REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.70 OF 2007

FRED WELISHA………….............................……………....…..APPEALLANT

VERSUS

REPUBLIC……………….............................….….………...…..RESPONDENT

[An Appeal from original conviction and sentence in Narok P.M.CR.C.NO.653/2006 by Hon S. M. Githinji,
Principal Magistrate, dated 30th day of March, 2009]

JUDGMENT

The appellant, Fred Walisha, was charged, tried and convicted of the offence of **rape** contrary to **Section 140** of the **Penal Code** and for **being illegally present in Kenya** contrary to **Section 13(2)(c)** of the **Immigration Act.**

Upon conviction, he was sentenced to 14 years imprisonment in respect of the offence of rape and 2 years for being unlawfully present in Kenya. The court ordered that the appellant be repatriated to Uganda after completing the sentences.

Being aggrieved by this, the appellant has brought this appeal arguing in the petition that the sentence of 14 years is excessive. However, in his written arguments, he has stated that the charge of rape was defective as the provision (**Section 40** of the **Penal Code**) upon which it was brought was defective; that the evidence against him was doubtful and finally that his rights under **Section 72(3)** of the **Constitution** were violated.

Counsel for the respondent conceded the appeal on the grounds that the intercourse was consensual as the complainant did not do anything to resist. Before I consider the grounds of appeal, it is necessary that I evaluate afresh the evidence on record in order to make an independent conclusion, bearing in mind that I have neither seen nor head the witnesses.

The complainant, a lady aged 18 or 19 years met the appellant as she walked home from school. After a handshake, the appellant who was a stranger to the complainant pulled the latter for about 50 meters to his house where he detained her for three days during which period he repeatedly had carnal knowledge of her.

On the third day, when the appellant went to work, the complainant escaped. At her home she explained to her parents what she had gone through in the hands of the appellant. The matter was reported to the

police, the appellant arrested and subsequently charged. Meanwhile, the complainant was examined and treated at N. E Health Centre and later at Narok District Hospital. According to **P.W.6, Stephen Talam**, a clinical officer at the hospital, he examined the complainant seventeen (17) days after the alleged rape. He observed that the complainant's hymen had been broken, bruises on the labia minora and majora, pus and spermatozoa in the vagina as well as dry blood stain on the thigh.

In his defence, the appellant stated that he had been framed up by the complainant and her family because he is Ugandan. That he was arrested as he was preparing a meal in his house.

The learned trial magistrate was persuaded by the prosecution evidence. He found the appellant guilty of the two counts and sentenced him as indicated in the previous paragraph.

The sole question in this appeal is whether, from the prosecution evidence, the offence of rape was proved. The appellant has also submitted that the charge under **Section 140** of the **Penal Code** was defective as that section had been repealed by the **Sexual Offences Act**. The offence in question is alleged to have been committed on 2nd June, 2006 while the **Sexual Offences Act** came into effect on 21st July, 2006. The charge was properly brought under the Penal Code. That disposes that ground.

I turn to the evidence. The only witness to the rape was the complainant herself. The learned trial magistrate who saw her testify observed as follows:

"The complainant in his case, who to me appeared to be of low intelligence, to a point where she may fit the description of being mentally retarded, which may explain why she was in class five though an adult, gave a lengthy and fairly consistent evidence."

The trial magistrate further found that the investigations were incomplete. For instance, he noted that the blood stained pant alleged to belong to the appellant was not subjected to a forensic analysis; that a crucial witness by the name Moses was not called to testify. The magistrate then concluded that:

"His failure to cover these areas, in such a serious offence is a clear sign of irresponsibility. However, bearing that in mind, I have the duty to consider whether the adduced evidence established the offences against the accused beyond reasonable doubt. The girl's evidence though lacks corroboration in many areas, is consistent and believable…………..... ....
It may appear from her evidence that she did not put in enough resistance for the three days she was held by the accused and that she never made enough efforts to escape especially for the times she was left in the house alone, or even try to seek help from the said Moses to escape."

I fail to appreciate how the learned magistrate could find so many faults on the complainant and generally in the prosecution evidence and still be persuaded by such evidence.

On my part, I find the evidence of the complainant incredible. She spent three nights with the appellant who would go to work during the day and return in the evening yet she made no efforts to escape or alert neighbours or passers-by. She explained that the main door was always locked from outside. She did not even scream. It is equally strange that Moses who was a house mate of the appellant temporarily moved out during the period in question but would occasionally come to the house to bring water to the complainant. She never complained to Moses. Moses himself was not called to testify.

The other issue is with regard to the medical evidence. The complainant was first treated at Nairagie Enkare Health Centre and 17 days later at Narok District Hospital. The evidence relating to the treatment at Narok District Hospital was not useful. Indeed it suggested that the complainant had been raped after the alleged incident with the appellant. She still had dry blood stains on her thighs, 17 days later. Spermatozoa could still be traced in her private parts.

I come to the conclusion that the offence of rape was not proved. If there was any sexual intercourse, then it was consensual. The appeal against conviction and sentence in respect of the first count (**Rape**) is allowed, the conviction quashed and sentence set aside. The appeal against the 2nd count (**being unlawfully present in Kenya** fails and is dismissed. The order for repatriation after the two (2) years' sentence remains in force.

Dated, Delivered and Signed at Nakuru this 21st day of February, 2011.

W. OUKO
JUDGE