



**IN THE COURT OF APPEAL OF KENYA**

**AT NAKURU**

**Criminal Appeal 177 of 2006**

**JULIUS WAWERU PLEUSTER .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Nakuru (Musinga, J)**

**dated 1<sup>st</sup> March 2004**

**in**

**H. C. CR. A. NO. 77 OF 2004)**

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**JUDGMENT OF THE COURT**

JULIUS WAWERU PLEUSTER, the appellant, has come to this Court on second appeal, to challenge his conviction by the court of the Principal Magistrate, at Nyahururu, for an offence under section 162(a) of the Penal Code. The Particulars of the charge against him read as follows:

“On the 17<sup>th</sup> day of September 2003 at Kinamba trading centre in Laikipia District within the Rift Valley Province had carnal knowledge of DM, against the order of nature.”

This being a second appeal only issues of law fall for consideration. Seven grounds of appeal have been set out in the appellant’s home made memorandum of appeal. The first ground attacks a finding of fact and so do the second, third and fourth grounds. The fifth, sixth and seventh grounds state as follows:

“5. That the learned judge erred in matter of law and fact when he upheld the conviction without considering an essential witness (mama Peris) was not summoned to testify thus the case was not proved beyond reasonable doubt.

6. That the learned judge further faulted in law and fact when he failed to disabuse his mind that the ordeal took place at daylight and the allegation that PW1 was retrived (sic) from his house to my house through the market while bounded (sic) without any one’s notice is

incredible.

7. That my defence was not intrinsically weighed against the advanced (sic) prosecution evidence as prescribed by (sic) not demolished in instant case.”

The facts of the case are short. DM who hails from Kinamba in Rift Valley Province was in September 2003 jobless. He had a rented room there where he resided. The appellant was also resident in the same area. The prosecution case against the appellant was that on 17<sup>th</sup> September 2003, at about 6 p.m. the appellant went to DM's house and struck him with a whip which he had, covered his face with a piece of cloth and used another piece of cloth to gag his mouth to prevent him from screaming. He then carried him to his house where he uncovered his face and thereafter served him with a meal which he ate. Thereafter, he demanded to have anal sex with DM but when the latter refused the appellant assaulted him and tied up his hands together. The appellant then carried him to his bedroom, removed his trousers, jacket, shoes and socks after which he took some cooking fat which he smeared over DM's anus and some around his penis. The appellant then pushed his penis into DM's anus and thus had sexual intercourse with DM. When the appellant finished, he threatened DM that he could stab him with a knife, which he held against him, if he dared to tell anyone what had taken place. DM later escaped and reported the incident to a certain woman called Peris, who advised him to report the matter to the police at Kinamba police station, which he did. It was DM's further evidence that as he ran away there was something like a rope hanging out from his anus. It was his rectum. Thereafter he was taken to hospital. Later DM led the police to the appellant's house. It was DM's testimony that his clothes were recovered from the appellant's house, and when the appellant's penis was checked it was found to be stained with DM's stool. The appellant was then arrested and charged with the offence; particulars of which we set out earlier.

In his defence the appellant stated that on the material date of the alleged offence he was drunk and was completely unaware of what took place. He stated that he did not remember ever seeing the complainant on that date, or being taken to hospital for medical examination. He further stated that he had paid the complainant Kshs.350/= so that he would drop his complaint against him and he was prepared to increase it to Kshs. 1,000/= . He explained that he did not want to waste his time in court and hence the payment. He called one witness, Daniel Kanyoro, in support of his case, but the witness stated that he knew nothing about the case.

Medical evidence showed that DM had been sodomised. Some pus cells were found when a swab was taken from the appellant's urethra. Likewise pus cells were found in DM's anus and yet he had no injury noted in his anus. The trial magistrate, L.K. Mutai, SRM, indeed did not consider the appellant's defence. He merely set it out but there is no evidence that he considered it. The superior court on first appeal did however, consider the defence. That court was satisfied that the defence was untenable, and if anything it was self-incriminating. We are of the same view.

The appellant also complained that a material witness was not called to testify. It is true that the woman to whom the complainant made the first report was not called as a witness. The position in law is that the prosecution is obligated to call such witnesses as are necessary to establish the truth. It is, however, not obliged to call a plurality of witness to prove a fact. If, however, the prosecution fails to call a material witness an adverse inference may be raised that had the witness been called he would have testified against the prosecution case. The woman who was not called was one Peris. Her evidence would have at best shown that DM complained to her about the appellant sodomising him. Even if we were to take an adverse view of the failure to call the witness, the result would not have affected the outcome of the appellant's case. The evidence against him is overwhelming.

No other point of law has been raised in this appeal which needs to be considered. This

appeal lacks any merit. The appellant was properly convicted and the sentence which was meted out against him is a lawful sentence. That being our view of the matter the appellant's appeal must be and it is hereby dismissed.

Dated and delivered at Nakuru this 2<sup>nd</sup> day of October 2009.

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR.**