



REPUBLIC OF KENYA



KENYA LAW
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**Karuu v Republic (Criminal Appeal E004 of 2022)
[2022] KEHC 11567 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E004 OF 2022
LM NJUGUNA, J
JULY 27, 2022**

BETWEEN

SILAS MURIMI KARUU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal arising from the conviction and sentence in Criminal Case (S.O.) 6 of 2019 by Gichimu J.W. Hon. at Senior Principal Magistrate's Court at Runyenjes and delivered on 12.01.2022)

Essential Ingredients for the Offense of Trafficking in Persons for Sexual Exploitation

The court discussed the essential elements of defilement and trafficking in persons for sexual exploitation. While holding that the offence of defilement had been proved beyond reasonable doubt, the court held minor contradictions noted in the prosecution's evidence were deemed immaterial as they did not undermine the substance of the case. Regarding trafficking in persons, the prosecution had to establish that the appellant abducted the complainant with the intent of exploitation, as defined under the Counter Trafficking in Persons Act. Exploitation was broadly construed to include practices such as slavery, forced labor, sexual exploitation, and child labor. The complainant's testimony, corroborated by medical evidence, detailed her abduction, blindfolding, and subsequent defilement. The court held that the offence of trafficking also captured any involvement in the trafficking process, even without direct exploitation, provided there was intent to facilitate exploitation. The court concluded that the appellant's defense was insufficient to rebut the prosecution's evidence, leading to the upholding of both the conviction and sentence.

Reported by Moses Rotich

Criminal Law – offences – trafficking in persons for purposes of sexual exploitation – ingredients of the offence of trafficking in person for purposes of sexual exploitation - where the appellant abducted the complainant and transported her to a place where he defiled her – appellant charged with the offence of trafficking in persons for the purpose of sexual exploitation and sentenced to 30 years imprisonment – whether the prosecution proved the offence of trafficking in persons for the purpose of sexual exploitation against the appellant beyond reasonable doubt –



what were the requisite elements to prove the offence of sex trafficking – Counter-Trafficking in Persons Act, cap 61, sections 3(1)(b) and 3(5).

Criminal Law – offences – defilement – elements of the offence of defilement – where the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, tried, convicted, and sentenced to 20 years imprisonment for the offence of defilement - whether the prosecution established all the elements of the offence of defilement against the appellant – Sexual Offences Act, cap 63A, sections 8(1) and 8(3).

Brief facts

The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act, cap 63A (the Act). On the second count, he faced the charge of trafficking in persons for purposes of sexual exploitation contrary to section 3 (1) (b) as read with section 3 (5) of the Counter Trafficking in Person Act, cap 61. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

The instant appeal emanated from the conviction and sentence by the trial court wherein the appellant was sentenced to serve 20 years and 30 years in counts I and count II respectively, and which the trial court ordered should run concurrently.

The appellant contended that the trial court erred in both law and fact by convicting them on insufficient evidence and relying on contradictory and inconclusive evidence to support the conviction. Further, the trial court was faulted for disregarding the appellant’s evidence without providing cogent reasons and for failing to find that the essential ingredients of the offense of trafficking persons for sexual exploitation had not been proved to the standard required to sustain a conviction.

Issues

- i. What were the requisite elements for the offence of defilement?
- ii. What was the effect of contradictions in the prosecution’s evidence?
- iii. What were the essential ingredients for the offence of trafficking in person for purposes of sexual exploitation?

Held

1. To sustain a conviction on a charge of defilement, the prosecution had to prove three elements beyond any reasonable doubt to wit; the complainant ought to be a child, proof of penetration and the positive identification of the assailant.
2. From the perusal of the court record, the birth certificate of the complainant was produced which indicated that she was 15 years at the time of the perpetration of the alleged offence. As such, that being the case, the trial court had the discretion of sentencing the appellant to 20 years imprisonment as provided for under the Sexual Offences Act.
3. Section 2 of the Sexual Offences Act deemed penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another. PW3 testified that on examining the complainant, he found that there was soreness and redness on the complainant’s labia minora, that the hymen was torn, there was whitish discharge from the vagina and upon carrying out a lab test, sperm cells were found. The element of penetration was thus ably proved by the prosecution.
4. The material that was used to blindfold the complainant was a net and she was able to see the appellant. She testified that she sat with the appellant in the boot and the appellant was a person known to her. It was the complainant’s evidence that she saw the appellant just before her eyes and mouth were covered and that she used to see the appellant visit PW1. The appellant also confirmed that he knew the complainant well given that previously he had an intimate relationship with PW1. Therefore, the circumstances were favourable for identification. In any case, the instant case was that of recognition given that the appellant was a person well known to the complainant and the alleged events happened in the broad daylight.



