



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT VOI
CRIMINAL APPEAL NO. 40 OF 2014

JOSEPH MWAMBURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being appeal from original conviction and sentence in Criminal

Case No. 116 of 2011 made on 29th April 2011 by the Senior Resident

Magistrate's Court at Wundanyi (the Hon. M. Chesang (Mrs.), DM II)]

RULING

Introduction

1. The appellant was on 20th February 2011 charged in Senior Resident Magistrate's Court at Wundanyi Criminal Case No. 116 of 2011 for the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that –

“PARTICULARS OF OFFENCE: JOSEPH MWAMBURI - On the 16th day of February, 2011 at Wesu Market in Wundanyi location within Taita Taveta County willfully and unlawfully assaulted Dorcas Miguro thereby occasioning her actual bodily harm.”

Upon hearing, he was convicted and sentenced to imprisonment for 2 years on 29th April 2011 by the trial court (Hon. M. Chesang, Mrs. DM II.)

2. The appellant was on the same date charge in Senior Resident Magistrate's Court at Wundanyi Criminal case NO. 113 of 2011 for the offence of unnatural offence contrary to section 162 (2) of the Penal Code. The particulars of the Offence were stated as follows:

Particulars of Offence: Joseph Mwamburi Kapanga: On diverse days of 16th and 18th February 2011 at unknown time at [Particulars withheld] market in Wundanyi location within Taita-Taveta had carnal knowledge of D K K against the order of nature.

3. Midstream through the hearing in Criminal Case No. 113 of 2011 after two witnesses - PW1 (the complainant father to the appellant) and PW2 (sister to the appellant) - had testified, the appellant changed his plea and was convicted on his own plea of guilty and sentenced to imprisonment for 10 years

on 11th May 2011 by the trial court (Hon. Orenge K. I. RM).

The Appeals

4. It would appear that although in seeking to appeal out of time the petitioner filed '*Petition of Appeal*' dated 28th May 2012 filed through the Officer in Charge Manyani Maximum Prison against both '*conviction and sentence of unnatural offence c/sec 162(a) PC*', the reference in the application to the two lower court files Criminal Cases Nos. 113 of 2011 and 116 of 2011 may have caused a confusion as to the appeal intended to be filed. Records on the file show that the High Court registry upon admission of appeal out of time by Odero, J. on 10.9.2012 then called for both the files from the trial court.

5. Upon being supplied with the records of the two files, the appellant who was unrepresented set out as his grounds of appeal in a document entitled Application for retrial in Cri Case NO. 116 of 2011 at Wundanyi by Hon. M. Chesang (Mrs) District Magistrate II on 29th April 2011, vide Mr. Joseph Mwamburi Kapanga. Having been sentenced to serve 2 years for the offence of grievous harm, I opt to apply my application for a retrial with the following grounds: [grounds set out].

6. During the hearing of the appeal, the appellant relied on the written grounds of appeal while, Mr. Sirima, Counsel for the Director of Public Prosecution (DPP) made oral submissions in response thereto, and judgment was reserved.

7. As the Court prepared for the judgment in this case, it became apparent that there was no appeal from the decision of the court in Criminal case no. 116 of 2011 on the conviction and sentence for assault causing actual bodily harm. The appeal was against the decision of the trial court in criminal case no. 113 of 2011 in convicting the appellant for unnatural offence and sentencing him to imprisonment for 10 years.

8. The two files were related somewhat and the confusion might have been caused by the fact that the conviction in one file Criminal Case No. 116 of 2011 was used as record of previous conviction in the other file Criminal Case No. 113 of 2011. The criminal offences charged in the tow files were moreover part of the same transaction in which the appellant was accused of beating his mother in the criminal case no. 116 of 2011 and sodomising the father in criminal case no. 113 of 2011. But, clearly, other than the reference to the court file in the application for leave to appeal, the intended appeal was as stated therein against the conviction and sentence for unnatural offence contrary to section 162 (a) of the Penal Code which is the offence charged under Criminal Case NO. 113 of 2011. I therefore hold that there was no appeal before the court with regard to the charge conviction and sentence in Criminal Case No. 116 of 2011 and the application or appeal by the appellant seeking retrial in criminal case no. 116 of 2011 is not properly founded and the same is rejected.

9. Indeed, at the time the 'appeal' was argued before the court on 16th April 2015, the appellant would have served his sentence of two years since 29th April 2011 over two years earlier, and the prayer for retrial could not arise.

Orders

10. Having found that there was no appeal with regard to criminal case no 116 of 2011 against conviction and sentence for assault and that the appeal was in fact against the conviction and sentence for unnatural offence in Criminal Case No. 113 of 2011, I would direct the appeal be fixed for hearing with notice to the parties for the hearing of appeal from the decision of the trial court in Wundanyi Senior Resident Magistrate's Court Criminal Case No. 113 of 2011.

DATED AND DELIVERED THIS 9TH DAY OF JULY 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Appellant in person

Ms. Karani for the Respondent

Ms. Linda Court Assistant.