



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO 522 OF 2013

(Appeal against Conviction and Sentence in Kangema SRM Criminal Case No 361 OF 2012 – J O Magori, PM)

JOSEPH KARIUKI GACHANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant in this appeal, **Joseph Kariuki Gachanja**, was convicted after trial of **committing an unnatural offence** contrary to **section 162(a)** as read with **proviso (i)** to the same section of the **Penal Code**. It was alleged in the particulars of the charge that on 03/09/2012 at about 10.00 pm in [Particulars withheld] Sub-location, Njumbi Location, in Murang'a County, he had carnal knowledge of one **GKM** against the order of nature without his consent. He was sentenced to serve 21 years imprisonment. He has appealed against both conviction and sentence.

2. Whereas the Appellant was defended by counsel at his trial, he is not represented in this appeal. His homemade grounds of appeal disclose the following complaints –

- (i) That he was convicted upon the evidence of the complainant without corroboration.
- (ii) That the case for the prosecution consisted mainly of the testimonies of members of the same family – the complainant, his mother and his cousin, and was inconsistent.
- (iii) That he was not taken for any medical examination to verify that he committed the act alleged.
- (iv) That the charge against him was trumped up on account of a long-standing dispute over a boundary between him and the complainant's family.
- (v) That the cause of the complaint's anal swelling was not established.
- (vi) That the sentence was manifestly harsh and excessive.

3. At the hearing of the appeal the Appellant tendered amended grounds of appeal and written submissions. He raised two additional grounds of appeal as follows –

- (vii) That the identity of the complainant's assailant was not proved beyond reasonable doubt.
- (viii) That material witnesses (the two members of the public who arrested and took him to the police)

were never called to testify, and no reasons were given for the failure to call them.

4. Learned prosecution counsel on the other hand supported the conviction. He submitted that the complainant, though apparently mentally challenged, was affirmed and gave clear testimony, even in a lengthy cross-examination by the Appellant's defence counsel, and was not shaken. Learned prosecution counsel further submitted that the complainant's testimony was corroborated by PW2, a boy aged 14 years who testified under oath, and also by medical evidence adduced by PW8 who found evidence of sexual activity and penetration in the complainant's anus. Counsel further submitted that the Appellant's defence in his unsworn statement was a mere denial, and that he never raised the issue of any prior grudge between him and the complainant's family in cross-examination of any prosecution witness.

5. As for the sentence, learned prosecution counsel submitted that the Appellant was awarded the maximum term of imprisonment provided for in law, and that this court was at liberty to reduce the same at its discretion.

6. I have read the testimonies of all the witnesses in order to assess the evidence placed before the trial court and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however the fact that I did not see and hear the witnesses, and I have given due allowance for that fact.

7. The Appellant was well known to the complainant who testified as PW3. He testified clearly how he, PW2 (Evanson Wairi Njuguna) and PW4 (Stanley Kigo Maina) found the Appellant at about 10 p.m. lurking at the complainant's gate as they were proceeding to PW4's house to sleep. The Appellant called him to go and sleep in his house but he declined. The Appellant then followed them and grabbed the complainant by the hand and took him to his house nearby where he spent the night with him.

8. The complainant further gave graphic details of what the Appellant did to him (sodomizing him three times in the course of the night). Apparently the Appellant also forced the complainant to perform fellatio with him.

9. PW2 and PW4 corroborated the testimony of the complainant. These two were with the complainant when the Appellant asked him to go and sleep at his house. The Appellant then followed the complainant and PW2. PW2 heard the Appellant call the complainant, and the complainant went with him despite PW2 telling him not to go. PW2 then went to sleep. The following day in the evening the complainant told PW2 that he had slept at the Appellant's house. Later the following morning the complainant told him that the Appellant had sodomized him.

10. PW4 on the other hand also heard the Appellant's initial invitation to the complainant to go and sleep in his house and the complainant's initial refusal. PW4 then observed the Appellant following the complainant and PW2.

11. The Appellant was well known to PW2 and PW4. He was a close neighbour and apparently they had known him all their lives. They knew his home. They could not have mistaken the person who invited the complainant to go and sleep in his house and who subsequently followed the complainant and PW2 and led away the complainant by the hand to his house.

12. The complainant himself, though mentally challenged on account of a childhood illness, also knew well the Appellant and his home. He could not have mistaken the man who led him away to his home and who sodomized him three times in the night.

13. It is true that the complainant did not make a report of the attack at the earliest possible opportunity. But it is clear from his testimony and the testimonies of others that he wanted to make the report first and foremost to his own mother who was then not at home. As soon as the mother was available he reported the matter. It is also to be remembered that he reported to PW2.

14. Medical evidence adduced by PW8 showed tears and lacerations in the anus of the complainant, and

there was evidence of penetration. The medical evidence provided ample corroboration to the testimony of the complainant.

15. It is apparent from the record that the Appellant never cross-examined the complainant's mother or any other witness about the alleged grudge over a boundary dispute with the complainant's family that he raised for the first time in his unsworn statement after he was placed on his defence. It was clearly an afterthought that was properly rejected by the trial court.

16. Upon my own evaluation of the evidence placed before the trial court, I am satisfied that the Appellant was convicted upon good and sound evidence. The charge against him was proved beyond reasonable doubt, and his conviction is safe. There is no merit in his appeal against conviction, and the same is hereby dismissed.

17. As for the sentence, it must be noted that the complainant was a child, not to mention also mentally challenged, and therefore incapable of giving consent. The *proviso* to section 162 of the Penal Code under which the Appellant was charged is in respect to sentence where there is no consent of the victim. But that consent obviously must be in relation to a person capable of giving consent. The *proviso* therefore did not apply to the circumstances of this case because the complainant was incapable of giving consent. The Appellant was therefore liable to imprisonment for 14 years and not to 21 years under the *proviso*.

18. There was no minimum sentence provided by law for the offence of which the Appellant was convicted. However, his beastly act against the complainant took place throughout the night, and he did it three times. He richly deserved not only a custodial sentence, but also the maximum imprisonment provided for by law. That maximum was 14 years imprisonment.

14. I will in the event set aside the sentence of 21 years imprisonment meted out against him as it was in effect illegal, and substitute therefor a sentence of 14 years imprisonment, to run from the date of the original sentencing. As already seen, the Appellant's appeal against conviction has already been dismissed. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 10TH DAY OF NOVEMBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 11TH DAY OF NOVEMBER 2016