5. Contradictions would usually but not necessarily lead to the evidence of a witness being rejected. The court would ignore minor contradictions unless it was of the opinion that the contradictions pointed to deliberate untruthfulness or if they did not affect the main substance of the prosecution's case. The contradictions in the prosecution's case were minor and not grave and the same were not material to its case.
6. Section 3 (1) (b) as read with section 3 (5) of the Counter Trafficking in Person Act created the offence of trafficking in persons for purposes of sexual exploitation. The prosecution bore the burden of proving beyond reasonable doubt that the ingredients of the offense were satisfied. In the instant case, it was essential for the prosecution to establish that the appellant abducted the child with the intent of exploiting them. The term "exploitation" was defined broadly to include actions such as keeping a person in a state of slavery, subjecting them to practices akin to slavery, involuntary servitude, the forcible or fraudulent use of a person for the removal of organs or body parts, armed conflict, forced labor, child labor, sexual exploitation, and child marriage.
7. The offence of trafficking in persons captured the entire trafficking continuum, and engagement in just one of these trafficking "stages" was sufficient. Therefore, different persons or groups of people could be responsible for different aspects of the trafficking crime. The offence was thus formulated in such a way as to capture the different actors along the trafficking continuum, including those who did not directly exploit the victim's labour or services, so long as they knew their action was for the purpose of exploiting or facilitating the exploitation of a person.
8. In the instant matter, the prosecution proved beyond reasonable doubt that the purpose for which the complainant was abducted was for sexual exploitation as testified by the complainant and corroborated by PW3. The record showed how the complainant was abducted, blindfolded, bundled into a motor vehicle and then transported from Gikuuri to Karurumo where the appellant defiled her.
9. The appellant's evidence was considered by the trial court, and found to have been dislodged by the the prosecution's evidence. The prosecution proved its case beyond any reasonable doubt. As such, the conviction and sentence by the trial court were upheld.

Appeal dismissed.

Orders

The conviction and sentence by the trial court were upheld.

Citations

Cases

Kenya

1. *Anjononi , Reuben Taabu & 2 others v Republic* Criminal Appeal 480, 208 and 209 of 1978; [1980] KECA 23 (KLR) - (Explained)
2. *Benard Onyandi alias Boi v Republic* Criminal Appeal 24 of 2016; [2018] KEHC 2430 (KLR) - (Mentioned)
3. *CWK v Republic* Criminal Appeal 72 of 2013; [2015] KEHC 7553 (KLR) - (Mentioned)
4. *Idah Nzisa Kikubi & another v Republic* [2021] eKLR - (Mentioned)
5. *Kagunda ,Francis Njuguna & Abdisiad Osman Abdi v Republic* Criminal Appeal 236 of 2019; [2022] KEHC 1011 (KLR) - (Explained)
6. *Muhammad Asif v Republic* Criminal Appeal 82 of 2017; [2017] KEHC 3701 (KLR) - (Explained)
7. *Mwalango Chichoro Mwanjembe v Republic* Criminal Appeal 24 of 2015; [2016] KECA 183 (KLR) - (Explained)
8. *Mwangi v Republic* Criminal Appeal 130 of 1984; [1985] KECA 100 (KLR); [1984] KLR 595 - (Mentioned)
9. *Odhiambo v Republic* Criminal Appeal 280 of 2004; [2005] KEHC 3215 (KLR) - (Explained)



10. *Onsongo ,Edwin Nyambaso v Republic* Criminal Appeal 39 of 2014; [2016] KEHC 4738 (KLR) - (Explained)
11. *Onyango Ondeng' v Republic* Criminal Appeal 5 of 2013; [2014] KECA 523 (KLR) - (Mentioned)
12. *Stephen Nguli Mulili v Republic* Criminal Appeal 90 of 2013; [2014] KECA 408 (KLR) - (Mentioned)

United Kingdom

Woolmington v DPP [1935] AC 462 - (Mentioned)

Regional Court

Okeno v Republic 1972 EA 32 - (Explained)

