

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 192 of 2008

WILSON KAMAU WAMBUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant Wilson Kamau Wambui was charged with the offence of defilement of a girl contrary to section 145(1) of the Penal Code. The particulars of the offence stated that, the appellant on the 7th day of December, 2004 at [*particulars with held pursuant to section 76(5) of the Children Act 2001*] within Central Province, had unlawful carnal knowledge of M. W. G a girl under the age of fifteen years.

The appellant's co-accused was charged with the offence of procurement contrary to section 147(a) of the Penal Code. The particulars of the offence stated that on the 7th day of December, 2004 at [*particulars with held pursuant to section 76(5) of the Children Act 2001*] within Central Province procured M. W. G. a girl under the age of sixteen years to have unlawful carnal connexion with another person namely Wilson Kamau Wambui.

The appellant pleaded not guilty and after the trial he was convicted and sentence to seven (7) years imprisonment. He is now dissatisfied with the conviction and sentence. During the hearing of this appeal he pursued the appeal against the sentence on the grounds that since incarceration he has reflected on the offence committed and realised his mistakes. He has also served a substantial portion of the sentence within which time he has learnt carpentry and wishes to be released so that he can contribute to the nation's well-being. Counsel for State left the matter on mitigation on sentence to the court to determine.

This being a first appeal this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction. In so doing this court should bear in mind that it never saw or heard the witnesses and give due allowance for that. I now wish to set out albeit briefly, the evidence that was before the trial court the basis of the conviction and sentence of the appellant.

M .W .G [PW1] testified that she had gone to visit Consolata Wambui Murage who was the 2nd accused person before the trial magistrate. Consolata requested the complainant to accompany her to the house of the appellant so that she can collect her money from the appellant. However upon reaching the house of the appellant, Consolata left and closed the door from outside leaving the complainant with the appellant who defiled her throughout the night of 16th December 2004. The complainant testified that she could not scream because she feared the appellant, and she was a stranger in that area.

The following day, the appellant left the complainant in the house, that is when she managed to escape to the home of Consolata. The complainant washed herself and the clothes she was wearing. She testified that Consolata refused to release her clothes so she could not go to her parents home. After sometime she was able to find her way to the home of her aunt who lived within the same area. That is where she was found by her parents F. W. G. PW2 and **E. G. M. PW3**. The complainant told her parents what had happened. The matter was reported to the Police. The appellant and the 2nd accused person, Consolata Wambui Murage were arrested.

Put on his defence the appellant admitted that he was living together with the complainant as a couple. The complainant was brought to his house on 7th December 2004 by the 2nd accused person who was the appellant's distant relative. He contended that they agreed with complainant that they would spend the night. However, when the appellant went to work the following day, on his return, he did not find the complainant at home. After two weeks he was summoned by the Police at Oljororok Police Station and charged with the present offence. The 2nd accused person in her defence contended that the complainant requested her to escort her to her husband's house who is the appellant. The 2nd accused person merely agreed to the complainant's request.

After evaluating the above evidence, the trial court found that there was no dispute that the complainant who was under the age of sixteen (16) years had spent the night with the appellant who had carnal knowledge of her. The trial court further found that the complainant was under the age of sixteen (16) years and she had no capacity to consent to the sexual intercourse thus the offence of defilement against the appellant was proved.

This appeal is only on sentence, the sentence prescribed by the law for this offence that the appellant was charged with, is 14 years imprisonment. The sentence of (7) seven years is extremely lenient. I find no justification for interfering with the discretion of the learned trial magistrate in sentencing. In any event the principles to bring to bear in mind on whether to alter the sentence were clearly articulated in the case of Ogalo s/o Owuor [1954] E.A.C.A at page 270 where the Court of Appeal held as follows: -

“The court does not alter a sentence on a mere ground that if the member of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless it is evident that the judge acted upon some wrong principle or overlooked some material facts if the sentence is manifestly excessive in view of the circumstances of the case.”

Accordingly I find no merit in this appeal. The decision of the trial court and sentence is upheld. The appeal is dismissed.

Judgment read and signed on 29th day of January 2009

M. KOOME

JUDGE