



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 8 OF 2018

SYLVIA OBURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No. 1072 of 2018 of the Chief Magistrate's Court at Busia by Hon. M.A Nanzushi – Senior Resident Magistrate)

JUDGMENT

1. **SYLVIA OBURA**, the appellant herein, was convicted for the offence of child prostitution contrary to section 15 (a) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence were that on diverse dates between 7th July 2018 and 10th July 2018 in BUSIA County, knowingly permitted **SA**, a child aged 16 years to remain in her house to be sexually abused by **Moses Aluku**.
3. The appellant was sentenced to serve 10 years imprisonment. She now appeals against both conviction and sentence.
4. The appellant was in person. She raised two grounds of appeal as follows:
 - a) That she pleaded guilty under coercion; and
 - b) That the sentence was harsh.
5. The state conceded the appeal through Ms. Ngari, learned counsel.
6. The facts of the prosecution case were briefly as follows:

SA was a day scholar. On 5th July 2018 she left for school at 6 a.m. but did not return home. On 7th July 2018, the appellant called the girl's mother and informed her where her daughter was. This was the basis of her arrest. She was charged with the offence.
7. The appellant pleaded not guilty. However, when the particulars were read to her, she said that the facts were true. On that basis, she was convicted and sentenced.
8. The plea was equivocal. When the charge was read to the appellant, the typed record indicates that she pleaded not guilty. I looked at the original record but try as I could, I was unable to decipher what the learned trial magistrate intended to communicate. A court of record has a duty to communicate in writing in a way anybody interacting with the record can be able to read what was written. Written communication like spoken words must be understood. Squiggles in the original record amount to a miscarriage of justice. It is time for all judicial officers and judges to consider making the record legible. If they cannot do so on their own, they must be compelled to do so. I was therefore left to rely on the interpretation of the typist.
9. A closer scrutiny of the facts that were read to the appellant one gets a very different picture from the particulars of the offence. Due to the handwriting complained hereinabove, the facts do not flow well. However, the picture that comes out is that the appellant reported to the girl's mother and informed her that Aluku intended to marry the girl. No wonder she admitted these facts. These facts do not disclose the offence that she was charged with. Section 15(a) of the Sexual Offences Act provides as follows:

Any person who—

knowingly permits any child to remain in any premises, for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or show;

For an offence to be established under this section, the prosecution must prove beyond reasonable doubt that:

- i) The accused knowingly permitted a child to remain in some premises.
- ii) The purpose of the child remaining in such premises is for the accused to cause the child to be sexually abused or participate in any form of sexual activity or in any obscene or indecent exhibition or show.

In the instant case both ingredients are lacking.

10. I find that the facts as read by the prosecution do not support the charge. Where the particulars of the offence are at variance with the charge, the accused is entitled to an acquittal. This was held in the case of **John Brown Shilenje vs. R. High Court (NBI) Criminal Appeal No 181 of 1981** (unreported)

11. From the foregoing analysis, I find that the conviction was unsafe. I quash it and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 24th Day of January, 2019

KIARIE WAWERU KIARIE

JUDGE