REPUBLIC OF KENYA

IN THE HIGH COURT OF KENAY AT MIGORI

CRIMINAL APPEAL NO. 41 OF 2015

ELLY OTIENO OMONDI.....APPELLANT

-VERSUS-

STATE ….....RESPONDENT

JUDGMENT

1. When the Appellant herein **ELLY OTIENO OMONDI** was arraigned before the Senior Principal Magistrate's Court at Rongo on 22/02/2013, he faced the charge of committing an un-natural offence contrary to Section 162(a) of the Penal Code. He denied the charge.

2. A total of four witnesses were called and at the close of the prosecution's case, the trial court placed the appellant on his defence.

3. By a judgment delivered on 23/03/2015, the appellant was found guilty as charged and was accordingly convicted. A sentenced of 10 years imprisonment was passed thereafter.

4. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal on 08/06/2015, albeit out of the required statutory period, but which appeal was deemed to be properly on record by an order of this Court made on 10/03/2016.

5. The Appellant raised five grounds of appeal in challenging both the conviction and sentence where he raised the issue of how the plea was taken, alleged shifting of the burden of proof by the court and that the sentence was excessive.

6. At the hearing of the appeal, the Appellant relied on his written submissions filed on the 14/04/2016 in which he expounded the grounds of appeal and relied on the persuasive judicial authority of **Erick Ochieng -vs- Republic (2015) eKLR.** The appellant further raised the issue of the infringement of his constitutional right to be provided with a legal Counsel at State's expense pursuant to Article 50(2)(h) of the Constitution and submitted that the default had led to his minimal participation in the trial. He also contended that the evidence was marred by contradictions. He prayed that the appeal be allowed and he be set at liberty.

7. In opposing the appeal, the State revisited the evidence and urged this Court to find that the evidence remains cogent and watertight and proved the offence. On sentence, it was submitted that the same was fair with a call for the dismissal of the appeal.

Discussion & Determinations:

8. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It

was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

9. In discharging the said duty, this Court is to satisfy itself that the ingredients of the offence of committing an un-natural offence were proved and as so required in law; beyond any reasonable doubt.

10. **Section 162(a)** of the Penal Code creates one of the offences against the order of nature as follows:-

> ***'162. 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 .....***

11. From the said section of the law, it was imperative for the prosecution to prove that the appellant, who is a male adult, had carnal knowledge with the complainant, **D.O. (PW1);** that PW1 was also a person of male gender and that the sexual encounter was against the order of nature.

12. I will therefore revisit the prosecution's case as recorded in evidence. The appellant was a friend to PW1 and both used to mine gold at Osongo area. Since PW1 hailed from far, the appellant appears to have been offering to stay with him at his house on some previous occasions. Likewise in the evening of 13/02/2013 the appellant invited PW1 to stay with him in his house as usual and PW1 readily agreed. That was the third time PW1 spent in the appellant's house. Unknown how they previously used to sleep, on that day they slept on the same bed. However before they retired to rest for the day, PW1 saw the appellant remove his clothes and remained with the underpant. On his part, PW1 opted not to remove neither his pair of trousers nor his underpant.

13. It must have been a restful night for PW1 not until around 11:00pm when PW1 felt some discomfort in his sleep. On waking up, PW1 came to terms with what was happening; he found that the appellant had removed PW1's underpant and trousers and was actually having sex with him in his anal opening. PW1 asked what the appellant was doing to him and the appellant stopped but that was not before the appellant had already reached the peak of the game and indeed ejaculated on PW1. In loudest possible protest PW1 decided to go out of the appellant's house but the appellant restrained him and a fight broke out. In the course of the fight the appellant bit PW1 on the left hand, right shoulder and the ribs. PW1 also bit the appellant on the ribs and at the end of it all PW1 managed to open the door and left the appellant's house. PW1 spent the rest of the night outside the appellant's house with a night watchman.

14. In the morning of the following day PW1 went to Rongo District Hospital where he was examined and treated and later lodged a complaint with the police at Kamagambo Police Station.

15. The Clinical Officer from Rongo District Hospital testified as **PW3.** She was one Miriam Ngungi. She produced treatment notes and a P3 Form for the PW1 and confirmed that PW1 had indeed been sodomized. She also noted other injuries on PW1 which were also commensurate with PW1's testimony. PW3 however stated that PW1 was sent to the hospital on 15/02/2013 by the police and was treated and a P3 Form filled on 20/02/2013.

