REPUBLIC OF REPUBLIC

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 60 OF 2012

Appeal from the original conviction and sentence by the Senior Resident Magistrate at Wajir (R. Odenyo) in Criminal Case No. 256 of 2008.

MOHAMED YARE HIRSI AHMED…….....APPELLANT

VERSUS

REPUBLIC……..…….....…RESPONDENT

JUDGEMENT

Background

Mohamed Yare Hirsi Ahmed, the appellant, is serving a twenty year jail term for the offence of committing an unnatural offence contrary to section 162 (a) of the Penal Code. It was alleged in the particulars of the offence that on 8th of September 2008 at Wajir Township in Wajir District within North Eastern Province the appellant had carnal knowledge of Ali Mohamed Roble against the order of nature.

Facts

The appellant was spotted by Kadra Musa, PW2, a girl aged 10 years as he was walking towards the complainant's, house at 8.00am on 31st August 2008. The appellant was at the time holding a knife and Kadra was curious to know what he intended to do with the knife. She attempted to spy on the appellant through the window of the complainant's house but the appellant closed the window. Kadra went back to their house and told her father Musa Ibrahim Noor, PW3, what she had seen. PW3 took a piece of timber which he used to push open the complainant's door. He entered the house and found the appellant sodomizing the complainant while holding the knife at the complainant's neck. The matter was reported to the police leading to the arrest of the appellant.

The trial court considered the evidence of five prosecution witnesses and the appellant's defence. The court found the offence proved and convicted and sentenced the appellant to twenty years in prison.

Petition of appeal

The appellant is aggrieved by the conviction and sentence and has come to this court on appeal. The appellant was initially represented by Mr. Ingutya but later the said advocate failed to attend court and informed the court through the Deputy Registrar that he did not intend to continue representing the appellant. The firm of Metto & Company advocate, by their letter dated 16th October 2013 informed the court that they had taken over the case from Mr. Ingutya. However, they did not attend court. The

appellant told the court that he would prosecute the appeal in person to avoid further delay. This was allowed by the court.

Mr. Ingutya had filed an application for leave to file an appeal out of time on 22nd May 2012. He attached a petition of appeal to that application but this was not admitted. Instead the appellant filed his petition of appeal on 4th April 2013 after the court granted him leave to file appeal out of time. The appellant advanced in his petition of appeal seven grounds of appeal in which he faulted the trial magistrate as shown in the following grounds of appeal:

(i). Concluding that the complainant was mentally unstable because he had declined to testify.

(ii). Allowing the prosecutor to change the date the alleged offence was committed in the middle of the trial.

(iii). Failing to consider that the prosecutor was intimidating the complainant to testify.

(iv). Failing to consider that the prosecution evidence was contradictory and uncorroborated.

(v). Failing to consider that the source of light to enable the identification of the appellant was not established given that the offence was committed at night.

(vi). Failing to admit the complainant's evidence given on 18th and 29th September 2008 which evidence tended to exonerate the appellant.

(vii). Relying on the evidence of the co mplainant adduced on 13th October 2008 without noting that it was given under duress.

The appellant made brief oral submissions that the complainant did not mention him as having committed this offence and that the complainant absolved him from this offence; that the witnesses contradicted each other by stating that the offence occurred at night while others stated that it was during the day; that he was arrested in town as he was going about his business and that the sentence is harsh and excessive. He asked this court to allow his appeal, quash the conviction, set aside the judgement and set him free.

Respondent's submissions

The appeal was opposed. Mr. Collins Orwa, learned state counsel for the respondent submitted that the evidence of 18th and 29th September cannot be construed that the complainant exonerated the appellant; that the complainant was retracting his statement to the police and the trial court declared him a refractory witness which is within the law for the trial magistrate to do; that this cannot be construed as suppressing the witness or allowing his to testify under duress.

Learned state counsel submitted that it is not true that the amendments to the charge sheet were done at the close of the prosecution case; that the evidence of the prosecution is well corroborated; that the appellant was found in the act still holding the knife; that the medical evidence confirmed that the complainant has been sodomized; that there is no evidence that the offence was committed at night; that it is only the complainant during his testimony for the first time when he said that the offence was committed at 8.00pm; that the trial court failed to conduct a *voir dire* examination of PW2 but that notwithstanding the prosecution evidence is overwhelming.

Learned state counsel submitted that the sentence of 20 years is illegal and urged this court to correct that error. He also urged the court to dismiss the appeal for lack of merit.

Determination

This is a first appeal and this court is alive to the duty placed on it to examine and evaluate the evidence

afresh with a view to arriving at its own findings. With this in mind I will subject the entire record of the lower court to fresh scrutiny.

The record of the lower court shows that the complainant, Ali Mohamed Roble, took the stand to testify five times. On 18th September 2008 he was sworn in for the first time and I think it is important to record what he told the court in the first four occasions. On 18th September 2008 he testified as follows:

> **"I am called Ali Mohamed Roble. I am 20 years old. On 31/8/2008 at about 8.00pm I was asleep. That person (pointing at accused) came and woke me up telling me to take him to the shop to buy milk. I went out with him but the shop was closed. We went to another shop when we bought the milk. We went back home. We drank the milk. Then both of us retired to sleep. One Musa came and asked what we were doing"** *(sic).*

At this stage the prosecutor applied for adjournment to allow the complainant refresh his memory. This was allowed and hearing rescheduled to 19th September 2008. The case did not proceed on 19th September 2008 following an application that the complainant had gone missing. Hearing was fixed for 29th September 2008. On that date the complainant took the stand again and was sworn afresh. He continued thus:

> **"After buying the milk we went to accused's house. We sat at the verandah. I excused myself to go and sleep. Accused followed me"**

The prosecutor told the court that the complainant was not telling the truth. The court then adjourned the case to 2nd October 2008 and remanded the complainant in custody. On 2nd October 2008 the complainant was sworn afresh, again, and he testified as follows:

> **"I am called Ali Mohamed Roble. I am a resident of Wajir Town. I do domestic chores. On 31/8/08 at about 8.00pm. The family has sorted"** (*sic*).

