REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 71B OF 2017

JOHN NJENGA NJERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of 30 years imprisonment in default to a fine of Shs.30 million in respect of child trafficking contrary to section 3(5) of the Counter Trafficking in Persons Act of 2010, being the offence charged in count 2. He has also appealed against his conviction and sentence of a fine of Shs.50,000/- in default to serve 6 months imprisonment in respect to providing alcohol to an underage person contrary to section 38 (1)(2) of the Alcoholic Drinks Control Act (Cap 121A) of the Laws of Kenya, being the offence charged in count 4.

2. The appellant was acquitted on the following 4 counts namely; child trafficking (count 1), providing alcohol to an underage person (count 3) and 2 offences of defilement contrary to section 8(1)(4) of the Sexual Offences Act of 2006 being counts 5 and 6.

3. The state has supported both the conviction and sentence of the appellant.

4. The appellant was convicted on the eye witness evidence of the complainant, R.N.M. (initial of her name) who was the complainant in both counts 2 and 4. There was additional evidence of Benjamin Tum (PW 4,) who was the clinical officer and that of the Cpl Joyce Ruto (PW 7), who was the investigating officer.

5. In this court, the appellant has raised 8 grounds in his amended petition of appeal. In ground 1, the appellant has faulted the trial court both in law and fact by failing to find that the action of the appellant did not constitute exploitation as defined in the Act. In this regard, the term *"exploitation"* is defined as including but not limited to -

(a) Keeping a person in state of slavery;

(b) Subjecting a person to practices similar to slavery;

(c) Involuntary servitude

(d) Forcible or fraudulent use of any human being for removal of organs or body parts;

(e) Forcible or fraudulent use of any human being to take part in armed conflict;

(f) Forced labour;

(g) Child labour;

(h) Sexual exploitation

(i) Child marriage

(j) Forced marriage.

The appellant is charged with child trafficking in respect of the 17 years old minor for the purpose of sexual exploitation. The evidence of the complainant (PW.1) in this regard is that she lived with her parents at [Particulars Withheld] and was schooling in form 2 at [Particulars

Withheld] Girls. She further testified that they were given liberty to go to their homes, since the teachers were on strike. As a result, she went home. It is her evidence that her mother was very angry with her conduct in that regard. She then punished her by requiring her to clean (the house?). Her parents told her to follow the school programme.

6. As a result, the complainant took a matatu to Narok, where she arrived between 1 and 2 p.m. Upon arrival in Narok, the complainant, who was in company of the complainant in count 1 (MNW the initials of the complainant in count 1). When they arrived in Narok, MNW rang the appellant, who was her friend. The appellant arrived and took them to a place call K-Annex Estate into a single roomed house. The appellant then went to his place of work and returned later on. While in that house of the appellant, R.W.M. stepped out and went out to the balcony. As a result, the caretaker of that house took issues with the complainant. She was then told to get into the house. Thereafter they left that house and met the appellant's friend namely Samuel Ndungu Waweru, who was the 2nd accused in the trial court. All of them then proceeded to a club called Crystals. In that club, they took alcoholic drinks. The complainant (R.N.M) asked for *"black ice,"* while her friends took Guarana. The complainant drunk 3 bottles of black ice, while the complainant in count 1 took 2. It is her further evidence that the 2nd accused paid for her drinks, while the appellant paid for the drinks of the complainant in count 1.

7. Furthermore, the complainant found herself in the house of the 2nd accused in the morning of the next day. She found that she did not have her trousers and panty. She had pain in her abdomen and irritation in her private parts. Upon awaking up, she found that she was drunk and was in bed with Samuel Ndungu Waweru. She then suspected that she had sex with Samuel Ndungu Waweru. At about 7.00 a.m., she went to the appellant's place and found that they had woken up. She decided to rest since she had a hangover.

8. The complainant (R.N.M) continued to testify that in the evening when they went to the place of Samuel Ndungu Waweru, the latter tried to force her to have sex with him, but she resisted. Samuel Ndungu waweru asked how old she was and she said her age was 17 years. Samuel Ndungu Waweru then asked her whether she was a virgin. They then slept but she did not remove her clothes. She also testified that Samuel Ndungu Waweru did not try to touch any part of her body.

9. The complainant (R.N.M.) was taken for medical examination at Narok County Hospital. She was examined by Benjamin Tum (PW 4), who found that she was 17 years old. He also found that there was penile penetration of her private parts. He also found that her hymen was broken. Additionally, after he did a swab test, he did not see any spermatozoa in her private parts. After carrying out an HIV, Hepatitis B, pregnancy and VDRL tests, he found all of them to be in the negative. PW 4 then put in evidence the P3 form as exhibit 5.

10. In view of the foregoing medical evidence of PW 4 and the evidence of the complainant that she resisted to have sex with Samuel Ndungu Waweru, I find that sexual intercourse between Samuel Ndungu Waweru was not proved beyond reasonable doubt. The fact that PW 4 found that there was the broken hymen does not per se amount to proof that there was sexual intercourse. The hymen may have been broken by other natural courses. It is also to be remembered that the alleged sexual intercourse is said to have taken place on 6/9/2015 and the complainant was examined on 11/9/2015, which was 5 days after the alleged sexual intercourse. In the circumstances, I find that there was no proof of sexual intercourse between Samuel Ndungu Waweru and this complainant. It therefore follows that an essential element of the offence charged was not proved beyond reasonable doubt. I therefore uphold ground 1 of the appellant's amended petition of appeal.

