



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: TUNOI, OWUOR & KEIWUA, J.J.A)
CRIMINAL APPEAL NO. 216 OF 2002

BETWEEN

MAKIO MUSYAAPPELLANT
AND
REPUBLICRESPONDENT

**(Appeal from the judgment of the high Court of Kenya at
Mombasa (Khaminwa, Comm. of Assize) dated 3rd
October, 2001**

in
H.C.Cr. Appeal No. 128 of 2000)

JUDGMENT OF THE COURT

The appellant, Makio Musya, was convicted of unnatural offence contrary to **section 162(a) of the Penal Code** and sentenced to 14 years imprisonment plus 8 strokes of the cane. His first appeal to the High Court of Kenya at Mombasa upheld the conviction but reduced the sentence to 8 years imprisonment. This is therefore a second appeal.

The appellant was employed by the family of the complainant as a houseboy. On the material day F.H (**PW2**), the mother of the complainant, was at home and she observed that the complainant who was aged 11 years at the time was walking with a lot of difficulty. She called him and asked him about it. The complainant, though slightly mentally retarded, narrated to her in detail how the appellant had sodomised him on more than five occasions between May, 1999 and 25th November, 1999.

A medical examination carried out on the complainant by Dr. Michael Mwita of the Coast General Hospital revealed that the muscles of the anal region had been significantly weakened and could freely open as the complainant bent. This was due to repeated unnatural acts of sodomy.

The two courts below believed the evidence of the complainant and held that the prosecution had proved its case against the appellant beyond all reasonable doubt.

This being a second appeal no point of law arose for our determination. The evidence on record

established beyond reasonable doubt that the appellant did indeed commit the offence with which he was charged. Moreover, the testimony of the complainant was credible and consistent and was lent corroboration by the medical report compiled by Dr. Mwita.

So, in our view, the evidence against the appellant was overwhelming. The conviction is upheld.

We find no merit in this appeal and we order that it be dismissed.

Dated and delivered at Mombasa this 24th day of January, 2003.

P.K. TUNOI

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

M. Ole KEIWUA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR