REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 452 of 2010

WILLIAM KIMANI NDICHU…….....…….APPELLANT

VERSUS

REPUBLIC…….....…….RESPONDENT

(From the original conviction and sentence in Criminal Case No. 11012 of 2009 of the Chief Magistrate's Court at Kibera by Mr. Karanja - Senior Resident Magistrate)

JUDGMENT

WILLIAM KIMANI NDICHU, the appellant herein was convicted for 3 offences, as follows;

(a) Having unnatural carnal knowledge of a young boy, against the order of nature **contrary to Section 11 (1) of the Sexual Offences Act;**

(b) Defilement, **contrary to Section 8 (1) (3) of the Sexual Offences Act;** and

(c) Housebreaking **contrary to Section 304 (1)** and Stealing **contrary to Section 279 (b) of the Penal Code.**

For the offence of having unnatural carnal knowledge of the young boy, he was imprisoned for 15 years: for the offence of Defilement, he was imprisoned for 20 years; and for the offences of Housebreaking and theft he was jailed for 3 years.

The learned trial magistrate ordered the sentences to run consecutively.

The appellant has challenged both the convictions and sentences He has raised 4 grounds in his appeal. The said 4 issues can be summarised as follows;

(i) The convictions were not based on the actual evidence that was produced in court.

(ii) The charge sheet was defective.

(iii) Essential witnesses did not testify at the trial.

(iv) The documentary evidence was not verified for authenticity.

The appellant submitted that the evidence adduced by the 10 prosecution witnesses was contradictory.

As far as he was concerned the evidence was simply same was defective because after it was amended, none of the 8 prosecution witnesses who had already testified were recalled. The appellant argued that all the witnesses should have been recalled. The failure to recall the witness is said to constitute a violation of the appellant's constitutional rights to a fair trial. Specifically, he stressed that his rights under **Article 50 (1) (2) (a) (b) (c) (h) (j) and (p) of the Constitution** were violated.

Thirdly, the evidence tendered was inconsistent and contradictory. For instance, **PW 6** said that the door was broken, yet **PW 9** said that the thief gained entry into the house by breaking through the wall, by removing iron-sheets at the back.

And whilst **PW 1** and **PW 2** said that they had been sexually assaulted, the Government Analyst **(PW 8)** and the Police doctor **(PW 5)** did not find any corroborating evidence. The appellant submitted that because the analyst found no semen or spermatozoa in the specimens obtained from the complainants, he should not have been convicted.

Furthermore, the police doctor found no injuries on the sexual organ of the girl. If anything, he found that the girl's hymen had been lost long before he examined her. Therefore, the appellant asserted that he should have been acquitted.

In conclusion, the appellant submitted that the evidence adduced could not sustain any of the convictions.

Miss Kuruga, learned state counsel, opposed the appeal. She submitted that the appellant was recognized by the 2 complainants who he assaulted sexually.

Secondly, pursuant to **Section 124 of the Evidence Act,** there was no need for corroboration in sexual offences. Therefore, I was invited to disregard the appellant's arguments to the contrary.

However, there was actual corroboration, if any was required.

Meanwhile, as relates to the offence of stealing, the respondent submitted that the appellant was found in possession of the stolen bicycle. Therefore, the conviction was sound.

On the issue of the sentences running consecutively, the respondent submitted that that was right became the offences were committed at different places and against different complainants.

Being the first appellate court, I am obliged to re-evaluate all

the evidence on record. I have done so, and have made my own conclusions whilst bearing in mind that I did not observe the witnesses when they testified.

Both **PW 1** and **PW 2** knew the appellant before the material date. Their respective families had lived on the property belonging to the appellant's father **(PW 9).** In other words, **PW 9** was the landlord to the families of **PW 1** and **PW 2.**

On 29th December 2008, the appellant persuaded **PW 1** that his mother was calling him. The appellant led **PW 1** into a forest, where he then sodomised him. The incident took place in broad daylight, and the complainant was therefore able to have an unhindered view to recognize the appellant.

The sexual assault did not occur suddenly. The appellant talked to **PW 1,** persuading him that his mother **(PW 3)** was calling him. The appellant led him up to the edge of the forest, where he grabbed **PW 1** and carried him into the forest. The appellant stuffed a handkerchief into **PW its** mouth, to stifle any attempts to shout. However, **PW 1** was still able to clearly see the appellant.

After the appellant had abused **PW 1** sexually, he forced him to go and get his mother's money from the

house. They walked together from the forest until the gate. That period granted a further opportunity for **PW 1** to see and recognize the appellant.

When Dr. Muhombe, examined **PW 1** at the Nairobi Women's Hospital, she found a minor laceration on his anal orifice.

Dr. Zephania Kamau **(PW 5)** also examined **PW 1,** and found that **PW 1** had a small tear on the anus.

Thus the 2 doctors corroborated the complainant's evidence about the sexual molestation which the appellant had visited on him.

Even though none of the boys who were with **PW 1** when the appellant called him, testified I find that they were not essential witnesses. I say so because there is no gap in the prosecution case which any of the boys would have been required to fill in.

In relation to **PW 2,** she said that the appellant asked her to accompany him to a farm, where they were to collect some bananas. He then led her into a forest, where he removed all her clothes. He then defiled her. The incident took place at about 2.00p.m. It was broad daylight.

The appellant did not conceal his identity at all. Therefore, the complainant did recognize him positively.

When Dr. Kamau examined **PW 2,** he found that there were no injuries to her sexual organ. However, the girl's hymen was not there. According to the doctor, the loss of the hymen was not a recent happening.

In order to appreciate that statement, it must be borne in mind that the doctor examined **PW 2** on 20th April 2009. Therefore, because the complainant was defiled on 29th December 2008, it is clear why the doctor said that the occurrence was not recent.

Dr. Muhombe **(PW 7)** examined **PW 2** on 2nd January 2009. That was about 3 days after the incident. **PW 7** found that **PW 2** had a ***"fresh hymenal tear at the 2 O'clock position."***

At the time **PW 7** examined **PW 2,** the girl also had some white discharge.

In effect, the medical evidence corroborated the testimony of the complainant. Therefore, there is no doubt at all that **PW 2** was defiled, and that the person who committed the offence was the appellant.

In the light of the overwhelming evidence, the appellant's defence was simply that he knew nothing about the allegations made against him. The defence was, correctly, described by the trial court, as a bare denial.

Even as regards the offence of breaking into the house of **PW 6,** and stealing therefrom, the appellant did not say anything in his defence. Of course, he had no obligation to say anything.

He could have chosen to remain silent. The onus was on the prosecution to prove that he was guilty.

Later, **PW 6** saw the appellant together with another young man, as they were pushing her bicycle which had been stolen from her house. At that point, the appellant ran off, leaving the young man with the bicycle.

The young man believed that the bicycle belonged to the father of the appellant. That is why he did not run away. In contrast, the appellant, who knew that the bicycle belonged to **PW 6,** ran away. His conduct shows that he not only knew that he had come by the bicycle unlawfully, but also that the bicycle belonged to **PW 6,** who had just seen him with it.

But was **PW 6's** house broken into through the removal of iron sheets at the back or through the door and the latch?

PW 9 said that iron sheets were removed from the back, whilst **PW 6** said that her door (including the latch) was broken.

It is therefore uncertain about what part of the complainant's house was broken into. And nobody saw the appellant breaking into the house. The Investigating Officer **(PW 10)** did not shed any light on the issue of the part of the house which was broken.

But, all the evidence shows that the appellant was in possession of the stolen bicycle. **PW 6** saw him with it. When the Investigating Officer questioned him about the bicycle, the appellant said that he was taking the bicycle to replace his father's bicycle which had been stolen.

And the appellant's father also questioned him. He told the father that he was returning the bicycle which he had taken from the father, earlier. But the bicycle he was "returning" to his father **(PW 9)** was not the one belonging to **PW 9.**

Clearly, therefore, the appellant was arrested in possession of the complainant's stolen bicycle. His only explanation for having it is that he was returning it to his father, to replace the father's stolen bicycle. That explanation did not meet the legal requirement that could exonerate the appellant from the doctrine of recent possession.

He was in possession of a bicycle which had been recently stolen from **PW 6.** He did not offer any explanation about how he came to be in possession of the bicycle. Therefore, by dint of the operation of the doctrine of recent possession, the appellant was presumed to have stolen it.

The only element which remained unclear is the part of the complainant's house which was broken. For that reason, I find that although the appellant stole the bicycle of the complainant, there is no conclusive evidence of the breaking into the complainant's house. Accordingly, the conviction for the offence of Breaking into a dwelling house contrary to **section 304 (1) of the Penal Code,** is quashed.

For the offence of Stealing, **contrary to section 279 (b) of the Penal Code,** the prescribed sentence is 14 years imprisonment. The appellant was jailed for 3 years for the

offences of Housebreaking and Stealing. In the event, the sentence of 3 years imprisonment for the offence of Stealing remains lawful, even after the conviction for the offence of Housebreaking has been quashed.

In the result, the convictions and sentences on counts 1 and 2 are upheld. Secondly, the conviction for the offence of Stealing, (on count 3), is upheld, together with the sentence. The conviction for the offence of Housebreaking is quashed. There was no specific sentence handed down for that offence.

But assuming that the sentence of 3 years on count 3, was in relation, partially, to that offence, I set aside such sentence. However, this order does not affect the sentence for the offence of Stealing **contrary to Section 279 (b) of the Penal Code.** It is so held.

Dated, Signed and Delivered at Nairobi, this 26th day of November 2012.

FRED A. OCHIENG
JUDGE