This time, it is the court that reacted. The trial magistrate commented that the witness did not want to talk and ordered that the witness be remanded again up to 13th October 2008. On that date the complainant was sworn and he testified as follows:

> **"I am called Ali Mohamed Roble. I come from Wajir. I do not work. I am 20 years old. On 31/8/08, I do not remember……"**

The trial court ordered that the complainant be stepped down to proceed with his testimony after a doctor had examined him on his mental capacity. The court then proceeded with the evidence of other witnesses. The next time the complainant appeared in court was on 15th October 2008. He took oath and testified after the court was informed by the prosecutor that he had been examined and found to be mentally sound.

I have taken time to reproduce the record of the proceedings because out of the seven grounds of appeal, the appellant has dedicated four of them to the issue of the manner the trial court handled the complainant and his testimony. In my view the prosecutor ought to have applied for the complainant to be treated as a hostile witness and cross examine him. The complainant was treated as a refractory witness and remanded in custody. After several days in custody he agreed to testify.

The appellant claims that the complainant testified under duress and his evidence ought not to be relied on. I have considered this issue. In my view the trial magistrate made errors in the manner in which he handled the complainant. The trial court seemed unsure what to do with the complainant when the procedure is clear. In my view the appellant is justified in raising this issue. It must have caused him anxiety and uncertainty to have the complainant stood down four times.

In **Daniel Odhiambo Koyo v Republic [2011] eKLR** the Court stated as follows in respect of refractory

or hostile witnesses:

> **"The law on such witnesses is clear. The probative value of his evidence is negligible. It may be relied upon in clear cases to support the prosecution or defence case…… There is a thin line between a hostile and refractory witness. Both are people who display reluctance in giving evidence as required of them."**

In **Maghenda v. Republic [1986] KLR 255 at P. 257,** the same Court remarked as follows regarding the evidence of a hostile witness:

> **"The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the Court."**

On my part I have noted that the complainant was not willing to volunteer information. I do not know what he meant by stating that "the family has sorted" but this could mean that the issue between him and the appellant had been sorted out by the family outside the court. Whatever the case, it is my considered view that the mistakes by the trial court in standing the complainant down on several occasions did not prejudice the appellant. This court will allow the complainant's evidence to support that of the other witnesses because what he stated is not at variance with what PW2 and PW3 stated in their testimony.

I have noted that the prosecutor applied to amend the date on the charge sheet to read 31/8/08 instead of 8/9/08. All the witnesses including the complainant testified to 31/8/08. PC Charles Masoka Michui, PW5, told the court that he arrested the appellant on 6th September 2008. This is confirmed on the charge sheet. In my considered view, the appellant was not prejudiced by this amendment given that the complainant, PW2 and PW3 testified to the offence having been committed on 31st August 2008. It seems the complainant did not report the offence immediately it was committed.

The appellant has claimed that the evidence is contradictory and uncorroborated. The contradictions he alleges refer to whether the offence was committed during the day or at night. I have noted that PW2 and PW3 and also PW1 in his testimony of 15th October 2008 refer to 8.00am. It is worth noting that the complainant had earlier in his testimony referred to 8.00pm. I find the evidence well corroborated that the offence was committed at 8.00am on 31st August 2008. The issue of source of light with which the appellant was identified does not arise since this was during the morning.

I have carefully analyzed the evidence both from the prosecution witnesses and the defence. The appellant said the case is fabricated and that the witnesses contradicted each other on the issue of the time of the offence. I have found the prosecution case well corroborated. PW2 saw the appellant enter the house of the complainant carrying a knife. She informed her father who went to check. He found the appellant, still holding the knife, at the act of sodomizing the complainant whom he refers to as Alio. This is how PW3's evidence captured that graphic moment:

> **"When I entered, I saw that man (pointing at the accused) sodomizing Alio. His trouser was on Alio's bed. Alio had removed his trouser down to his knees. Accused was having a knife which he was pointing at Alio's neck. They were bending. When accused saw me, he removed his penis from Alio's anus while still erect. He pleaded with me not to harm him……"**

The medical evidence further corroborates this evidence. On section C Part 3 (b) of the P3 Form it states that **"Features indicating forced anal penetration – lacerations and bruises on the anal region. Sphincter muscles weak."**

In view of the available evidence, I have no doubt in my mind that the appellant committed this offence. There is sufficient evidence to support this finding. I have no option but to reject the appellant's defence just as the trial court did. The appeal against conviction has no merit.

The sentence prescribed by the law under section 162 (a) of the Penal Code is fourteen years. The trial

court sentenced the appellant to twenty years which is against the law and therefore illegal. I will and do hereby correct this error by setting aside the sentence of twenty years and under the provisions of section 354 (3) (b) of the Criminal Procedure Code reduce the sentence to eight years imprisonment to be calculated from the time appellant started serving term on 17th October 2008. I make orders accordingly.

Dated, signed and delivered this 17th day of September 2014.

S. N. MUTUKU

JUDGE