16. **PW4** was the arresting officer. He was an administration officer from Nyamarambi Suguta AP Camp but had previously served at Nyachenge AP Camp. While on duty at the Nyachenge AP Camp on the 21/02/2013 at around 04:00pm, he received information that two people were fighting at the market. He

hurriedly proceeded there and found PW1 and the appellant fighting and he arrested and took them to the camp. PW4 learnt that PW1 had been given an arrest order from Kamagambo Police Station for the arrest of the appellant a result of which PW4 escorted the appellant to the said police station.

17. The investigating officer testified as **PW2** and confirmed that PW1 had reported a case of sodomy at the Kamagambo Police Station on 14/02/2013 and he had issued him with a P3 Form which was filled and returned with a confirmation that PW1 had indeed been sodomized. He then issued an order of arrest and preferred the charge against the appellant upon his arrest.

18. With that evidence the prosecution closed its case and the appellant was placed on his defence. However before the appellant presented his unsworn defence, the then trial magistrate was transferred and upon compliance with **Section 200** of the Criminal Procedure Code the matter proceeded further before another trial magistrate.

19. In his unsworn defence, the appellant centered his evidence on the events of 25/02/2013 and 28/02/213 and agreed that he truly had a fight with PW1 on account of PW1 having refused to return his cell phone. The appellant also conceded that PW1 used to mine gold with him at Osongo area and that he used to stay with him in his house since PW1 came from afar place. The appellant however denied the offence.

20. The appellant was thereafter convicted and accordingly sentenced.

21. I have carefully considered the evidence on record and perused both the treatment notes and the P3 Form. The treatment notes is dated 13/02/2013. The P3 Form was issued by the police on 14/02/2013 and was filled in by PW3 on 15/02/2013. The charge sheet alleges that the offence was committed on 13/02/2013 and PW3's evidence has it that PW1 was sent to the hospital by the police on 15/02/2013 and was treated and a P3 Form filled on 20/02/2013. From the record therefore it can be clearly seen that PW3 was mistaken on the dates. The P3 Form is clear on the dates. The contradiction which therefore arose was of a minor nature and cannot be said to have adversely affected the appellant. The appellant understood the charge and fully participated in the proceedings up to tendering his defence. The contradiction on the dates are therefore reconcilable under **Section 382** of the Criminal Procedure Code as it caused no failure of justice on the appellant. In so finding, I echo the words of the Learned Judge in **R =vs Pius Nyamweya Momanyi, Kisii HCRA No. 265 of 2009 (UR)** when he stated thus:-

"...It is trite law that minor discrepancies and contradictions should not affect a conviction."

22. The evidence on record has it that PW1 upon examination by PW3 was found with a cut on the anus and according to PW3's medical experience and expertise that confirmed an act of sodomy.

23. ***But was the cut on PW1's anus caused by the appellant?*** PW1 testified on the events of the night of 13/02/2013. The appellant's defence had nothing to do with the events on the night of 13/02/2013. The appellant dealt with what happened on 21/02/2013 and thereafter and does not deny that PW1 occasionally used to spend in his house. I will equally agree with the trial court who saw the demeanor of the witnesses in finding that the defence did not shake the prosecution's evidence.

24. The appellant however contended that he was not subjected to a DNA testing to confirm if he really ejaculated on PW1. That may appear to be a sound argument but that is not a prerequisite in this type of offence. As long as there is other admissible evidence to connect the appellant with the offence, the issue of DNA testing does not stand out to be a mandatory one. (See the Court of Appeal cases of ***Aml vs. Republic (2012) eKLR*** (Mombasa) and ***Nyamai Musyoka vs. Republic (2014) eKLR).***

25. The appellant also took issue with the fact that PW1 did not scream in the cause of their fight in his house so as to attract the attention of the neighbours and the watchman whom PW1 spent the rest of the night with. That cannot be a serious argument. PW1 did not necessarily have to do that. Indeed the act complained of in itself, being against the order of nature, is so shameful and one may make it public if need real demands. That could have been the reason why the defence hearing was conducted in camera.

