



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 59 OF 2016

BETWEEN

WYCLIFFE OTIENO OGUNDO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and Sentence of

P. GICHOI (MRS), CM, in Homa Bay CM's Court Criminal

Case No.772 of 2015 dated 15/11/2016)

JUDGMENT

1. The appellant **WYCLIFFE OTIENO OGUNDO** was convicted on three counts of kidnapping contrary to **Section 257 Penal Code**, that on 14th November 2015 in Homa Bay County, he jointly with another who is still at large, kidnapped **P A O** (11 years), **I O J** (6 years), **R A O** (3½ years), from the lawful guardianship of their parent.

The appellant denied the charges and after trial in which 5 witnesses testified, and he was the only defence witness, he was convicted and sentenced to serve 6 years imprisonment.

The three named victims are children of **I O** and **J O**, and **R A O**.

2. On 14/11/2015, eleven year old **P O** (PW2) woke up at her mother's house and had breakfast at about 7.00 a.m. She was with her mother and other siblings. She then went to her step mother's (**R A**) house at **RODI KOPANY** and found her step brother **I**. They decided to pay a visit to their grandmother who did not live too far from their home. They were accompanied by **R** (another sibling). They left for their grandmother's house without informing anyone.

3. On the way they met the appellant whom they knew even before as he used to work in their shop at **RODI**. He was riding a motor cycle and stopped next to the children. He asked where they were going and offered to give them a lift since he did not know their grandmother's house, the children were to guide him. They boarded the motor cycle.

4. However upon reaching the road to their grandmother's house, the appellant failed to stop and when the children requested him to stop, he told them to stop making noise. The appellant rode for a long distance to a place not known to the children. The house was locked, so they waited for sometime before the owner came – it was a woman. The children got into the house and spent the night there as did the appellant and the woman.

5. Later while it was still dark, the appellant left the house and rode off on his motor cycle. PW1 saw him because she was unable to fall asleep. When the woman in the house left the room to see off the appellant, PW1 followed her and peeped through the main door, before rushing back to bed and pretending to be asleep.

The children spent the whole day there, had supper then slept. The next morning the woman cautioned them not to leave the house.

6. The woman left the house at about 9.00 p.m. but she did not lock the door. PW1 went to answer a call of nature outside and saw people who appeared to be searching for something. They shouted at her not to run away, so she stopped. They asked for her siblings, so she went

into the house and came out with **I J** and **R**.

Just then police arrived with the appellant, and the children were escorted to the police station where they found their father and two mothers **R** and **L** plus other family members. **J** (PW1's mother) later disappeared to date.

7. On cross examination PW1 stated that the appellant used to work for her mother, and that she saw his face very clearly when he stopped to offer them a ride.

Incidentally on 11/11/2015 she told their house girl named **SHARON** that she had dreamt she had been kidnapped and a ransom of Kshs.7 million was demanded from her father.

Upon being asked in court whether she perhaps heard her mother **J** discuss about a kidnap, PW1 burst into tears and told the court she did not wish to talk about it. PW1 also informed the court that when she told her mother of her intention to visit her grandmother, the latter advised her to go with **I J** and **R**, saying she should not go alone.

8. PW1 explained that they usually visited their grandmother on Saturdays. She also stated in cross examination that upon requesting the appellant to lend her his phone so as to contact her father, he said the area did not have network.

On re-examination PW1 stated:-

“My mother told me that on my way to my grandmother's house, I would meet a motorcycle and I would know it if the rider hoots.”

That is how she met the motor cycle the appellant was riding and he hooted. Her mother also gave her a piece of paper bearing a number, and instructed her to give it to the rider.

9. Meanwhile **I O** (PW4) who is the father of the children received a text message on his phone on 14/11/2015 at about 1.15 p.m. which read that within 18 hours, only 6 million shillings would rescue his three children. The message was sent from a cell phone number 0756054803 to his number 07*****.

10. He immediately called one of his wives names **R A A O** and asked her to confirm where the three children were.

Needless to say when **R A** (PW3) went to their home, the children were nowhere to be found. After failing to locate the children in the places they frequently visited including their grandmother's home at **RODI KOPANY**, PW1 made a report to police.

11. On suggestions by the appellant during cross examination that his other wife **J** was the one who had instructed for the children to be taken to Tanzania, PW4 said he could not confirm as he was unaware of her having relatives living in Tanzania.

12. **P A O** (PW1) is a Kenyan married in **RORIA** district Tanzania. It was her evidence that on 14/11/2015 while at her home, the appellant who is her nephew, arrived accompanied by three children (two girls and one boy), on a motor cycle. She welcomed them, and prepared supper which they all ate. She did not know the children and upon inquiry from the appellant, he said they were his children, and he had brought them so they could know her.

13. The appellant left the next day saying he was going to visit a friend within Tanzania and would spend the night there. She spent the next day and night with children as the appellant had not returned. The next day, she left the children inside her house as she needed to go and pick her child who was in a boarding school in **NYATIKE** (Kenya). On her way back she was arrested and taken to **ORASI** shopping centre where she found the three children. When she was asked why she stole the children, she informed police that they had been taken to her by the appellant.

14. **CPL JOSEPH NYAMAI** of District Criminal Investigations Homa Bay received the report about the children's disappearance from PW4 who also showed him the text message on his phone. In the course of his investigations, he located the number which had sent the message to PW4. The signals showed the phone had last been used in **MUHURU BAY**, but subsequently switched off. He also established that the sim card used was not registered.

On 16/11/2016, he got another number which had used the same handset, it was 0727905915, and inquiries from the headquarters showed it was registered in the names of **WYCLIFFE OTIENO OGUNDO** from **KANYAMKAGO** location, **AWELE** sub location.

