



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO. 46 OF 2019

(Appeal originating from Nyahururu CMC's Court Cr. No. 2663 of 2018 by Hon. S. N. Mwangi – SRM)

TIMOTHY KAGECHA THUKU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

On 06/12/2019, Hon. S. Mwangi SRM, convicted the appellant, Timothy Kagecha Thuku for the offence of Abduction with intent to secretly and wrongfully confine contrary to **Section 259 of the Penal Code.**

The particulars of the charge are that on the night of 3rd and 4th December, 2018 at [particulars withheld] Village, Gatimu Location in Nyandarua County, abducted MNW, a girl aged 13 years in a rental house with intent to secretly and wrongfully confine her.

Upon conviction, the appellant was sentenced to seven years imprisonment.

The appellant is dissatisfied with the judgment of the trial court and preferred this appeal citing ten grounds of appeal. The firm of Waichungo Advocate took over and filed submissions on 14/07/2020. The grounds of appeal can be condensed into two broad grounds;

- 1) That the charge of abduction was not proved to the required standard;**
- 2) That the sentence meted on the appellant was harsh and excessive.**

The appellant prays that the conviction be quashed, sentence set aside and he be set at liberty forthwith.

The appeal was opposed and Ms. Rugut, learned Counsel for the state filed submissions dated 27/07/2020.

This is a first appeal and it behoves this court to exhaustively examine all the evidence tendered before the trial court analyse it and arrive at it's own conclusions but bear in mind that it neither saw nor heard the witnesses testify. This court is guided by the decision of **Okeno vrs Republic (1972) EA 32.**

EVIDENCE:

The prosecution called a total of four witnesses in support of their case.

PW1 Anne Wambui Wanjiru a resident of Boiman, on 26/11/2018 released her three daughters, NWN (PW4), MN and FN to go and visit their grandmother at Ng'arua. She kept in touch with them daily on phone. On 02/12/2018 she was only able to talk to two of them but PW4 was not available. She was later informed that PW4 was at her aunt's place; that her grandmother went to get PW4 and beat her up for leaving home without permission and PW4 ran away. At 7.00pm of the same day, PW1 went out to try and trace PW4. PW1 received a call from somebody who said he was with PW4 at Nyahururu and required 600/- fare to take PW4 to Boiman. PW1 did not have the money and asked the person to wait. Later, when she got the money, the phone on which she had been called the man on was switched off. The Chief of Muthengera advised her to report to Oljoro Orok Police Station. Instead, she engaged the motorcycle riders to find out if they knew the person who had called her. Through M-pesa, she came to know that the caller who was with PW4 was Timothy Kagecha (the appellant). One of the riders admitted to knowing him and agreed to lead her to his house while in company of APC Maina from Kibathi AP Police Post. They knocked, at the door, then called out PW4's name and she responded from inside the house. PW1 said the house was locked from outside, they broke the door open. PW4 was removed and taken to hospital for checkup while other police officers went in search of the appellant.

PW2 APC Maina received a report from PW1 on 04/12/2018 at about 4.00am, that her daughter was missing. PW2 and PW1 went with motorcycle riders to a house where PW4 was found. According to him, the house was locked from inside. He denied that it was locked with a padlock; that PW4 told them that the appellant told her to wait there and he would be back. PW2 said that the house in which the girl was found had a bed, mattress, utensils, basin and water, eggs, cooking oil and mesh wire.

PW3 Cpl Stephen Wokabi of Oljoro Orok Police Station recalled that PW1 and the child (PW4) reported a case of Kidnapping of PW4. He interrogated witnesses and issued PW1 with a P3 form to go for checkup to establish if she was defiled. He went to the house where the girl had been kept and took photographs. He charged the appellant. He established that the room where PW4 was found had been rented by the appellant.

PW4 MNW a girl aged 14 years, recalled that on 03/12/2018, she disagreed with her grandmother because she had gone to visit her great grandmother and slept there without permission. When she reached home, her sister and aunt also beat her and she decided to go back home to her mother at Boiman. She reached Nyahururu about 5.30pm, got confused and that a motorcycle stopped where she was. The rider asked what her problem was and she explained that she was lost and he asked her to get onto the motorcycle so that he could take her to Boiman, but instead he took her to a house outside Nyahururu; that she gave her mother's number and the person talked to her but the mother did not have 500/- fare and he refused to take her; that as she washed her clothes, he locked the door with a padlock and left saying he would pick her up in the morning. Later in the night, she heard her mother's voice and responded, they broke into the house and found her.

When called upon to defend himself, the appellant opted to make an unsworn statement. He recalled that on 03/12/2018 when on his way home, near Tuzo, near the river, a girl stopped him and she asked if he could take her to Boiman stage. When he asked for money, she did not have. He asked her to call the mother. He used his phone to call the mother and informed her that he was with the daughter. The appellant asked for 600/- fare but the mother had only 100/-; that his credit on the phone got finished; that the mother then called and talked to him but the phone went off. He asked PW1 if he could get her a place to sleep and she agreed and that is when he took her where she was found. He made for her warm water to bath and left her there and went home. He told PW4 not to open for anyone and he would pick her next day. He informed his wife about the encounter but at 5.00am he was woken up by motorcycle riders, and arrested.

