REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. E119 OF 2022

ROBERT MUTHAMA NTHOKOI……...……APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(From the original conviction and sentence in Criminal Case E113 of 2022 of the Chief Magistrate's Court at Makueni by Hon. E. Kemei– Resident Magistrate)

JUDGMENT

1. Robert Muthama Nthokoi, the appellant herein, was convicted of unnatural offence contrary to section 162 (a) of the Penal Code.
2. The particulars of the offence were that on the 6th day of May 2022, at Kyamuthei market in Makueni Sub-County within Makueni County, Maingi Kioko had carnal knowledge of Maingi Kioko against the order of nature.
3. The appellant was sentenced to seven years' imprisonment. He has appealed against both conviction and sentence. He was in person and raised the following grounds of appeal:
    a) The learned trial magistrate erred both in law and fact by convicting the appellant despite inconsistent, insufficient and contradictory evidence.
    b) The trial court erred both in law and fact by failing to conduct a holistic scrutiny of the whole evidence on record to base its conviction and sentence.
    c) The learned trial magistrate erred in both law and fact by deflecting my defence.
4. The state opposed the appeal through Margaret Muraguri, prosecution counsel, on the following grounds:
    a) The prosecution proved its case to the required standards.
    b) The sentence meted out was legal.
    c) The appeal lacks merit.
5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the

witnesses give their testimonies. Therefore, I will follow the well-known case of **Okeno vs Republic [1972] E. A 32** to guide my decision-making process.

6. ***Section 162 (a) of the Penal Code provides:***

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.

7. The complainant in this case has a mental disability. However, he was able to give evidence. With patience, one could understand what he was saying. His testimony was that the appellant, whom he knew as "Papa", had sodomized him. The evidence of Alice Wanza (PW3) confirmed the consistency of the complainant in identifying the person who sodomized him and the location where the incident occurred. The medical evidence presented by Stella Mwasya (PW4) indicated that the findings showed the anus was not intact, and an anal swab revealed signs of blood. This confirmed penetration.
8. The proviso to section 124 of the Evidence Act states:

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

9. In the instant case, I find that the prosecution proved its case against the appellant to the required standards.
10. The appellant contended that the sentence was excessive. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances

entitling it to vary the trial court's order. These circumstances were well illustrated in the case of **Nillson vs Republic [1970] E.A. 599,** as follows:

> ***The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in JAMES Vs. REX (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R vs SHERSHEWSITY (1912) C.CA 28 T.LR 364.***

11. The appellant was sentenced to serve seven years' imprisonment. This court has not been shown that the learned trial magistrate acted upon any incorrect principle or overlooked any material factor. I have no grounds to interfere with the sentence.
12. The appeal is without merit, and I therefore dismiss it.

Delivered and signed at Makueni, this 22nd day of October 2025

KIARIE WAWERU KIARIE
JUDGE