REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 18 OF 2015

WILSON MUTAI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From the original conviction and sentence in Cr. Case No.1581 of 2015 in the Chief Magistrate's Court at Narok, dated 4th November, 2015, R. v. Wilson Mutai]

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of fifteen years imprisonment in respect of an indecent act with a child contrary to section 11(A) of the Sexual Offences Act No. 3 of 2006.

2. The state has supported both the conviction and sentence.

3. The appellant was convicted and sentenced on the direct evidence of the complainant (PW2), PC (PW1) and PW3 and on other evidence.

4. The appellant has raised eleven grounds of appeal in his petition of appeal to this court. In ground one, he has stated the unchallenged fact that he did not plead guilty. I will deal with grounds 3 and 6 together, since they raise a common ground namely that the language used and its interpretation were not understood by the appellant. The appellant has cited the provisions of article 50 (2) (b) (c) and 4 of the 2010 Constitution of Kenya. I will deal with the provisions of each sub-article.

5. First, the provisions of article 50 (2) (b) require that the accused be informed of the charge with sufficient detail to enable him to answer it. In this regard the record of the proceedings shows that the appellant was informed of the charges preferred against him through a Swahili interpreter in the Swahili language. After understanding those charges, he replied thus:

"*Count 1 – Ni uongo (false)*

Alternative count: Ni uongo (false)"

Thereafter, the trial court recorded a plea of not guilty.

6. In the light of the foregoing, I find that there is no merit in grounds 3 and 6 that he was not informed of the charges against him in the language that he understood namely Swahili and I therefore dismiss it.

7. Furthermore, the provisions of article 50 (2) also require that an accused to be provided with an interpreter at state expense, if he does not understand the language at his trial. In this regard, the record of the trial proceedings shows that there was an interpreter (court clerk-Soi) through whom the appellant conducted cross examination in Kipsigis Language. The interpreter interpreted in both Kiswahili and Kipsigis.

8. Furthermore, the appellant in his sworn evidence decided to use Kipsigis and the same interpreter (Soi) interpreted both in Kiswahili and Kipsigis. I therefore find that the appellant had the assistance of an interpreter (Soi) in both Kiswahili and Kipsigis throughout his trial. I find no merit in this ground of appeal and is hereby rejected.

9. Furthermore, the appellant has complained that he was not given adequate time and facilities to prepare for his defence. I have examined the record of the trial proceedings and I find that this complaint is being raised for the first time in this appeal. It was not raised during his trial. I find that this complaint is an afterthought and I hereby reject it.

10. In view of the above findings, I find no merit in grounds 2, 3 and 6 of his petition of appeal and I hereby dismiss them.

11. In ground 5 the appellant has faulted the trial court both in law and fact for dismissing his cogent and plausible defence. The defence of the appellant was that he was framed and that he was so drunk that he did not know what he did. He further testified that he did not know when and how he was arrested. While under cross examination, the appellant further testified that he had no grudge with the complainant's family.

12. In this regard reference to the evidence of PC (PW 1) is important. PW1 testified that she had released the complainant (PW2) to go to school to attend her baby class. At the end of the day PW1 decided to go and collect PW2 from school. While en-route PW1 found PW2 crying. PW2 told her that the appellant had done bad things to her. PW2 further told PW1 that the appellant had removed her underwear and had slapped her before removing it.

13. PW1 then examined PW2 and found nothing wrong with her. As at that time PW2 was holding her underwear in her hand. The evidence of PW1 was that when the appellant saw them he ran away. In the process of doing so, the appellant dropped his marvin (a hat) at the scene, which she recovered and was put in evidence as prosecution exhibit Pex 2.

14. Furthermore, the unsworn evidence of the complainant (PW2) was that she identified her underwear and the marvin of the appellant. She also testified that the appellant beat her up and removed her underwear. PW2 made an unsworn statement after the trial court found her to be incapable of testifying on oath, following a *voire dire* examination. Finally, the record shows that the mother of PW2 acted as her intermediary in court.

15. Another witness who testified was MC (PW3), who gave testimony following a successful *voire dire* examination. She was then aged 13 years. Her evidence was that she found the appellant on top of the complainant. She also testified that the appellant had removed the underwear of the complainant. Her further testimony was that when the appellant saw her, he got up and dropped his marvin and escaped to the bush.

16. Thereafter, the appellant got out of the bush and tried to run away. PW3 screamed and as a result other women joined her in raising an alarm. As a result the appellant was arrested by members of the public. He was then frogmarched to the shop of John Kiringey (PW4). It is PW4 who successfully pleaded with the members of the public not to lynch him. PW4 then took the appellant to Ololulunga police station.

17. In the light of the foregoing evidence, I find that the evidence of the complainant (PW2) was amply corroborated by that of PW1 and PW3. Although, PW3 was a child of tender years aged 13 years, her sworn evidence did not require corroboration as a matter of law according to *Kipangeny Arap Kolil v. R. (1959) EA 92.*

18. In the circumstances, I find that defence of the appellant that he was framed up was rightly rejected. I further find that his further defence of drunkenness has no merit in view of the fact that he drunk voluntarily until he was intoxicated. Intoxication is only a defence if it shows that it was caused without his consent or by a malicious or negligent act of another person. It is also a defence if by reason of intoxication, the accused person became insane temporarily during the act or omission with which the accused is charged with in terms of section 13 of the Penal Code. (Cap. 63) Laws of Kenya.

19. In the circumstances, I find that the defence of intoxication in terms of section 13 of the Penal Code is not open to him and I hereby reject it.

20. In grounds 4 and 9 the appellant has faulted the trial court both in law and fact for imposing a manifestly excessive sentence of 15 years imprisonment. In sentencing the appellant the court took into account that the appellant was a first offender and he was not remorseful. It also took into account the act was so brazen and that it was committed on a public road in broad day light. I find that these considerations were not only relevant but also proper.

21. In addition to the foregoing, I have also taken into account that the complainant (PW2) was a defenceless three year old child and that the appellant was a grandfather (Bomori in Kipsigis) of the victim. I therefore find that the sentence of 15 years imprisonment was merited. This is a first appeal. As a first appeal court according to *Okeno v. R. (1972) EA 32,* I am required to re-assess the entire evidence and make my own independent findings. I have done so and I find that the appellant was convicted on ample evidence.

22. The upshot of the foregoing is that the appellant's appeal fails and is hereby dismissed in its entirety.

Judgement delivered in open court at **Narok** this **28th** day of **September, 2017** in the presence of the appellant and Ms. Nyaroita for the respondent.

J. M. BWONWONGA

JUDGE

28/9/2017