



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.64 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. Opande (Ag.SRM)) delivered on 6th July 2015 in Kibera CM. CR. Case No.1313 of 2011)

DAVID NGUI MAITHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, David Ngui Maitha was charged with the offence of **committing an unnatural offence** contrary to **Section 162(a)** of the **Penal Code**. The particulars of the offence were that on diverse dates between 4th and 6th April 2011 at [particulars withheld] within Nairobi County, the Appellant had carnal knowledge of W N, a child aged twelve (12) years old against the order of nature. He was alternatively charged with **committing an indecent assault on a boy** contrary to **Section 164** of the **Penal Code**. The particulars of the offence were that on the said dates and in the same place, the Appellant unlawfully and indecently assaulted W N, a boy under the age of fourteen (14) years by inserting a penis into his anus against the order of nature. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted on the main count of **committing an unnatural offence** and was sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial court acted on inconsistent and contradicted evidence of the complainant to convict him. He complained that the trial court erred in relying on medical evidence that fell short of the legal standard. The Appellant was also aggrieved that the case against him was not established to the required standard of proof beyond any reasonable doubt. He was aggrieved that the trial court ignored his defence without giving reasons for rejecting it thereby violating **Section 169** of the **Criminal Procedure Code**. In his supplementary grounds of appeal filed without leave of court (this court will however consider them), the Appellant criticized the trial court for failing to test the credibility of the complainant's evidence to the satisfaction that he was truthful. He faulted the trial court for failing to find that the charges against him were inspired by a personal grudge that the complainant's family held against him. He further faulted the trial court for reaching the decision to convict him yet the age of the complainant was not established. Finally, he faulted the trial court for failing to find that the prosecution had carried out shoddy investigations before reaching the decision to charge him with the offence. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

Prior to the hearing of the appeal, the Appellant presented to the court his written submission in support of the appeal. He further made oral submission in support of his case. A response to the Appellant's submission was made by the Learned State Counsel, Ms. Sigei. The Appellant submitted that the trial court erred in failing to draw a negative inference from the inconsistencies and contradictions in the evidence of the prosecution witnesses. He relied on the case of **Geoffrey Ogeyo -Vs- Republic [2010] eKLR** to support his submission. He further submitted that the prosecution did not conduct investigations into the allegations made against him to establish that some of the witnesses for the prosecution may have had a grudge against him. He argued that it was possible that the witnesses conspired to fabricate the evidence against him. As to whether the case against him had been established to the required standard of proof beyond reasonable doubt, the Appellant submitted that the trial court failed to properly evaluate the evidence on record and wrongly convicted him. He contended that the prosecution failed to prove the complainant's age, that the complainant was penetrated and further, his participation in the offence. He further submitted that PW5, the investigation officer conducted shoddy investigations on the case as he only relied on the witnesses' statements to prefer the charge against him without undertaking independent investigations. He further submitted that he was not furnished with documents that the prosecution relied upon to enable him prepare his defence occasioning him a miscarriage of justice. According to the Appellant, the trial court did not seem to have analyzed his defence before rejecting it. He argued that the trial court did not weigh the evidence of the prosecution against his evidence before reaching the decision to convict him. Further it did not give reasons for its findings. In this regard, the Appellant cited the case of **Kimotho Kiarie -Vs- Republic, Criminal Appeal No. 93 of 1983** to support his submission. In so far as his sentencing was concerned, the Appellant submitted that the trial court failed to apply its mind to the principles applicable in determining an appropriate sentence as was laid down in the cases of **Cecilia Mwelu Kyalo -Vs- Republic [2009] eKLR and Donald Mukaka Mukatala -Vs- Republic [2013]eKLR**. He therefore urged the court to allow his appeal.

Ms. Sigei for the State opposed the Appellant's appeal. She submitted that the prosecution proved its case against the Appellant to the required standard of proof beyond any reasonable doubt. According to her, all the essential elements requiring proof beyond reasonable doubt in the offence were established. It was her submission that the prosecution led evidence during trial showing that the Appellant had carnal knowledge of the complainant. She further submitted that the complainant's evidence was corroborated by the medical evidence of PW3 and PW5. As far as the identification of the Appellant is concerned, the Learned State Counsel submitted that the Appellant was well known to the complainant as he was his neighbour. She further submitted that the both PW2 and PW4 saw the Appellant push the complainant out of his shop when they went to search for him. She submitted that PW2 held no grudge against the Appellant. According to the Learned State Counsel, the prosecution witnesses adduced cogent, credible and consistent evidence linking the Appellant to the offence. She therefore urged the court to disallow the Appellant's appeal.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (**See Njoroge -vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellants of **committing an unnatural offence** contrary to **Section 162(a)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

