



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 161 OF 2011

(An Appeal arising out of the conviction and sentence of Hon. T. Ngugi - PM delivered on 14th June 2011 in Makadara CMC. CR. Case No.2431 of 2007)

WILSON WAFULA SIMIYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Wilson Wafula Simiyu was charged with **committing an unnatural offence** contrary to **Section 162(a)** of the **Penal Code**. The particulars of the offence were that on 20th May 2007 at Mathare Area in Nairobi County, the Appellant had carnal knowledge of EN (the complainant) against the order of nature. He was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant unlawfully and intentionally committed an unlawful act with the complainant by touching her private parts. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged of the main count and sentenced to serve eighteen (18) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for relying on fabricated evidence of the complainant to convict him. He further faulted the trial court for convicting him on insufficient evidence. Lastly, he faulted the trial court for failing to consider his plausible defence. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant was unrepresented. The Learned State Counsel, Ms Sigei represented the State. The Appellant presented his written submissions to the court which can be summarized thus:

The Appellant submitted that the trial court relied on fabricated evidence of the complainant. He argued that the complainant was told by a group of women to implicate him and that is why the complainant pointed at the Appellant while in the dock. He contended that there was no sufficient evidence to warrant his conviction. He averred that no witness was called by the prosecution to confirm that he was indeed the one that committed the offence. Further, he stated that the doctors who testified at the trial court gave different reports with regards to the alleged offence. He made submission to the effect that there was no medical report linking him to the alleged offence. Finally, he urged the court to consider the period he had served in prison before and after being sentenced to serve the custodial sentence.

Learned Counsel for the State, Ms. Sigei opposed the Appellant's appeal. She submitted that the Appellant sexually assaulted the complainant, a child of nine (9) years. She contended that the minimum sentence for the offence of **committing an unnatural act** under **Section 162(a)** of the **Penal Code** was fourteen (14) years, therefore the eighteen (18) years imprisonment was well within the law. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses and by the defence before the trial court, so as to arrive at its independent determination on whether or not to uphold the conviction of the Appellant. In so doing, the court is mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot give an opinion as regarding the demeanour of the said witnesses (see **Okeno -vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by the court is whether the prosecution established a case for this court to convict the Appellant on the main charge of **committing unnatural act** contrary to **Section 162(a)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

The facts of the case are as discerned from the proceedings of the trial court is as hereunder: the complainant in this case, PW1, EN, was at the time a child aged (nine) 9 years. She was a Standard two pupil at [Particulars Withheld] Mixed Primary School in [Particulars Withheld].

According to the complainant's testimony, on 20th May 2007, she had gone to visit her grandparents in Mathari. She testified that on the day in question, she was on her way from the toilet when she met the Appellant. She narrated that the Appellant took her to his house, removed her clothes, placed her on his bed and then placed his penis inside her vagina and later into her anus. She felt pain. A certain woman by the name Muthoni (who however did not testify in the case) knocked the door from outside, as it had been locked from the inside. The Appellant refused to open the door in the first instance. Muthoni knocked for the second time, that's when the Appellant opened the door. Muthoni inquired why the Appellant was with the complainant in his bed. In response, the Appellant told Muthoni that the complainant was left under his care by her mother. Muthoni demanded that he should let the child go. Muthoni then reported the incident to the complainant's mother, who took the complainant to the hospital for examination and treatment. She was later taken to the police station to record a statement

PW2, P W testified that on the day in question, she had gone to buy vegetables. When she returned, Muthoni told her that she found the complainant in the Appellant's house. Upon inquiry from the complainant, the complainant told PW2 that the Appellant sexually assaulted her. When PW2 interrogated the Appellant, he denied having committed the alleged offence. She took the complainant to Nairobi Women's Hospital where it was established that the complainant's anus had a tear. The Appellant had accompanied the complainant and PW2 to the hospital. Thereafter, the Appellant was escorted by Security guards from Nairobi Women's Hospital to Pangani Police Station. At Pangani Police Station, he was arrested and detained for further investigations.

PW3, Ketra Muhombe attached at Nairobi Women's Hospital testified that she examined the complainant on 22nd May 2007. She noted that there was no injury on the genitalia, anal region had reddened and had a sphincter torn and minor bruises. She prepared a medical report on the same which she produced in court as **Prosecution's Exhibit No.1**. PW4, Cyrus Langat attached at Pangani Police Station testified that he arrested the Appellant on 22nd May 2007. PW5, Dr. Zephaniah Kamau attached at Police Surgery testified that he examined the complainant on 23rd May 2007. He recorded that the hymen was absent and on the vaginal area, there was a bruise at 9 O'clock and a tear at the 12 O'clock position. He prepared the P3 form which he produced as **Prosecution's Exhibit No.2**. Further, he examined the Appellant on the same day, his genitalia were normal. He produced the Appellant's P3 form as **Prosecution's Exhibit No.3**. PW6, Ruth Mutua attached at International Life House Police Post was the investigating officer in this case. She charged the Appellant with the offence of **committing an unnatural act** contrary to **Section 162(a)** of the **Penal Code** after concluding her investigations.

When the Appellant was put on his defence, he denied committing the offence. He told the court that he was framed by his wife and PW2. He pleaded his innocence.

In the present appeal, the Appellant submitted that the prosecution did not prove its case to the required standard of proof beyond any reasonable doubt. He averred that the medical report did not prove that he was involved in the alleged offence. PW3 testified that the anal region had a tear, minor bruises and it had reddened. PW5 recorded that the hymen of the complainant was missing. The evidence of PW3 and PW5 confirmed that indeed the complainant was sexually assaulted. Penetration was established to the required standard of proof. As to the identity of the Appellant, the complainant testified that it was the Appellant who sexually assaulted her. He was well known to her. The Appellant was a neighbour to the complainant's grandparents. The evidence of the complainant was corroborated by that of the neighbour who found the complainant in the Appellant's house and by the medical report produced by PW3 and the P3 form produced by PW5. The complainant was found in the house of the Appellant in circumstances that clearly pointed to the fact that he committed the offence.

The evidence on record clearly shows that the trial court considered the Appellant's defence before reaching its decision.

This court is of the view that the defence put forward by the Appellant does not dent the otherwise strong cogent and culpatory evidence that was adduced by the prosecution witnesses connecting him with the offence. His culpability was established to the required standard of proof beyond any reasonable doubt. The contention by the Appellant that he was framed by his wife and PW2 has no basis. His conviction therefore lacks merit and is hereby dismissed.

As for the sentence, the offence carries a maximum imprisonment of twenty one (21) years. In the present case, the Appellant was sentenced to serve eighteen (18) years imprisonment. The sentence is therefore legal. The appeal against sentence lacks merit and is hereby dismissed.

DATED AT NAIROBI THIS 10TH DAY OF JULY 2018

L. KIMARU

JUDGE