The appellant said he was merely helping the girl and had no ill motive had they waited till morning, he would taken her to the mother; that he could not take her to his house because it was two roomed, with one bed and a sitting room and that he did not know the girl well.

APPELLANT'S SUBMISSIONS;

Mr. Waichungo, the appellant's Counsel, submitted that the appellant's intention was to help PW4; that PW4 was not removed from her guardian by the appellant nor forced or by deceit; that she was not forced to board the motorcycle. PW4 did not raise any alarm; that later PW4 was found asleep; that the house was made of timber and PW4 never sought or cried out for help; that the house was known to be the appellants by his colleagues and his matrimonial home was also known and he did not try to conceal his whereabouts; that the appellant had not tried to sexually molest the girl; that if the appellant had failed to collect PW4 the next day as promised, then it would have been assumed that he did not intend to reunite the girl with the mother; that the appellant having called the mother had exposed himself.

As to whether or not the house was locked from inside or outside, it was argued that it was immaterial as the appellant's intentions would only have been known on the next day.

As regards sentence, it was faulted because the appellant was given the maximum sentence of 7 years yet he was a first offender; that the sentence was harsh and excessive and that if the appeal on conviction is not successful, the court should consider a non-custodial sentence.

In reply to the respondent's submissions, Ms. Rugut learned State Counsel argued that the prosecution proved its case because after the appellant called PW1, he switched off the phone and PW4 was found locked up in a house and the padlock had to be broken; that the defence corroborates the prosecution case as to the events of the day; that the appellant used deceitful means. On sentence, counsel argued that the offence is a felony and the sentence was fair.

ANALYSIS AND DETERMINATION;

The appellant was charged under **Section 259 of the Penal Code** which provides as follows;

"Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years."

Abduction is defined under **Section 256 of the Penal Code** as follows;

"Any person who by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person."

The **Black's Law Dictionary 9th Edition** defines abduction as ***"the act of leading someone away by force or fraudulent personation."***

The issues the court has to determine is whether PW4 was carried away by force or by fraudulent personation.

PW4 told the court that when she reached Nyahururu, she became confused. It was late and getting dark; that when the appellant stopped his motorcycle it is PW4 who approached him and after she explained that she was lost and needed to go to Boiman, he agreed to take her, that is when she boarded the motorcycle. PW4 requested the appellant to call the mother and he did. Although PW4 denied that the appellant did

not allow her to talk to the mother, PW1, did admit that she talked to both PW4 and the appellant when the appellant asked for Kshs.600/- as fare to Boiman which PW1 did not have. PW1 said that she later got the money but was not able to get through to the appellant's phone. The appellant has explained that his phone went off from the initial encounter between PW4 and the appellant. There is no shred of evidence that the appellant forced PW4 into going with him or used fraudulent means.

According to PW4, the appellant took her to a house where there was nobody else. PW3 said they established that the house indeed belonged to the appellant. The appellant gave PW4 water to bath, offered her food which she declined and then offered her a bed. He did not make any sinister moves or suggestions towards PW4. He did not defile PW4 neither was he indecent towards her. The appellant informed PW4 that he would come back for her the next morning. PW1 with the help of motorcycle riders and police found PW4 before the morning reached. I realize that the appellant's action of leaving PW4 in the house and not taking her to Boiman or to his matrimonial home that night raised suspicion that he may not have been upto any good.

This being a criminal trial, it was the duty of the prosecution to prove the cardinal principle of Criminal Law, that the appellant possessed *mens rea* or the intention to wrongly confine the child, PW4, beyond any reasonable doubt.

The appellant had already exposed himself by calling PW1 informing her that he was with PW4. He used his own phone to call PW1 and that is why he was easily traced. In these days of advanced technology, it was not hard to trace him through his phone as it indeed happened. The appellant took PW4 to one of his houses where PW4 was easily traced. The appellant had told PW4 that he would collect her the next morning. However, PW4 was found before then and the appellant was arrested in his matrimonial home. In my view, an intention to confine PW4 could only have been established if the appellant did not pick PW4 the next day and take her to her mother as she had intimated. The appellant has given plausible explanation for his actions on the night he found PW4 stranded. The appellant may have been a good Samaritan out to help a stranded girl. In my view, the intention to confine PW4 was not proved beyond reasonable doubt nor was fraud proved. There was suspicion on the appellant's move or action, but suspicion alone however strong, has never been a basis for a conviction.

For the above reasons, I find that the conviction was not merited and is unsafe. The appeal succeeds. The conviction is hereby quashed and the sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at NYAHURURU this 30th day of September, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms Rugut for state

Ms Wanjiru Muriithi for Appellant

Appellant present

Henry – Court Assistant