REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 87 OF 2015

M K.....……..APPELLANT

Versus

Republic …… RESPONDENT

(Being an appeal from the original conviction and sentence in ***Mwingi Senior Resident Magistrate's Court Criminal Case No. 312 of 2009*** *by* ***Hon. H. M. Nyaberi Ag. S P M on 10/02/11)***

J U D G M E N T

1. **M K,** the appellant, was charged with the offence of **Committing an Unnatural Offence** contrary to **Section 162(a)** of the **Penal Code.** Particulars of the offence were that on the **5th** day of **April, 2009** at **[Particulars Withheld]** in **Mwingi District** within the **Eastern Province,** had carnal knowledge of **G K** against the order of nature.
2. Having pleaded not guilty to the charge he was subjected to trial, convicted and sentenced to serve **fifteen (15) years imprisonment.**
3. Being dissatisfied with the conviction and sentence thereof the Appellant appealed on grounds that:

- The charge was not proved beyond all reasonable doubt.
- The Appellant's rights as enshrined in **Article 49(1)(f)(i)** of the **Constitution** were violated as the police held him in custody for more than the prescribed time.
- Evidence adduced was not premised on the first report of the Complainant.
- Evidence adduced was contradictory.
- Essential witnesses were not produced at trial.
- The charge was defective.
- The *alibi* defence was not considered.

4. It was the Prosecution's case that on the **5th April, 2009,** PW1 **V K ,** returned home from a meeting to find his **five (5) years old** son, PW2 **G K K** wearing a blood stained pair of short trousers at the back side that covers the gluteal area. She examined him and noticed a wound on the anus. He explained that their neighbour the Appellant took him to their farm and made him lie on his abdomen. He went onto his back and something sharp penetrated his buttocks. The matter was reported to the police who arrested the Appellant. The child was examined by PW4 **Thomas Gichohi,** a Clinical Officer who found mucoid discharge around the anus. The anal region had a fresh bruise. Hence the case.
5. When put on his defence, the Appellant stated that on the **5th April, 2009** he was arrested while at his butchery. He was informed that he had molested the Complainant. He stated that the child's mother was his friend. In the year **2008** she requested him to sell his father's land so that they

could go to her home area, **Makindu,** but he declined. That prompted her to threaten him with dire consequences. He called a witness DW2 **K K M** who stated that following the allegations he interviewed the Appellant and found that indeed the child's mother was the Appellant's mistress.

6. The learned magistrate considered evidence adduced and found the child's evidence credible, reliable and consequently believed him. He found that the Appellant was a neighbour of the Complainant who was well known to him. As a result he disregarded the defence put up.
7. The Appellant canvassed his appeal by way of written submissions. In response thereto the State through **Mr. Wanjala,** State Counsel opposed the appeal. He submitted orally that the charge of sodomy was confirmed by the medical evidence adduced and the defence put up was not believed by the court.
8. This being the first appellate court, I am duty bound to re-evaluate evidence adduced at trial and come up with my own inferences and conclusions bearing in mind that I neither saw nor heard witnesses who testified. **(See Okeno V. Republic (1972) EA 32).**
9. The Appellant merged his grounds of appeal in the submissions that I have duly considered.
10. It is submitted by the Appellant that his fundamental rights were violated as he was held in custody for **48 hours** before being arraigned in court. The entry on the charge sheet shows that the Appellant was arrested on **6th April, 2009** and arraigned in court on the **8th April, 2009.** It is stated by the Appellant that his rights as enshrined in the **Constitution of Kenya, 2010** were contravened. The offence was alleged to have been committed in the year **2009** prior to the alluded to law formally coming into operation. Therefore the law applicable was **Section 72(1)(3)(b)** of the **old Constitution.** Pursuant to the law the Appellant ought to have been produced in court within **24 hours** or as soon as reasonably practicable. It is evident that the **24 hour rule** was not complied with which behooved the court to get an explanation from the Prosecution. This should have been raised at trial.
11. That notwithstanding, failure to produce an accused person in court within the required **24 hours** which is provided for by the **Constitution,** cannot result into an acquittal or discharge. Where a person establishes that his rights were indeed contravened he may lay a civil claim for damages **(See Julius Kamau Mbugua versus Republic – Criminal Appeal No. 50 of 2008 (Reported in 2010 eKLR).**
12. It is alleged that the charge was defective. The offence the Appellant was charged with is provided by **Section 162(a)** of the **Penal Code** that reads:

