REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 90 of 2007

ALI ABDI SHABURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 3173 of 2005 of the Chief Magistrate's Court at Nakuru, H. M. Nyaga, SRM)

JUDGMENT

Ali Abdi Shabura *(the Appellant)* was charged and convicted on two counts of committing an unnatural offence contrary to Section 162(a) of the Penal Code *(Cap. 63, Laws of Kenya)* and was on the evidence sentenced to fifteen years imprisonment on each count. The sentences were ordered to run consecutively.

Aggrieved both with his conviction and sentence the Appellant has in his Amended Petition of Appeal submitted to court at the hearing of his Appeal on 23.07.2012, set out five grounds of appeal -

- ***that there was no evidence to support the charges against him because the medical expert's evidence exonerated him from the offence; (ground 4),***

- ***the evidence of the complainants was not corroborated; (ground 5),***

- ***the sentence passed against him was harsh and contrary to Section 162(a) of the Penal Code, (grounds (1) & (2)), and***

- ***his constitutional right to be brought to court within 24 hours as required by Section 72(3)(b) of the former constitution were violated (ground 3).***

The Appellant also made written submission on each of the grounds of the Petition of Appeal. I will commence with claim of violation of his constitutional right to be brought to court within 24 hours.

It is correct that under Section 72(3) of the repealed Constitution of Kenya, a person who is arrested and charged with a non-capital offence was required to be brought to court within 24 hours. It was not however the law of the Constitution that a person who was so arrested or detained and not

brought to court within 24 hours was not to be prosecuted. His remedy was an action in damages under Section 72(6) of the said Constitution.

The prosecution of the Appellant was proper and legal. This ground of appeal fails.

Turning on the other grounds the contended that there was no evidence against the Appellant **firstly** because the evidence of the prosecution witnesses was not corroborated by independent evidence, and **secondly** because the expert witness evidence exonerated him from the offence of which he was charged.

On the first contention that the evidence of the two complainants was not corroborated in terms of Section 124 of the Evidence Act, *(Cap. 80, Laws of Kenya)* that an accused shall not be liable to be convicted on the evidence of a minor received under Section 19 of the Oaths and Statutory Declarations Act, *(Cap. 15, Laws of Kenya)* unless it is corroborated by other material evidence in support of the minor's evidence or implicating the accused, the proviso thereto provides that that in criminal cases involving a sexual offence, the court is empowered to receive the evidence of a minor 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.

On the alleged exoneration of the Appellant by the Doctor's evidence, what PW3, the doctor said is that he, found no injuries on the two boys' genetalia, and also noted no discharge from the boy's anal regions. The Doctor however found the degree of injury as *"grievous harm"*. Examination was carried out after 6 days, and hence the absence of any tell-tell signs of the injury to the anal areas of the two boys. This does not mean that no sodomy took place. In the case of **KIBET vs. REPUBLIC [2009] KLR 48,** the Court of Appeal held inter alia that....

"... the vaginal swab was not showing the presence of spermatozoa since the trial magistrate's record showed that the complainant was examined after 5 days after the offence, this might have interfered with the presence of spermatozoa …."

The appellant cannot therefore argue that the Doctor's evidence exonerated him. This leg of the Appellant's argument also fails.

Reacting to the first leg of the Appellant's argument that the two boys evidence was not corroborated, the proviso to Section 124 of the Evidence Act *(referred to above)* donates to the court the discretion to convict an accused person in criminal cases involving sexual offence without corroboration of evidence. According to the New Shorter Oxford English Dictionary *(Third Index Edition of 1993)*, the pharase *"carnal knowledge of"* means *"full or partial sexual intercourse with".* The offence of having carnal knowledge of any person "means to have sexual relationship with another person. The phrase *"against the order of nature"* means "sexual intercourse or copulation between man or woman in the same sex, or either of them with a beast". It is also termed *"buggery"*, *a crime against nature, abominable and detestable crime against nature, an unspeakable crime.*

So for the 6 year old PW1 and PW2, they called it **"tabia mbaya"**. PW1 testified that the Appellant would call him cook for them, told him to remove his shorts and when the boy refused - ***"he removed my shorts. He held my mouth with his hand. He did "tabia mbaya" on my matako (anus). He did it several times. He had told me he would kill me if I told anyone. He also did it to H".***

When cross-examined by the Appellant, PW1 was firm in his statement -

"You used to call me. After cooking for us, you would take me to a corner and you did "tabia mbaya". You told me you would kill lme, if I told anyone. You put your hand on my mouth. You put your "dudu" on my anus. You did it many times. I am saying what happened."

The evidence of PW2 who too was subjected to *"a voire dire"* was similar. He informed his mother … ***He did it to the two of us. He started with S (PW1). He did it in his kiosk. I am telling the truth."***

It is thus very clear from the above statements of PW1 and PW2, the victims of acts of sodomy, that the two victims are telling the truth. There is hardly any guile in children of this age. Their testimony is credible. Even if the Doctor's evidence was excluded, there was sufficient evidence here to convict the Appellants. The Appellant's contention to the contrary is not tenable. It fails.

The Appellant's last contention related to the sentence of fifteen years running consecutively and which the Appellant submitted was harsh and excessive. There are two issues here, **one** the sentence itself, and **two** that it was to run consecutively.

On the sentence itself, the Appellant is correct that the punishment for the offence for having carnal knowledge of any person against the order of nature is imprisonment for fourteen years. There is however a proviso to Section 162(a), that in the case of that offence, the offender is liable to imprisonment for twenty-one years if -

(i) the offence was committed without the consent of the person who was carnally known, or

- ***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 or by fear of bodily harm, or by means of false representations as to the nature of the act."***

In this case, the children aged six years were incapable of giving any such consent to be sodomised, and from their evidence, they protested, and were intimidated with threats of being killed. The learned trial magistrate was well within the law to impose a sentence of twenty-one years imprisonment but instead imposed fifteen years on each of the counts. The second question was whether it was lawful to order the sentences to run consecutively.

The law regarding the imposition of consecutive sentences is set out in Section 14 of the Criminal Procedure Code that when a person is convicted at one trial of two or more distinct offences, the court may sentence him for these offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order in which the court may direct, unless the court directs that the punishment shall run concurrently.

Under Section 14(3) aforesaid, only the court of the Chief Magistrate or Senior Principal Magistrate, the Principal Magistrate or Senior Resident Magistrate may at one trial pass consecutive sentences -

(a) of imprisonment which amount in the aggregate to more than fourteen or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction is competent to impose whichever is the less.

(b) of times which amount in the aggregate to more than twice the amount which the court is competent to impose.

And Section 14(3) says that for the purposes of appeal, the aggregate of consecutive sentences imposed under this Section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

In this case, there were two distinct counts, offences committed against two different complainants, PW1 and PW2. The sentence of fifteen years on each count to run consecutively was passed by a Court of the Senior Resident Magistrate and was therefore proper. In the circumstances I find no merit on the appellant's contention to the contrary.

In summary therefore, there was adequate evidence to convict the Appellant, the sentence was lawful. I confirm the conviction and sentence and dismiss the appeal.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 2nd day of November, 2012

M.J. ANYARA EMUKULE

JUDGE