



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 45 OF 1982

PETER MAINA KIMANI.....APPELLANT

Versus

REPUBLICRESPONDENT

**(From original convictions and sentences of the Senior Resident Magistrate at Nairobi –J Aluoch
(Mrs) dated 21/1/1982 in Criminal Case No 2414 of 1981)**

JUDGMENT

The appellant was charged before the learned Senior Resident Magistrate, Nairobi on three counts, the first of which was for Robbery contrary to section 296(1) of the Penal Code (cap 63), the second for unnatural offence contrary to section 162 of the Penal Code and the third for stealing from the person contrary to section 279(a) of the Penal code. He was convicted on all three counts and was sentenced to 5 years' imprisonment and 2 strokes on each count. The custodial sentences were ordered to run concurrently and he was further ordered to be placed under police supervision for a period of 5 years from the date of his release from prison. He appealed to this court against the convictions and sentence.

Before the commencement of the trial, the appellant applied to the Trial Magistrate for the transfer of his case to another magistrate on the ground that she had convicted him in another case at Makadara court when she was stationed from April, 1979 to 21st January, 1981. The learned Senior Resident Magistrate after explaining to the appellant that she could not recall having tried him earlier, ... rightly in our view, rejected the application for transfer of the case to another court and ordered the hearing to proceed before her. During the course of the evidence in chief of the complainant in counts 1 and 2 (P W 2), the appellant again applied for case to be transferred to another court and on the learned Magistrate's refusal to do so he began to shout loudly in court and by his conduct made it impossible for the magistrate to proceed on with the trial in his presence. He was in the circumstances removed from the court and the trial continued in his absence. The learned magistrate with remarkable patience and understanding gave the appellant another chance when the trial resumed at 2.30 p m the same afternoon but the appellant showed no improvement in his behaviour and continued to behave as before. He was then again ordered out of the court and the trial proceeded to its completion in his absence until the day of the judgment which was delivered in his presence, when his behaviour was normal.

In his grounds of appeal he submits that the magistrate's refusal to transfer the case was because of a personal grudge against him and that she erred in law in refusing to grant his application. We find no merit in either ground. There is nothing at all on record to indicate that the learned Senior Resident Magistrate had any grudge against him. She was scrupulously fair to him two opportunities to stop shouting in court and it was only then that she returned him to the cells in order to continue with the trial

in his absence. This she was clearly entitled to do under the provisions on section 77 of the Constitution of Kenya relevant part of which reads as follows:-

77 ... and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the case in the presence of the appellant was impracticable.

This the learned Senior Resident Magistrate did on satisfying herself that the hearing of the case in the presence of the appellant was impracticable.

The appellant was no stranger to the court procedure as has previously been convicted in the magistrate's courts .. times and on his own admission his appeal against another conviction had been allowed. As a person who had face charges in the courts 12 times he should have realised that his interruptions during the course of the trial would result in the way the did.

We accordingly reject his contention that the learned Senior Resident Magistrate had a grudge against him or that she had erred in law in refusing to grant his application.

The evidence adduced by the prosecution was that at about 1.00 p m on 10.10.1981 while the complainant No 1 (P W 2) was waiting for a bus outside Sabina Day & Might Club in Moi Avenue, Nairobi, the appellant approached him and introduced himself as a taxi driver. He induced the witness to accompany him under the pretext that he would buy him a drink.

P W 2 agreed and accompanied him but instead of going to some place for a drink, he was taken to the public lavatories near Wakulima Market where the appellant threatened him with a simi and forcibly Had unnatural sexual intercourse with him in addition to robbing him of shs 400. After robbing and sexually assaulting P W 2 the appellant ordered him to go away and not to mention about the incident in the lavatories to anyone.

P W 2 went to look for Taxi Registration No KPV 270, which the appellant had told him was his vehicle but did not find him there. At about mid night, he found the appellant in custody of the police and reported the matter to the police officers on the back of P W 2's under-pants and the other (P W 5) noted smell of sperms on him. The same night both the appellant and P W 2 were examined by Dr. Mohamed Afiz Khan (PW 1) who found a very small fresh tear on the back and fron sides of P W 2's anal canal. The Doctor collected a swab from the anal region of P W 2 under-pants and anal swab were examined by the Government Analyst who found no spermatozoa on either of them.

At about 11.30 p m the same night, while the second complainant (P W 3) was walking near Ambassadeur Hotel the appellant approached him, removed shs 200 and some documents from his pocket and started to run away. The witness gave chase and caught him with the help of members of the public in Tom Mboya Street behind the same hotel. The appellant managed to free himself but was caught again. Shortly afterwards P W 4 and P W 5 arrived at the scene, searched him and found shs 215 at his possession. P W 3 identified shs 200 of this sum as belonging to him.

The learned Senior Resident Magistrate believed the two complainants as she was entitled to do and convicted the appellant on all three counts. We not that there was no evidence that the wrist watch mentioned in count No 3 was stolen by the appellant. No mention of it was made either in the prosecution evidence or in the learned magistrate's judgment.

As to count No 2 we are not satisfied that having regard to the medical evidence and the Government Analyst's Report, that sexual intercourse had actually taken place between the first complainant and the appellant, but on the evidence before the court we are satisfied that the appellant did make an attempt to have sexual intercourse with the first complainant. Had the intercourse actually taken place one would have expected to www.kenyalawreports.or.ke have a positive result of the appellant's penile swab for analysis of foecal material but we know from the Government analysts's Report that no such penile swab was submitted for analysis.

We do not attach much weight to the fact that the sum of sh 400 belonging to the first complainant was not found in the appellant's possession when he was arrested about 21/2 hours after the same were taken away by him. We think he had ample time to dispose of that money between the time of robbery and the time of his arrest.

On our own evaluation of the prosecution evidence we are satisfied that the appellant was properly convicted on count No 1 and appeal against conviction on that count is accordingly dismissed.

As stated earlier we are satisfied that there was only an attempt. On the part of the appellant to commit an unnatural offence against the first complainant. We accordingly quash the conviction for unnatural offence contrary to section 162 of the Penal Code and substitute therefore a conviction of attempt to commit unnatural offence contrary to section 163 of the Penal Code.

As to count No 3 we find that the appellant stole from the person of the second complainant shs 200 and dismiss the appeal against conviction on that count.

The appellant has 11 previous convictions but out of these only two (Nos 8 and 11) are for serious offences. While the present convictions are also for serious offences, we think that the custodial sentences imposed on him are on the higher side. We reduce the same to 4 years' imprisonment and 2 strokes in each count. The custodial sentences will run concurrently. The accused will also be subject to police supervision for a period of 5 years from the date of his release from prison.

Delivered at Nairobi this 5th day of November, 1982.

M G MULI

JUDGE

P S BRAR

JUDGE