



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCRA NO. 23 OF 2017**

**WAMBUA MWANIA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant was charged with offence of unnatural offence Contrary to Section 102 Penal Code.
2. Particulars being that on 19/06/2012 in Kibwezi Eastern Province had carnal knowledge of M M against the order of nature.
3. He was also charged with the offence of indecent act with a child Contrary to Section 11(1) Sexual Offence Act No. 3 of 2006 by touching the anus of M M, a child aged 6 years.
4. The Appellant pleaded not guilty and the matter went into trial.
5. The Appellant was found guilty and was convicted and sentenced to serve 15 years imprisonment.
6. Being aggrieved by the aforesaid decision, the Appellant lodged appeal setting out the following grounds;
  - 1. The case was not proved beyond reasonable doubt.**
  - 2. PW1 & PW2 were not credible nor were they corroborated.**
  - 3. The sentence was excessive.**
7. The parties agreed to canvass appeal via written submissions. the Appellant mixed his submissions with what he called Amended grounds which were in nature of mitigation namely:-
  - *He was deeply remorseful.*
  - *He was first offender.*
  - *He had fatherly responsibility.*
  - *He is resourceful person.*
  - *He has acquired skills.*
8. Thus court sought to exercise discretion and lessen the sentence term or a non custodial sentence be awarded to him.
9. On the prosecution case it was submitted that the case was proved beyond reasonable doubt via the evidence of PW1, PW2 and doctor PW4 as same corroborated one another. The elements of penetration, age of victim and identification of Suspect/Appellant was established beyond reasonable doubt.
10. The defence did not supplant the prosecution case. The defence was mere denial. On sentence, the maximum is 21 years but accused was awarded 15 years which is within the law and same is not excessive. Thus appeal sought to be dismissed.

11. The duty of the 1<sup>st</sup> Appellant court is to evaluate the evidence and make its own conclusion.
12. Thus the prosecution case was that PW1 C M stated to court that on 17/06/2012 at 11.00 a.m., she went to church and returned home at 4.00 p.m. She found her children had gone out to graze goats. The children came home and one of them told her that K had been penetrated in the anus by Wambua using a stick.
13. The K M also confirmed to her same and on enquiring she learned that Wambua had actually used his penis. The child could not sit properly. She was also releasing stool and crying in pain. She called the village elder who came and confirmed the penetration.
14. They arrested accused and took him to Utithi police post where they were referred to Kibwezi police station. They attended AMREF, Kibwezi sub-district hospital and the child was treated. A P3 form was issued and filled at Makindu District Hospital. She knew accused and his family.
15. PW2 M M stated on oath that on 17/06/2012, they were playing with M M and K.
16. Wambua the accused came and asked her to drive goats towards a cow/pen. He pulled her and took her to Mwanga's house. He removed her biker and panty. He removed his penis and inserted it into her anus.
17. She cried but accused told her that he will give her githeri. He promised to buy her something good if she never tells anybody about it but he never bought her anything.
18. B her brother told her mother about it as she had already told Ben about it. She was later taken to hospital and treated. She knew John who stays at Mueni's place.
19. On cross examination by accused she stated that children were near and heard her crying but they never came to the house. Later accused was allowed to cross examine PW1 at his request.
20. On cross examination she stated to court that when the child came back home she just used one side of her buttocks. That she took the child to hospital and it was confirmed. That the child told her that accused took her pantie and threw it into a pit latrine.
21. The child returned home with the biker only. Waste was passing from her anus. That she did not beat the child. And she had no grudge with the accused. That the child is the one who told her everything out of her own volition.
22. On cross examining PW2, she stated that she was with other children who did not come to her rescue. That her mother told her to come to court and tell the truth.
23. PW3 Sergeant Alice Kioko stated that on 18/06/2012 she was minuted this case by OCS Kibwezi police station to investigate. She took the child to the hospital and was treated. They filled a P3 form at Makindu District Hospital. She recorded witness statements.
24. She visited the scene and learnt that the accused did the act in a house he sleeps in. He then took the girl to the kitchen and served her with githeri. He then did it again in the kitchen seat and sent her away warning her never to tell the other children about it.
25. The child told other children about it and the brother reported the incident to the mother. That she had a biker which was soiled. Also the child was physically injured which she ascertained. She charged accused with this offence.
26. On cross examination by accused in person she stated that she visited the scene and saw where accused used to sleep.
27. The soiled innerwear was not brought to court. That she never took the accused to hospital as she believed the young girl. She also did not find any reason why the complainant a child could frame him.
28. PW4 Dr. Hannington Mibei MOH Makindu District Hospital stated to court that on 19/06/2012 he filled a P3 form for one M M.
29. On examination he found that the child had bruises in the perineum, loose sphincter muscles, rectal lacerations, stool around the perineum. The degree of injury was harm. He produced the P3 form as evidence.
30. On cross examination by accused he stated that they examined and found the child had been defiled. That it was his evidence that there was sodomy.
31. The Appellant was put on his defence and put unsworn statement. He stated that he comes from Machinery area. That he is a mason. On 17/06/2012 he went to his neighbours making a cattle pen.
32. On Sunday he woke up and went to church and left at 1.00 p.m. and went home at 7.00 p.m. At 8.00 p.m., police arrested him and was beaten and taken to the police station and was later charged with the offence before court.