In this case since PW1 was able to handle the situation and freed himself from the appellant, it was not of necessity that he must have raised alarm.

26. On a reconsideration of the entire evidence and the relevant law I therefore find that it was the appellant who had carnal knowledge of PW1 and being persons of the same gender that act was against the order of nature.

27. The appellant was hence properly convicted and his appeal on conviction fails. I will however deal with the other arguments tendered in the submissions to see they can vitiate the conviction before I venture into the issue of the sentence; if there will be need.

28. On the contention that the appellant and PW1 were to be instead charged with the offence of affray, I take the position that the fact that the appellant and PW1 were involved in a fight in a public place did not bar PW2 from preferring the charge of committing an unnatural offence once he gathered sufficient evidence. Infact PW2 reserved the liberty of preferring the charge of affray against the appellant and PW1. The ground fails.

29. The appellant also raised the issue of not having been supplied with witness statements during the trial. I have carefully gone through the record and there is no evidence that the appellant complained that he had not been so supplied with those statements or at all. The appellant fully participated in the trial and even tendered his defence when called to do so. The persuasive decision of **Erick Ochieng -vs- Republic (supra)** is hence distinguishable. That ground can only be seen as an afterthought and is hereby rejected.

30. Since the appellant pleaded not guilty to the charge when he was presented before the lower court for plea taking, the issue of having not understood the charge does not arise. He pleaded not guilty to the charge. Further the record remains silent that the appellant raised any complaint at the plea-taking or thereafter on the issue of the language. The language used by the court is clearly stated in the record as English/Kiswahili/Dholuo and again having fully participated in the trial and even tendered his defence, the appellant cannot be heard to raise the issue of the language. That ground equally fails.

31. There was also the issue that the appellant was not accorded a Counsel at State's expense given that he faced a serious offence and the appellant argued that his rights as guaranteed under Article 50(2)(h) and (j) of the Constitution were violated. I will briefly state that this issue has been greatly discussed by the Court of Appeal in several cases including that of ***Karisa Chego, Jefferson Kalama & Kitsao Charo Ngati v. Republic (2015) eKLR*** where the Court of Appeal reiterated that even in cases where a party is able to demonstrate that its constitutional rights were so contravened by the lack of a Counsel at the state's expense, the remedy is not an acquittal. The ground cannot stand either.

32. I will now turn to the issue of sentence. The appellant was sentenced to 10 years in prison. **Section 162 of the Penal Code** provides that upon conviction with the offence of committing an un natural offence under limbs **(a), (b),** or **(c),** the penalty is liability to **14 years** in prison. However the proviso to that section provides that in case of an offence under limb (a) the offender shall be liable to **21 years** if it is proved that the offence was committed without the consent of the person carnally known or the consent was obtained by force, means of threats or intimidation, fear of bodily harm or by means of false representation as to the nature of the act.

33. In our case, PW1 contended that he did not consent to being carnally known by the appellant and that the appellant took advantage of his sleep. That position is fortified by PW1's reaction on realizing that something bad had happened to him. He protested and attempted to walk out of the appellant's house, but the appellant restrained him leading to a fight. PW1 finally managed to regain his liberty and spent the rest of the night outside of the appellant's house. Come the morning of the following day, PW1 went to hospital for examination and treatment and later reported the matter to the police. That set of actions cannot be said to be commensurate with one consenting to an act. Having found so, the appellant was then liable to a maximum sentence of 21 years in prison. The sentence of 10 years in prison was therefore lawful.

34. The appellant now contends that the sentence is so excessive in the circumstances of the case. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act upon in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

35. This is a case of serious breach of trust by a close friend. That was indeed so painful to PW1 and that is why he furiously fought the appellant both in the appellant's house and when he met him at the market place. PW1 will have to unfortunately live with that social embarrassment and stigma for the rest of his life. Although the sentencing erred in not calling for the criminal record of the appellant, but even though it is taken that the appellant was a first offender, I do not see how the court erred in sentencing him to less than one-half of the maximum sentence neither do I see how that sentence can be said to be excessive. It is not. The appeal on sentence also fails.

36. Consequently, the appeal is unsuccessful and is hereby dismissed.

DELIVERED, DATED and **SIGNED** at **MIGORI this 12th day of May 2016.**

A. C. MRIMA

JUDGE