REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 200 OF 2010

WILSON MUGAMBI NJERU…… APPELLANT

VERSUS

REPUBLIC .....PROSECUTOR

From original conviction and sentence in Criminal Case No.1361 of 2009 at the Chief Magistrate's Court Embu by Hon. E.K. NYUTU – SRM on 10/12/2010

J U D G M E N T

WILSON MUGAMBI NJERU the Appellant herein was charged and convicted of the offence of Sexual Assault contrary to section 5(1) (b) of the Sexual Offences Act No.3 of 2006.

The particulars as stated in the charge sheet were as follows;

WILSON MUGAMBI NJERU: On the 10th day of September 2009 in Embu District within the Eastern Province intentionally and unlawfully sexually assaulted AMN a boy aged 15 years.

He was sentenced to fifteen (15) years imprisonment upon conviction. He then filed this appeal against both conviction and sentence raising the following grounds;

1. ***That the learned trial Magistrate erred in point of law and fact by not considering that the Appellant's constitutional rights were violated by being detained in police custody for more than 24 hours contrary to the provision of the constitution of the day.***
2. ***That the learned trial Magistrate did not consider that the prosecution did not explain the reason for the illegality stated in ground one.***
3. ***That the learned trial Magistrate erred in law by convicting the Appellant relying on a single witness evidence.***
4. ***That the learned trial Magistrate ignored or merely pretended not to see that the witnesses testified only hearsay and not what they themselves witnessed.***
5. ***That the learned trial Magistrate erred in both points of law and fact by not considering***

that the Appellant was not placed on medical checkup to prove his involvement in the said act.

6. ***That the learned trial Magistrate did not consider the Appellant's defence which was plain truth and that he has no knowledge of court matters.***

The facts of the case are that PW1 then aged fifteen (15) years left home for his grandmother's home on 10/09/2009 evening. The reason was that he had feared being beaten by his father for failing to account for shs.100/= given to him by his father to pay for tuition fee. On the way he met the Appellant who told him it was not safe to walk at night. He offered him accommodation at his house. He had known the Appellant before as a conductor. While asleep the Appellant woke him up at 1.00am and ordered him to remove his trouser or else he would kill him. He was holding a knife and the boy feared. He removed his trouser and the Appellant had sex with him through the anus. He felt a lot of pain. The next morning they boarded a motor vehicle with the Appellant and he was dropped at a tea collection Centre. When his sister passed on her way to school he asked her how the father was and he was told he was okay. He went to Manyatta market where he stayed. PW2 came there and he told him what the Appellant had done to him. PW2 took him home and reported the incident to his mother. PW1 repeated the same report to his mother. The boy's father was informed and that's how the Appellant was arrested. PW1 was treated at Embu Provincial General Hospital. Dr. Julia M. Ndawa (PW4) produced a P3 form (EXB1) in respect of PW1. The report confirmed that the boy had been sexually assaulted through the anus.

In his unsworn defence the Appellant denied the charge. He stated that on 16/8/2009 PW3 and her husband had been passengers in his taxi when they claimed he had taken their bag and he would pay. So that's why they had framed him.

When the appeal came for hearing the Appellant presented the Court with written submissions in which he had expounded on his grounds of appeal and even raised the issue of a defective charge sheet. The learned State Counsel M/s Ing'ahizu opposed the appeal saying the evidence was overwhelming.

This is a first appeal and this Court has the duty to reconsider and reevaluate the evidence on record and arrive at its own conclusion. The Court of Appeal in the case of **MWANGI –V- REPUBLIC [2004]2 KLR 28** held thus;

1. ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate Court's own decision on the evidence.***
2. ***The first appellate Court must itself weigh the conflicting evidence and draw its own conclusions.***
3. ***It is not the function of the first appellate Court merely to scrutinize the evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.***

Being guided by the above authority I have reconsidered the evidence on record. I have also considered submissions by the Appellant and the learned State Counsel plus the grounds of appeal. On the 1st ground of appeal the Appellant states that he was held in prison for over 24 hours. He has not indicated what day of the week the 11th September 2009 was. The provisions of the 2010 Constitution do not however apply to those dates he has cited. In any event if he is very certain that those quoted dates did

not coincide with a weekend he is at liberty to file a suit for compensation for the violation of his rights.

He has also submitted that he should have been charged with the offence of committing an unnatural offence. This is not correct as the said issue of an unnatural offence was under the Penal Code which was repealed with the enactment of the Sexual Offences Act No.3 of 2006. I now wish to consolidate grounds number 3-6 of his appeal and deal with the issue of the evidence adduced. Section 124 of the Evidence Act provides;

"Corroboration required in criminal cases Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him".

The learned trial Magistrate addressed this issue in her Judgment. She was satisfied with the evidence of PW1. The boy reported the incident at the earliest opportunity to PW2. He was immediately taken to the hospital. The medical evidence (PW4) and the P3 (EXB1) support the complain of PW1. PW1 knew the Appellant well and even gave out his name and what he does for a living. Even the Appellant confirmed the he does taxi business for a living. The learned trial Magistrate in her Judgment also addressed his defence. She considered it and dismissed it which I also do.

Upon my own re-evaluation of the evidence I do find that the learned trial Magistrate analysed the evidence well and arrived at the correct decision. It is evident that PW1 was sexually assaulted through the anus and the person who did this was the Appellant. The sentence he meted out to him is lawful and well befitting the offence committed.

I have no reason to make me interfere with both the conviction and sentence. The result is that the appeal is dismissed.

Right of appeal explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 26TH DAY OF SEPTEMBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ingahizu for Prosecutor

Appellant

Njue – C/c

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 3.0 Unported License, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions. Read our Privacy Policy | Disclaimer