#### **ISSUES, ANALYSIS AND DETERMINATION**

33. Did the act of sodomy happen on the complainant? PW1 and PW2 who have been found to be truthful narrated how it happened. PW1

confirmed that indeed the child could only sit with one buttock and was in pain. Secondly she was passing stool uncontrollably.

34. PW3 also confirmed that the child was also in pain physical pain when she took her to hospital. Thirdly the doctor in his P3 form stated that child had loose sphinatural muscles, bruises in the perineum, rectal lacerations, and noted stool around the perineum.

35. He concluded that the child must have been sodomised and confirmed the degree of injury as harm.

36. PW2 evidence shows that she was penetrated in her anus. It's corroborated by PW1, PW3 and PW4 evidence. The doctor observed it and also referred to the treatments to confirm the position in the first instance.

37. Who then penetrated PW2? PW2 stated that she knew the person who did it. It was during the day. She went immediately and told B her brother what had happened together with the name of the assailant. She named the accused Wambua Mwanja as the assailant.

38. This is the information B passed to the mother first hand even before the complainant informed her mother. She has been consistent ever since. She could not have been mistaken on the assailant in these circumstances.

39. Furthermore there is nothing that came from cross examination or the defence to show that the PW2 could have been lying or framing the accused. Actually it's not alleged to that effect.

40. The trial court had no doubt in mind that accused did perform the act of sodomy on the PW2. Section 162(a) of the penal code states;

***“Any person who;***

***(a) has carnal knowledge of any person against the order of nature.....***

***(b) ..... is guilty of an felony and shall be liable for imprisonment for fourteen years.”***

41. Provided that in case of an offence under paragraph (a) the offender shall be liable to 21 years if (i) the offence was committed without the consent of the person who was carnally known.

42. The penetration of a child or any person's anus by a person penis is what can be classified as against the order of nature.

43. The requirements of Section 162(a) of the penal code are thus satisfied. The consent of such action is not in issue because the age of consent has not been reached by the complainant who was 6 years at the time of the offence.

44. Thus the court finds no merit in the appeal and makes the following orders;

**i. Appeal is dismissed and conviction is affirmed.**

**ii. The sentence is confirmed but to run from 17/06/2012 to factor in the period Appellant was in custody before conviction.**

**SIGNED, DELIVERED THIS 24<sup>TH</sup> DAY OF JULY 2018, IN OPEN COURT.**

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**C. KARIUKI**

**JUDGE**