15. With the help of the area chief and Assistant chief he arrested the appellant at his home. He recovered the appellant's national identity card which bore the same names. Also recovered was a **TECHNO** phone whose **IMEI** history showed it was the hand set used to send the message to PW4. The appellant disclosed to police that he had taken the children to his aunt in Tanzania and offered to take police there. Eventually the children were found in Tanzania.

16. On their way back to Kenya they met PW1 at the border and arrested her. The children were handed back to their father and other mothers. The investigations revealed that the appellant had colluded with PW4's wife named **J** to kidnap the children. **J** remains at large.

17. In his sworn testimony the appellant stated that PW4's wife **J** instructed him on 14/01/2015 to proceed until he meets the three children whom she was sending to **KOGWE**. She instructed him to take the children to his aunt who was the one who had connected him to **J** (the missing conspirator). He obliged and took the children to her aunt's place. He confirmed that PW1 requested to use his phone to call their

father, but he could not give them.

18. The appellant denied telling PW1 that the children were his and insisted that he had told her they were his boss's children who had instructed that the children be taken to be introduced to PW1. Later on he tried to call the children's father in vain and he eventually gave up.

He confirmed that when police caught up with him in his house they also took away some phones.

19. In her analysis the trial magistrate found that the appellant was well known to the children as well as members of their family. She also noted that there was no dispute that the appellant took the children from **RODI** to PW1's house in Tanzania, and the children remained there until they were rescued by police.

20. The trial magistrate took into account that **I J** and **R** were not called as witnesses and the investigating officer's explanation was that they were too young to testify. She also considered the fact that **SHARON**, a house help mentioned by PW2 was also not called as a witness. The trial magistrate was alive to the provisions of **Section 125 (1)** of the **Evidence Act** which she referred to and case law regarding failure to call some witnesses; and removed them by invoking **Section 143** of the **Evidence Act** which provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

21. The trial magistrate held that the investigating officer had clarified that he had availed all the witnesses he found necessary to prove the case and she was satisfied that the failure to call the said witnesses was not fatal.

22. The appellant's defence that it was J (PW2's mother) and his aunt P who conspired to kidnap the children, and that the children knew he was taking them to PW1 and were willing to be taken there was dismissed on grounds that:-

a) From PW2's evidence and her demeanor in court, it was apparent she was not aware that they were being kidnapped or that she had conspired with her mother.

b) There was no evidence to prove that the children understood the whole concept about kidnapping.

The trial magistrate held –

“It is clear from the evidence on record that the accused person executed instructions from J O to the letter. He is obviously an accomplice in this case. He conspired with her to kidnap the said children. He intercepted them on their way to visit their grandmother and this was easy. The children were known to him for a long time. They had no difficulty accepting his offer for lift there (sic). He capitalized on their trust knowing he would take them elsewhere.”

23. The trial magistrate was persuaded that the appellant was not an innocent employee simply following his employer's instructions, and he lied to PW1 that those were his children, left claiming he was going to visit another friend within Tanzania, and sneaked back to Kenya where police found him **three** days later. The trial magistrate observed that the children were taken to PW1's home in Tanzania, with no change of clothes, and he never returned to even check on their well being, if he was genuine about taking them there, and it was apparent he had no authority from PW3 and PW4 to take them away.

24. The trial magistrate further noted that **J O** (PW2's mother) had initially feigned innocence and joined her husband (PW3) in the search for the children, but this did not last long and she disappeared from her home in the wee hours of the morning, never to be seen again.

She also noted the message sent to PW4 clearly demanding a ransom and the **IMEI** history traced the message to the appellant's phone.

25. The appellant contested these findings on grounds that the evidence was not sufficient to sustain a conviction taking into consideration the defence he advanced.

He also faulted the sentence meted out was done in error and without taking into account his mitigation.

26. The appeal was canvassed by way of written submissions where the appellant argued that the evidence clearly showed that **J O** was the brain child behind the kidnapping, and he was a mere employee who simply obeyed instructions to transport the children. He argued that the failure to call **SHARON AKINYI JUMA** as a witness yet she had recorded statements with the police was fatal.

27. In opposing the appeal, **MR. OLUOCH** submitted that the appellant did not deny participating in committing the offence and in fact confirmed transporting the children to Tanzania.

He also drew this court's attention to the appellant's message to the children's father demanding ransom – for which the appellant had not explained – so if he had not participated in the offence then he could not have –

a) *Transported the children to Tanzania*

b) *Sent the demand for ransom.*

28. The trial magistrate duly considered the opportunity which the appellant relied on by virtue of his earlier association with the family of the victims. This indeed enabled him to win the children's trust. Obviously Janet was involved in the scheme that is why she had mentioned

to her daughter about a motor cycle which would carry them to the grandmother's home. If the appellant had only been involved in transporting the children, then it would have been considered the innocent act of an employee but as the trial magistrate correctly observed when he got to PW1's house – he said those were his children whom he had taken to her so as to get to know her. He did not say they were his employer's children.

29. He did not deny PW1's assertion that he left saying he was visiting another friend within Tanzania, yet sneaked back to Kenya and was going about his life like nothing sinister had happened. Then there is the message on the phone sent to PW4 demanding ransom for the children – traced to the appellant's phone. Indeed as the trial magistrate observed this was one case where there was excellent investigation and a sense of thoroughness by the police officers. There was nothing to suggest that someone else used the appellant's phone to send the messages.

30. The conviction was safe and is upheld and sentence confirmed. Appeal is dismissed.

Delivered and dated this 16th day of October, 2017 at Homa Bay

H.A. OMONDI

JUDGE