



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 79 OF 2018

BETWEEN

DORIS KEMUNTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. N.S. Lutta, SPM dated 25th January 2015 at Chief Magistrates Court at Kisii in Criminal Case No. 168 of 2016)

JUDGMENT

1. The appellant, **DORIS KEMUNTO**, was charged and convicted of the offence of trafficking in person contrary to section 3 (1) (b) as read with section 3 (5) of the Counter Trafficking in Person Act No. 8 of 2010 ("the Act"). It was alleged that on 7th May, 2013 in Kisii South District within Kisii County, fraudulently transferred VK a child aged 3 years and two months with intent to deprive SK the parent who had the lawful charge and care of the possession of the said VK.
2. According to the second count, Caren Moraa Asiago (2nd accused) was charged with trafficking in person contrary to section 3 (6) as read with section 3 (5) of the Act. The particulars were that on 7th May, 2013 in Kenyena District within Kisii County received VK a child aged 3 years two months knowing it to have been so taken with intent to deprive SK the parent who had the lawful charge of the possession of the said VK.
3. The appellant was found guilty and convicted of the offence of trafficking in person contrary to section 3 (1) (b) as read with section 3 (5) of the Act, while the 2nd accused was acquitted for lack of evidence. The appellant now appeals against conviction and sentence.
4. The appellant's case is set out in her petition of appeal, supplementary grounds of appeal and accompanying written submissions. The appellant contended that the case against her was based on hearsay. She submitted that she was prejudiced when she elected to remain silent and that a crucial witness to the case was never called to testify on her alleged confession. She further submitted that the sentence of 30 years imprisonment was excessive.
5. Counsel for the respondent, Mr. Otieno, supported the conviction and sentence. He submitted that the appellant was correctly convicted by the trial magistrate Court for trafficking in person. He submitted that Pw1 recalled that the appellant was left with the child and later, both were found missing. The missing child has never been recovered. He submitted that even though the appellant raised the issue that the alleged written confession was never produced, the evidence that she was with the child was not from the written confession and there was sufficient proof of her guilt.
6. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic [1972] EA 32***).
7. The facts emerging at the trial court were as follows. The Complainant (Pw2), the mother of the child, gave evidence that she had left the child with Pw1 in 2012 and was informed on 7th August 2013 that the child was missing. The complainant's mother (Pw1) recalled that on the afternoon of 7th May 2013, she went to Suneka and left the child in the custody of the Appellant who was her daughter in law. On returning back home she found the accused as well as the child missing. Pw1 further recalled that on 13th January 2016 the Appellant was found in Suneka and arrested. According to Pw3, the investigating officer, the appellant was brought to the station by members of the public who alleged that the accused had stolen a baby, VK in 2013. He stated that she admitted to have stolen the baby and sold it to 2nd accused.
8. The court found a prima facie case against the 1st and 2nd accused and put them on their defence. The Appellant chose to remain silent and

called no witness.

9. I will now consider the issues raised by the appeal. The Appellant elected to remain silent after being found with a case to answer and contends this led to the trial magistrate arriving at the conclusion that she did not have a cogent reason to rebut the prosecution evidence. It was her submission that the prosecution was to prove the case beyond reasonable doubt. I find that the appellant chose to remain silent willingly and has the right to do so. She did so after the provisions of section 211 of the Criminal Procedure code were explained to her on the day the court set down the case for defence hearing. The fact that she chose to remain silent in my view had no bearing in the case because the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt and not to perhaps leave some gaps to be filled by the defence of the appellant. An accused person does not assume any burden to prove his innocence. In the case of *Stephen Nguli Mulili -vs- R [2014] eKLR* the Court of Appeal made the following observations:

“On the issue of whether the prosecution discharged its burden of prove, it is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP -Vs- Woolmington (1935) UKHL where the court eloquently stated that the “golden thread” in the “web of English Common Law” is that it is the duty of the prosecution to prove its case beyond reasonable doubt.”

10. This court has to ask itself whether the prosecution proved its case beyond reasonable doubt based on the evidence before the trial magistrate court. The prosecution has to satisfy the court that the ingredients of the offence have been proved beyond reasonable doubt. In this instant 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.*

11. Pw1 testified that she left the appellant who was her daughter with the child on the 7th of May 2013 and on returning she did not find the appellant, the child too was missing. This evidence clearly shows that the child was in the custody of the appellant and that she left with the child. The appellant never returned on the material day nor the child, who has not been found to date. The appellant was arrested about 3 years later. The appellant was a person well known to Pw1. Pw2 confirmed that VK was her child and that Pw1 informed her of the disappearance her child. This child in my view has been subjected to slavery for wherever she is she has been deprived of her parental care and love. She is living with persons who are not her parents nor relations. Wherever she is she has deprived of motherly love which in my view amounts to slavery. Further section 3 (3) provides that, *the recruitment, transportation, **transfer**, harbouring or receipt of a **child for the purposes of exploitation** shall be considered “trafficking in persons” even if this does not involve any of the means set out in subsection (1) of this Act(**emphasis mine**).* The prosecution proved their case beyond reasonable doubt. The evidence adduced was sufficient even if the confession was not adduced in evidence. I therefore affirm the conviction.

12. On sentence the appellant has submitted that it is excessive. 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.* 30 years imprisonment is the minimum sentence, I have no discretion to reduce the sentence. The sentence too is affirmed. All in all I find no merit in the appeal, the appeal is dismissed.

Dated and Delivered at Kisii this 25th day of January 2019.

R.E. OUGO

JUDGE

In the presence of;

Appellant In person

Mr. Otieno for the Respondent/ State

Rael Court clerk