidence of the PW2 and PW4 who stated that they never saw the appellant committing the offence. The complainant gave straightforward and clear testimony on his encounter with the appellant. He knew the appellant who was his teacher and he described in minute detail the appellant’s act of sodomising him. PW2 and PW4 gave circumstantial evidence which was corroborated by that of the complainant.
30. The evidence of the two witnesses provides the proper context in which the offence occurred and was subsequently reported, and in which appropriate follow-ups did take place.
31. I find the testimony of PW2 and PW4 to have been quite consistent with that of the complainant. I am not, in agreement with the appellant, that there was anything deprecatory in the testimony of PW3, regarding the medical tests on the complainant.
32. The prosecution established in the evidence adduced that the appellant had carnal knowledge of the complainant against the order of nature, and he thus committed the offence charged contrary to **Section 162(a) of the Penal Code** (Cap.63). I find that the conviction was based on cogent evidence and is hereby upheld.
33. The law requiring the power and jurisdiction for an appellate court to interfere with any sentence passed by a trial court is well stated in the case of **Ogalo s/o Owuora [1954] 24 EACA 70.** It is well set out that:
- “This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice”***
34. The maximum sentence prescribed under Section 162(a) of the Penal Code is fourteen (14) years and twenty one (21) years where the offence was committed without the consent of the victim.
35. The appellant was sentenced to seven (7) years imprisonment. This sentence was lenient in my view considering the facts of the case and the circumstances of the offence.
36. However, since the respondent did not apply for enhancement and the appellant has not been served with the requisite notice, I will leave

the sentence undisturbed.

37. Consequently, the sentence imposed by the trial magistrate is within the law and it is hereby upheld.

38. The appeal lacks merit and it is hereby dismissed.

39. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Nandwa for the Respondent

Appellant present