



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 30 OF 2019

ALICE ANYANGO OUMA.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O.A case No. 12 of 2019 of the Principal Magistrate's Court at Oyugis by Hon. J.S Wesonga–Senior Resident Magistrate)

JUDGMENT

1. Alice Anyango Ouma, the appellant herein, was convicted for the offence of child prostitution contrary to section 15 (b) of the Sexual Offences Act No.3 of 2006.
2. The particulars of the offence were that on the 17th day of March, 2019 at Kachieng sub location in Rachuonyo South sub county of Homa Bay County intentionally procured a child namely MAO aged 14 years for sexual intercourse with an adult namely Godfrey within Sukuru Island within Mbita area.
3. The appellant was sentenced to serve 10 years imprisonment. She has appealed against both conviction and sentence.
4. The appellant was represented by the firm of P.R Ojala & Company Advocates. She raised four grounds of appeal as follows:
 - a) That the learned trial magistrate erred in law and fact in finding that the appellant committed the offence.
 - b) That the learned trial magistrate erred in law and fact by shifting the burden of proof upon the appellant.
 - c) That the learned trial magistrate based her finding on hearsay and arrived at a wrong decision in the finding the appellant guilty.
 - d) That the sentence was excessively harsh.
5. The appeal was opposed by the state through Mr. Ochengo, learned counsel on ground that the offence was proved to the required standards.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. Section 15 (b) of the Sexual Offences Act Provides as follows:

Any person who—

(b) acts as a procurer of a child for the purposes of sexual intercourse or for any form of sexual abuse or indecent exhibition or show; commits the offence of benefiting from child prostitution and is liable upon conviction to imprisonment for a term of not less than ten years.
8. In order for an offence under this subsection to be established, the following ingredients must be established:

- a) That the accused person procured the child;
- b) That as a result of procurement, the child was defiled or was sexually abused or used in indecent exhibition or show;
- c) That the victim was a child as envisaged in the Sexual offences Act.

9. Procurement has not been defined in the Sexual Offences Act. Microsoft Encarta Dictionary defines the word procure as Follows:

Procure

- 1. *transitive verb acquire something: to obtain something, especially by effort*
- 2. *transitive and intransitive verb provide prostitutes:: to provide somebody for prostitution*

10. The **Macquarie Dictionary** indicates the meaning of “procure” includes:

- a) *to effect, cause, bring about, especially by unscrupulous or indirect means or*
- b) *to obtain for the gratification of lust or purposes of prostitution.*

In Black’s Law Dictionary 10th Edition defines procurement as:

The act of persuading or inviting another, especially a woman or child, to have illicit sexual intercourse.

11. We can therefore conclude that **a procurer of a child for the purposes of sexual intercourse** is a person who induces another person to be a client of a child for sexual intercourse by means of written or oral communication or other similar means.

12. In the instant case I will address my mind to the evidence adduced and consider whether the ingredients of the offence were proved to the required standards of a criminal case.

13. The complainant in this case MAO was aged 12 years at the time of the alleged offence. A copy of her birth certificate which was produced indicated that she was born on 22nd April, 2006. The date of the offence is 17th March, 2019. She was therefore 12 years and 11 months at the time of the complained of offence. She was therefore a child both under the Children Act and the Sexual Offences Act.

14. MAO (PW2) testified how the appellant approached her on 15th March, 2019 and persuaded her to accept to be married by a man she had seen in her house. When MAO told her she was still in school, the appellant told her that school was not important. The appellant was in company of one J who was a form four candidate. When she declined, they went and returned on a Friday and asked her if she had changed her mind. The appellant still pursued her in school and sent one Joshua to call her but she refused to go.

15. On 17th March, 2019, the appellant went to their home and borrowed her mother’s (PW2’s) lesso. On the same day, her mother sent her to Oyugis to collect her jacket. She met the appellant who again implored her to accompany her but she declined. The appellant called for a taxi and forced her to enter.

16. The taxi took them to Homa Bay where they boarded a boat that took them to Sukuru Island. They went to a house where they found three men. Alice, the appellant, prepared a meal and after they had eaten, one of the men introduced himself as Godfrey and said that he needed a wife. She however told Godfrey that she was too young for marriage.

17. At about 8 p.m., the appellant, the complainant and Godfrey went to a house where they were going to sleep. The appellant excused herself to go and answer a call of nature but did not return. When she screamed upon realising that the appellant was not going to return, Godfrey threatened to throw her into the lake. Godfrey invited her to share a bed with him but she declined. She slept on the floor using a bedsheet.

18. On the following morning she saw the appellant who told her that she was leaving her with Godfrey and declined to return with her.

19. Godfrey hid her bed sheet and she had to share a bed with him where he defiled her. She later sent her mother a text message and later on the same day, the appellant called Godfrey and asked him to send her back. He gave her Kshs.500/= and sent her away. She went and found the appellant under arrest.

20. EA (PW1) is the complainant’s mother. When her daughter went missing, she went to look for her at her school. This is where she learnt that the appellant had taken her away. When she went to the appellant and asked her about it, she denied any knowledge. Later her missing daughter sent her a text message and informed her that the appellant had taken her to a place she did not know and that she was not happy. This is when she went to report to the police and the appellant was arrested.

21. Alice Anyango Ouma, the appellant, denied any involvement in the offence.

22. The proviso to section 124 of the Evidence Act states:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

The trial magistrate had evidence at her disposal that did not require any corroboration. Though it did not require corroboration, the medical evidence that confirmed that the complainant was defiled was such a corroboration.

23. The contention by the appellant that the finding by the learned trial magistrate was based on hearsay has no basis.

24. The learned trial magistrate meted out the sentence that is provided by the statute.

25. In a nutshell, the appeal lacks merit and the same is dismissed.

DELIVERED and SIGNED at Homa Bay this 24th Day of June, 2021

KIARIE WAWERU KIARIE

JUDGE