The facts leading to the charge against the Appellant as presented by the prosecution witnesses are as follows. The complainant in this case is W N. Although no documentary evidence was produced to confirm his age, the complainant was said to be aged thirteen (13) years during trial and was a standard six (6) pupil at [Particulars withheld] Primary School. He lived with his parents and two siblings in Kawangware. The complainant's mother, PW2 M K W owned a tailoring shop located behind their house where the complainant slept together with his brother. The Appellant and the complainant were neighbours. Their houses were adjacent to each other with the Appellant's house being the first one from the gate. The Appellant also owned a barber shop located at the front of his house. On 4th April 2011 at around 10.00 p.m, the complainant was at home watching a football match with his family. He testified that during the match's half time, he was asked together with his brother to go and spread their beds. They

therefore left the house and went to their shop. The complainant testified that he left his brother at the shop to go to an outside toilet within their compound. On the way, he passed by the Appellant's shop and saw the Appellant standing at his door step. There was light inside the shop. He was able to identify the Appellant. He testified that the Appellant got hold of him and dragged him inside his shop. He closed the door and took him to the next room which was his sleeping area. The room was lit with a lantern lamp and the complainant could see a mattress on the floor.

The complainant testified that the Appellant asked him whether he was circumcised and he answered in the affirmative. He testified that the Appellant then raised the volume of his radio and began to undress him. He tried to resist and raise alarm but the Appellant gagged his mouth with his hands and threatened to kill him. He testified that the Appellant gagged his mouth with one hand and continued to undress him with the other hand. Once he was naked, the Appellant began to fondle him and attempted to make him lie down on the mattress. He resisted and cried. The Appellant told him that he was going to get a knife and when he came back he shoved him onto the mattress. The Appellant then stood behind him and placed him between his legs. He then untied his belt, pulled down his trousers. The complainant testified that the Appellant then removed his penis and inserted it into his anus. He felt pain. He testified that the Appellant sexually assaulted him for about three (3) minutes before he stopped when he heard a knock at the door. He testified that the Appellant then dressed himself up and ordered him to also do the same. When they finished dressing up, the Appellant took him back to the barber shop and stood in front of him to hide him from the person at the door. He testified that the Appellant pushed him out of the shop when the said person entered the shop.

According to PW2, the night in question was 6th April 2011. She testified that she had sent the complainant together with his brother to make their beds but the complainant's brother returned to the house after (10) minutes to inquire whether the complainant had gone back to the house. She testified that the complainant's brother told her that the complainant had said that he had gone to the toilet. PW2 therefore sent the complainant's brother and his sister to the toilet to look for him but they did not find him. She asked the children to remain in the house as she went outside with PW4 Christine Namlanda to look for him. They searched for the complainant within the neighbourhood but they did not find him. They therefore returned and stood by the roadside about five (5) metres from the Appellant's shop.

Although the Appellant's shop was closed, the lights were on and there was loud music from the shop. Both PW2 and PW4 testified that they saw a man approaching the Appellant's shop. He knocked at the door. They testified that after a while, they saw the Appellant push the complainant out of his shop after the said man entered the Appellant's shop. PW2 testified that she rushed to where the complainant was and found him crying. She testified that she began to scream as she suspected that the Appellant had done something bad to the complainant. According to PW2, this was because the complainant had previously disclosed to her and her husband that the Appellant had on previous occasions undressed and touched him inappropriately. He would then pay him so that he would not say a word to anyone. PW2's screams attracted people's attention and a crowd gathered outside the Appellant's shop. She was advised to take the complainant for medical attention.

The complainant was taken to Nairobi Women's Hospital. PW3 Dr. Demek testified that the complainant was medically examined at the hospital by Dr. Thuo on 7th April 2011. He testified that the complainant came to the hospital with a history of having been sodomized. He testified that on anal examination, the complainant was found to have fresh bruises. He was also found to have a loose anal sphincter. The doctor found that the injuries sustained by the complainant were consistent with the alleged sexual assault. He therefore prepared a medical report on his findings which was produced into evidence by PW3 as **Prosecution's Exhibit No.1**. The complainant and the Appellant were seen by Dr. Kamau based at the Police Surgery. He examined the complainant on 11th April 2011. He noted that he had bruises in his anal opening. He also examined the Appellant on 13th April 2011. He however saw nothing remarkable on the Appellant. The doctor filled his findings in P3 forms which were produced into evidence by PW5 as **Prosecution's Exhibits Nos. 2 and 3** respectively. The incident was reported at Muthangari Police Station. PW5 P.C Stanley Kioni was assigned to investigate the case. He testified that after concluding his investigations, he formed the view that a case had been disclosed for the Appellant to be charged with the present offences.