Statutes

Kenya

1. Counter-Trafficking In Persons Act (cap 61) section 3(1)(b)(5)
2. Evidence Act (cap 80) section 143 - (Interpreted)
3. Sexual Offences Act (cap 63A) sections 2; 8(1)(3); 11(1) - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the same being that on February 26, 2019 between 1000hrs and 1900 hrs at Karurumo Sub Location in Embu County, intentionally and unlawfully caused your penis to penetrate the vagina of WKM a child aged 14 years.
2. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006.
3. On the second count, he faced the charge of trafficking in person for purposes of sexual exploitation contrary to section 3(1)(B) as read with section 3(5) of the *Counter Trafficking in Person Act*.
4. The particulars of the same being that on February 26, 2019, between 1000hrs and 1900hrs at Karurumo sub location in Embu County, he trafficked one WKM a minor aged 14 years by abducting her and transporting her from Karurumo to Gikuuri Market at unknown time she was subjected to sexual exploitation.
5. This appeal emanates from a conviction and sentence by the trial court wherein the appellant was sentenced to serve 20 years and 30 years in counts I and count II respectively, and which the trial court ordered should run concurrently.
6. The appellant by a petition of appeal filed on January 27, 2022 preferred an appeal against his conviction and sentence on the following grounds:
 - i) That the learned magistrate erred in both matters of law and fact by convicting the appellant on insufficient evidence.
 - ii) That the learned magistrate erred in both law and fact by relying on contradictory and inconclusive evidence to convict the appellant.
 - iii) That the learned magistrate erred in both law and fact by disregarding the appellant's evidence without giving cogent reasons.



- iv) That the learned magistrate erred in both law and fact by failing to find that the ingredients of the offence of trafficking person for sexual exploitation were not proved to sustain a conviction.
7. The appeal was canvassed by way of written submissions. The appellant argued that the prosecution's evidence was full of contradictions and the same dealt a blow to his conviction and sentence. That the prosecution did not discharge the burden of proof given that the age of the complainant was never clearly determined and proper identification of the alleged perpetrator was never conclusively determined given that from the testimony of the complainant, she was categorical that she was blindfolded and therefore, could not have properly identified him as the perpetrator of the offence herein. That the complainant had testified that she was aged 15 years while PW4 stated that the complainant was 14 years instead. He relied on the case of *Odhiambo v Republic* CR Appeal No 280 of 2004 eKLR.
8. The respondent did not file submissions in the appeal.
9. I have considered the petition of appeal, the submissions by the appellant and the record of the trial court in general and in my view, the only issue for determination is; if the appeal herein has merits. The duty of the first appellate court is to re-evaluate the evidence afresh and draw its own independent conclusions of course bearing in mind that it neither saw nor heard the witnesses and give due regard and allowance for that. This duty was espoused in the case of *Okeno v Rep* 1972 EA 32. The Court of Appeal in that case stated that;
- “An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala v R* [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some 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 act that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] EA 424.”
10. The appellant was charged with two counts; defilement contrary to section 8(1) as read with section 8(3) and an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* 3 of 2006. Accordingly, he was found guilty of the main charge of the offence of defilement. To sustain a conviction on a charge of defilement, the prosecution has to prove three elements beyond any reasonable doubt to wit; the complainant must be a child, proof of penetration and the positive identification of the assailant [See the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No 72 of 2013].
11. The sentence under section 8(3) of the *Sexual Offences Act* states that:
- A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
12. The appellant has contended that the age of the complainant was not clearly determined by the prosecution given that, the complainant testified that she was aged 15 years while PW4 on the other hand, stated that the complainant was aged 14 years.



13. In the case of *Edwin Nyambaso Onsongo v Republic* [2002] eKLR, in which the court cited the case of *Mwolongo Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal No 24 of 2015 (UR) the Court of Appeal held that:
-the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents, guardian or medical evidence among other forms of proof.....
14. From the perusal of the court record, the birth certificate of the complainant was produced which indicates that she was 15 years at the time of the perpetration of the alleged offence. As such, that being the case, the trial court had the discretion of sentencing him to 20 years imprisonment as provided for under the *Sexual Offences Act*.
15. In regards to whether there was an act of penetration, section 2 of the *Sexual Offences Act* defines penetration to mean the ‘partial’ or complete insertion of the genital organs of a person into the genital organs of another. The Court of Appeal in the case of *Erick Onyango Ondeng v Republic* (2014) eKLR was of the view that;
- “In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”
16. The complainant testified that on the material day, she was sent home because she had not paid school fees and on reaching home, the guardian (PW1) told her to remove her clothes and sweep the compound but she later decided to go back to school to collect her school bag. On her way from school she met with her friend, one MW, who asked her to wait for her as she picked her bag. That as she was waiting for her at the road side, a motor vehicle christened “City Boy” came and stopped near her and all over sudden, her eyes and mouth were covered. She saw one Silas Murimi who held her and pushed her to the back of the motor vehicle. He covered her using a net and she could see him. That she used to see Silas driving the motor vehicle and he used to visit her guardian (PW1).
17. That the appellant sat with her at the boot in the motor vehicle which was being driven by another person and had one other passenger. The vehicle took a turn at the Catholic Church, into a bushy area. The appellant then removed her clothes and her underpants, opened the trouser zip and inserted his penis into her vagina. She could not scream as it was in the bush and her mouth was still covered. She lost consciousness and later found herself at Gikuuri market without clothes where she was assisted by members of the public who took her to Runyenjes police station. She was later taken to Runyenjes General Hospital.
18. PW3 testified that on examining the complainant, he found that there was soreness and redness on the complainant’s labia minora; that the hymen was torn at 3 o’clock, 9 o’clock and 5 o’clock; there was whitish discharge from the vagina and upon carrying out a lab test, sperm cells were found. It was his evidence that he saw the complainant one day after the incident and to him, the degree of injury was that of harm. Upon cross examination, he stated that the child had taken a bath prior to the examination. He formed the opinion that there was a possibility that the minor had been defiled. In that regard, the element of penetration was thus ably proved by the prosecution.
19. On identification, the complainant testified that the material that was used to blind fold her was a net and she could be able to see the appellant. That she sat with the appellant in the boot and further that, this was a person who was known to her. It was her evidence that she saw the appellant just before her eyes and mouth were covered. It was also her evidence that she used to see the appellant visit



