



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO. 50 OF 2016

PATRICK OKOTH OBWORE.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC

(From the original conviction and sentence in S.O.A case No.126 of 2014 of the Chief Magistrate's Court at Busia by Hon. M.A Nanzushi– Senior Resident Magistrate)

JUDGMENT

PATRICK OKOTH OBWORE, the appellant herein, was convicted for the offence of kidnapping contrary to section 255 of the Penal Code.

The particulars of the offence were that on 15th November 2014 at [**Particulars withheld**] sub location, in **BUSIA** County, he kidnapped **J A B** from lawful guardianship of **M N**.

He was sentenced to serve seven years imprisonment. He has appealed against the sentence which he says was very harsh.

The appellant was in person. He raised contented that the learned trial magistrate erred in law and in fact by meting out a harsh sentence.

The state conceded the appeal on both conviction and sentence through Mr. Owiti, learned counsel. He contended that the ingredients of kidnapping were not established.

The facts of the prosecution case were briefly as follows:

The daughter of the appellant was staying in the home of the complainant.

On 14th November 2014, the appellant informed **M N**, the guardian of the complainant that he was taking his daughter and the complainant to escort him to Marenge beach. The following morning when **M N** woke up, she found the two girls and the appellant having left. When the complainant returned, the matter was reported to the police and the appellant was arrested and charged.

The appellant denied the offence.

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.

The offence of kidnapping is defined under section 255 of the Penal Code as follows:

Any person who takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of a lawful guardian of the minor or person of unsound mind, without the consent of the guardian, is said to kidnap the minor or person from lawful guardianship.

The ingredients of kidnapping are as follows:

- (a) The taking away or enticing of a minor or a person of unsound mind out of the keeping of a lawful guardian
- (b) Without the consent of the guardian
- (c) The minor if male, be under the age of fourteen years and if female, be under the age of sixteen years.

In the instant case, the evidence on record indicates that when **J A B'S** guardian (**PW2**) was informed by the appellant that he was going to take the two girls (**J A B** included) to escort him to Marenga beach she never raised any objection. I therefore find that the appellant had consent to take **J A B** to Marenga beach. However from the narration of **J A B**, the consent was obtained by misrepresentation of facts. She testified that at about 3a.m they boarded a vehicle to the home of the appellant. This was after the appellant had informed them that they were only escorting him to Marenga beach and were to return in the morning. From the appellants home they went to Teso where they stayed for several days before she returned home. While there, she cooked and moped the appellant's house. Consent obtained by deceit is not consent.

At the time of the offence, it was established that **J A B** was under the age of sixteen years.

I find that the offence of kidnapping was proved to the required standards.

The punishment for kidnapping is provided for under section 257 of the Penal Code as follows:

Any person who kidnaps any person from Kenya or from lawful guardianship is guilty of a felony and is liable to imprisonment for seven years.

The appellant was a first offender. He ought not to have been sentenced to the maximum penalty. I am persuaded to reduce the sentence to five years imprisonment. To that extent his appeal succeed.

DELIVERED and SIGNED at BUSIA this 31st day of July, 2017

KIARIE WAWERU KIARIE

JUDGE