> ***"Any person who –***
>
> a. ***has carnal knowledge of any person against the order of nature ....."***
>
> ***..... is guilty of a felony and is liable to imprisonment for fourteen years."***

13. In the case of **Ridge vs. Baldwin (1964) AC 40 Lord Morris** had this to say:

> ***"It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet."***

14. The charge as framed was simple. It disclosed the offence that was known in law. Particulars provided contained the ingredients of the offence stated. Essentially the Appellant was given sufficient particulars that enabled him to know the charge that he was alleged to have contravened.
15. Had the charge been drawn in a manner that would have left the Appellant guessing as to which offence he is alleged to have committed then this court would not have hesitated in quashing the conviction. **(Also see PP v. Leepak (1937) MLJ 256).**
16. In the instant case the Appellant understood the charge, participated in the hearing of the case, defended himself and even called a witness. He was not prejudiced. Therefore the trial was not vitiated.
17. I will merge other grounds of appeal which hinge on whether the charge was proved beyond any

reasonable doubt. It is apparent that there was no eye witness to the act of penetration of the child's anus. Proof of anal penetration of the child was established by medical evidence. On examination the Complainant was found having sustained bruises of the anus. There was also presence of mucus and blood.

18. PW2, the Complainant gave unsworn evidence. He was a child of tender age. He accurately described the act of penetration that was consistent with the medical injuries sustained.

19. The learned trial magistrate who heard the child's evidence found his testimony credible, reliable and worth of being believed. Consequently he believed him and remarked in his judgment reasons why he believed him.

20. In the case of **Mohamed vs. Republic (2006) 2KLR 138** the court stated thus:

> ***"It is now settled that courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."***

21. This reasoning emanates from the proviso to **Section 124** of the **Evidence Act.** The Complainant identified the Appellant as the person who sexually violated him. He even stated the name of the person he resided with. In his defence the Appellant did not deny the fact that he was a person well known to the Complainant. He came up with an allegation of having befriended the Complainant's mother. This strengthened evidence of having been well known to the Complainant.

22. In the case of **Geoffrey Kioji vs. Republic Criminal Appeal No. 270/2010 (Nyeri)** the court stated thus:

> ***".....The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed under the proviso to Section 124 of the Evidence Act, Cap 80 (LOK), a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records reasons of such belief."***

23. The learned trial magistrate analyzed evidence adduced and disregarded the defence put up that the Appellant had a relationship with the mother of the Complainant as being farfetched.

There was no need to call evidence of a witness who did not witness the act. In any case under **Section 143** of the **Evidence Act** no particular number of witnesses is required to prove a case **(Also see David Mutune Nzongo v. Republic (2014) eKLR).**

24. Having re-evaluated evidence adduced I find that the learned trial magistrate did not err in reaching the decision to convict the Appellant. Therefore the appeal against conviction is devoid of merit. In the result the conviction is confirmed.

With regard to sentence – what was meted out was **fifteen (15) years. Section 162** of the **Penal Code** provides thus:

> ***"Any person who—***
>
> ***(a) has carnal knowledge of any person against the order of nature; or***
>
> ***(b) has carnal knowledge of an animal; or***
>
> ***(c) permits a male person to have carnal knowledge of him or her against the order of nature, 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."

25. The Complainant having been a child of tender years **(See Section 2 of the Children Act)** was incapable of consenting to the act of penetration into his anus. The sentence imposed was not in accordance with the law. In the result I set it aside and substitute is with **21 years imprisonment.**
26. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **9th** day of **February,** 20**16.**

L. N. MUTENDE

JUDGE