When the Appellant was put on his defence, he denied committing the offence. He attributed his woes to an existing grudge held by the complainant's family against him. He testified that he had for a long time not had a cordial relationship with the complainant's family although they lived together as neighbours. The Appellant testified that he has had an issue with PW2's children obstructing his business by playing outside his shop. This is an issue that PW2 has refused to resolve. He claimed that PW2 has also had complained about the loud music he played in his business premises. He also claimed that PW2 had also caused him to lose his job as the caretaker. According to the Appellant, he was framed for allegedly committing the offence. He testified that on the night of 7th April 2011 at around 7.00 p.m, he was in his barber shop attending to a customer when the complainant came to the shop accompanied by his aunt. He testified that he was surprised to see the complainant there as PW2 had prohibited her children from stepping into his shop. He testified that he even asked the complainant why he was at his shop. He told him that he had been sent there for a haircut.

The Appellant testified that he finished with his customer and attended to the complainant. The complainant remained in the shop reading a newspaper after he was through with his haircut. He testified that before he close his shop, he heard PW2 talking to someone in her shop. He testified that PW2 then walked into his shop with her husband and another lady. They found the complainant and asked him why he was in the shop. The Appellant testified that PW2 then slapped the complainant. He started crying. He testified that the commotion inside the shop attracted a crowd. He stated that when the crowd cleared, he closed his business. He testified that he was surprised to be arrested on 12th April 2011 and charged with the present offence. According to him, the complainant's version of events is not to be believed as he is not sure of the date the alleged incident occurred. The evidence of DW2 Agnes Wambui Kwome and DW3, Brian Shikalo Shitiavai did not touch on the evidence that was adduced against the Appellant.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the grounds of appeal presented by the Appellant and the submissions made by the Appellant and the State. The Appellant was charged with the offence of **committing an unnatural offence** contrary to **Section 162(a)** of the **Penal Code**. To establish its case against the Appellant, the prosecution was required to establish the three elements that constitute the charge of committing unnatural act against the order of nature: the first element is penetration. The prosecution must establish that the Appellant caused penetration on the anus of the complainant which is against the order of nature.

In the present appeal, the complainant testified that on the material day of 4th April 2011, while on his way to the toilet, he passed by the Appellant's shop and saw the Appellant standing at his door step. He testified that the Appellant got hold of him and dragged him inside his shop. He closed the door and took him to the next room which was his sleeping area. He testified that the Appellant then raised the volume of his radio and began to undress him. He tried to resist and raise alarm but the Appellant gagged his mouth with his hands and threatened to kill him. He testified that the Appellant gagged his mouth with one hand and continued to undress him with the other hand. Once he was naked, the Appellant began to fondle him. He attempted to make him lie down on the mattress. He resisted and cried. He testified that the Appellant told him that he was going to get a knife. When he came back he shoved him onto the mattress. He then stood behind him and placed him between his legs. He untied his belt, pulled down his trousers and then removed his penis which he inserted into his anus. He testified that felt pain.

The complainant testified that the Appellant sexually assaulted him for about three (3) minutes. The complainant was on 7th April 2011 medically examined at Nairobi Women's Hospital by PW3 Dr. Thuo. An examination of his anal opening revealed that he had fresh bruises. He was also found to have a loose anal sphincter. The doctor found that the injuries sustained by the complainant were consistent with the alleged sexual assault. A medical report from the hospital in respect to the findings was produced into evidence by PW3 as **Prosecution's Exhibit No.1**. The complainant and the Appellant were seen by Dr. Kamau based at the Police Surgery. He was found to have had bruises on his anal opening. Dr. Kamau filled his findings on a P3 form which was produced into evidence by PW5 as **Prosecution's Exhibits Nos. 2**. The evidence adduced by the complainant was credible and consistent. It was corroborated by medical evidence supported the complainant's claim. The complainant had bruises in his anus which was consistent with the testimony that he had been sodomized. The prosecution therefore proved penetration to the required standard of proof beyond any reasonable doubt.

The third element that the prosecution was required to establish is the identity of the perpetrator. The complainant knew the Appellant prior to the incident. In fact, the Appellant was his neighbour. The Appellant also knew the complainant. The complainant testified that it was the Appellant who had sodomized him. The complainant's testimony in regard to how the incident occurred was credible, cogent and consistent. PW2 and PW4 saw the complainant being pushed out of the Appellant's shop on the night in question. In the premises therefore, upon re-evaluation of the evidence adduced, this court reaches the same finding as the trial court that the prosecution established its case on the charges of committing **unnatural act against the order of nature** contrary to **Section 162(a)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

As regard sentence, the maximum sentence provided under the section is fourteen (14) years imprisonment. The Appellant was sentenced to serve ten (10) years imprisonment. That sentence was lawful taking into consideration the entire circumstances of the case. In the premises therefore, the appeal lodged by the Appellant both on conviction and the sentence lacks merit and is hereby dismissed. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF MARCH 2017

L. KIMARU

JUDGE