11. Furthermore, in ground 2, the appellant has faulted the trial court both in law and fact in failing to find that the evidence of the complainant exonerated the appellant from any sexual activity. In this regard, I find that I have dealt with this ground in addressing the issue of sexual exploitation in ground 1. I therefore uphold this ground of appeal as well.

12. In ground 3, the appellant has faulted the trial court both in law and fact by failing to have an amended charge sheet by removing the name of the 2nd accused Samuel Ndungu Waweru from the charge sheet. It is the contention of the appellant that the retention of this name prejudiced the case for the appellant, who was the 1st accused in the trial court. It appears from the proceedings that the 2nd accused absconded and did not appear in court on 14/9/2015. As a result, a warrant of arrest was issued. It is desirable that the charge sheet should have been amended by removing the name of the 2nd accused from that charge sheet. However, its retention throughout the trial until its conclusion is a curable error in terms of section 382 of the Criminal Procedure Code (Cap 75) Laws of Kenya. In the circumstances, I find that this error did not occasion any prejudice to the case against the appellant. I find no merit in this ground of appeal and is hereby dismissed.

13. In ground 4, the appellant has faulted the trial court both in law and fact by failing to acquit the appellant in count 2 in the light of the acquittal of the appellant on count 1 which is similar to count 2, save that the complainants are different. The acquittal of the appellant in count 1 was based on the fact that the complainant therein was not credible. Having found that the complainant in count 1 was incredible, the acquittal of the appellant in that count was inevitable and proper. However, I have found in relation to grounds 1 and 2 that sexual intercourse was not proved. In the circumstances, I find it unnecessary to deal with this issue in count 2, a matter in regard to which I found that it was not proved.

14. In ground 5, the appellant has faulted the trial court both in law and fact by failing to find that the appellant did not have sexual intercourse with the complainant. I have already found in relation to grounds 1 and 2 that sexual intercourse between the appellant and the complainant was not proved beyond reasonable doubt. I therefore uphold this ground of appeal.

15. In ground 6, the appellant has faulted the trial court both in law and fact for convicting the appellant in count 2. For the reasons given in the foregoing paragraphs, I uphold this ground of appeal.

16. In ground 7, the appellant has faulted the trial court by misdirecting herself in convicting the appellant after finding that the 2nd accused in the trial court is the one who paid for the drinks of the complainant. The evidence of the complainant in this regard was that: *"I took 3 bottles of black ice, Njoki took 2. Njenga paid Njoki's drinks and Sam paid mine."*

It is clear from this evidence that the alcohol drinks of the complainant were paid for by Samuel Ndungu Waweru. I therefore find no merit in this ground of appeal and is hereby dismissed.

17. In ground 8, the appellant has faulted the trial court for misdirecting herself both in law and fact by not attaching the requisite weight on the evidence of the complainant in count 1, who disowned her testimony and further informed the court that she was under duress to record her police statement. In this regard, the evidence of the complainant (PW 1) in count 1 is that she denied the contents of what she told the police in her statement. As a result, she was declared a hostile witness after which she was cross examined by the prosecutor. In respect of her evidence in court, the trial court found that she was incredible and her evidence was not worthy of belief. According to *Peters v. Sunday Post Ltd (1958) EA 424*, an appeal court is generally required to defer to findings of facts based on the credibility of witnesses by the trial court. I have re-evaluated the evidence of PW 1 and I find that the trial court was entitled to find her an incredible witness. In the circumstances, I find no merit in this ground of appeal and is hereby dismissed.

18. I have reassessed the entire evidence as a first appeal court and I find that the conviction in count 2 which charged the appellant with harbouring the complainant for sexual exploitation was not proved. The offence of providing alcohol to an underage person contrary to section 28(1)(2) of the Alcoholic Drinks Control Act was proved beyond reasonable doubt.

19. In the light of the foregoing, the conviction and sentence in count 2 is hereby quashed and set aside. The conviction in count 4 is hereby upheld. As regards sentence, I find that the trial court did not conduct an inquiry as to the ability of the appellant to pay the find of Shs. 50,000/= in default 6 months imprisonment. I find from the evidence that the appellant was an employee of Naivas Supermarket. This is also clear from the evidence of Cpl Joyce Ruto who testified during the bail proceedings that the appellant was an employee of that supermarket. In the circumstances, I find that the trial court fell in error in failing to carry out an inquiry as to the ability of the appellant to pay the fine. I find from the record of proceedings and judgement that the appellant was a first offender and married with one child aged 5 years old. In those circumstances, I find that the sentence of a fine of Sh. 50,000/- in default to serve 6 months imprisonment in respect of count 4 was manifestly excessive. I therefore reduce the sentence of fine to Sh.20,000/- in default to serve 6 months imprisonment in count 4.

Judgment delivered in open court this **17th** day of January **2018** in the presence of the Appellant, Mr. Mukofu for the Respondent.

J. M. Bwonwonga

Judge

17/1/2018