PW1; and equally, the appellant testified that he knew the complainant well, given that previously, he had an intimate relationship with PW1. I therefore find that the circumstances were favourable for identification. In any case, this was a case of recognition and not identification given that the appellant was a person well known to the complainant and further, the alleged offence happened during broad daylight. [See the case of *Anjononi & others v Republic* [1989] KLR in which the court held;

Recognition is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.

20. The appellant has argued that the prosecution failed to discharge the burden in that its evidence was full of contradictions more so in regards to the age of the complainant.
21. On contradictions, the law is clear that contradictions will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case. [See the case of *Onyango Odeny v Republic* [2014] eKLR]. The contradictions in the prosecution's case were minor and not grave and in my view, the same were not material to the prosecution's case.
22. On the ground that the second count was never proven; the complainant's evidence was that, she was abducted, blindfolded, bundled into a motor vehicle and then transported from Gikuuri to Karurumo whereby the appellant defiled her. She stated that she identified the vehicle that carried her as that which the appellant was driving, a fact which was admitted by the appellant in his evidence after he was put on his defence. After PW1 led police officers to the appellant's house, they found it in his compound.
23. Section 3(1)(b) provides that;
' a person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbours or receives another person for the purpose of exploitation by means of abduction.
Section 3(5) provides that;
" A person who traffics another person, for the purpose of exploitation, commits an offence and is liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life."
24. For the offence to be proved, the purpose of transporting the complainant had to be proved. The duty of proving it lay with the prosecution. [See *Stephen Nguli Mulili v R* [2014]eKLR ; *Woolmington v DPP* [1935] AC 462].
25. This court has to ask itself whether the prosecution proved its case beyond reasonable doubt based on the evidence before the trial magistrate's court. The prosecution has to satisfy the court that the ingredients of the offence have been proved beyond reasonable doubt. In this case, it was material for the prosecution to prove that the appellant abducted the child for purposes of exploiting the child. The definition of exploitation includes keeping a person in a state of slavery; subjecting a person to practices similar to slavery; involuntary servitude; forcible or fraudulent use of any human being for removal of organs or body parts; forcible or fraudulent use of any human being to take part in armed conflict; forced labour; child labour; sexual exploitation; and child marriage. [See *Francis Njuguna Kagunda & another v Republic* [2022] eKLR].



26. Although there were no eye witnesses, the complainant and PW3 from their testimonies confirmed the facts. [See section 143 of the Evidence Act; and also in the case of *Mwangi v R* [1984] KLR 595 where it was stated that:

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

27. In the case of Mohammed Asif v Republic (2017) eKLR where it was held that:

“The offence of trafficking in persons captures the entire trafficking continuum, and engagement in just one of these trafficking “stages” is sufficient. Therefore different persons or groups of people may be responsible for different aspects of the trafficking crime. The offence is thus formulated in such a way as to capture the different actors along the trafficking continuum, including those who do not directly exploit the victim’s labour or services, so long as they knew their action was for the purpose of exploiting or facilitating the exploitation of a person.”

28. In the circumstances, I find that the prosecution proved beyond reasonable doubt that the purpose for which the complainant was abducted was for sexual exploitation as testified by the complainant and corroborated by PW3. The record shows how the complainant was abducted, blindfolded, bundled into a motor vehicle and then transported from Gikuuri to Karurumo whereby the appellant defiled her. [See Idah Nzisa Kikubi & another v Republic [2021] eKLR; Benard Onyandi v Republic [2018] eKLR].

29. The appellant urged this court to find that his defence was never considered by the trial court in reaching its determination but from the record, the court in its judgment, noted that the evidence adduced by the appellant was dislodged by the evidence by the prosecution given that the prosecution proved its case beyond any reasonable doubt. Therefore, in the premises, that ground equally fails.

30. From the foregoing, I find and hold that the prosecution proved its case beyond any reasonable doubt and as such, the conviction and sentence by the trial court are upheld.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JULY, 2022.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent

