



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL CASE NO.164 OF 2012**

**Consolidated with**

**CRIMINAL APPEAL CASE NO.181 OF 2012**

**(From original conviction and sentence in Criminal Case No.790 of 2010 of the PM'S Court at Kilgoris delivered on 23<sup>rd</sup> March 2012 by Hon. B. Ochieng – PM)**

**SAMWEL OKOTH NYAKINYE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant herein, **SAMUEL OKOTH NYAKINYE**, was charged with the offence of **defilement contrary to Section 8(1)** as read with **Section 8 (2) of the Sexual Offences Act No.3 of 2006**.

The particulars of the charge were that on 27<sup>th</sup> September 2010 in TransMara District within Narok County did cause his penis to penetrate the vagina of R.M. (*name withheld*) a child aged 13 years.

2. In the alternative, he was charged with the offence of **Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006**. The particulars were that on 27<sup>th</sup> September 2010, within Narok County, did intentionally and unlawfully cause his penis to come into contact with the vagina of R.M. (*name withheld*) a girl aged 13 years.

3. The Appellant also faced a 2<sup>nd</sup> count of **Child trafficking contrary to Section 13(a) of the Sexual Offences Act No.3 of 2006**. It was alleged that on 27<sup>th</sup> September 2010, within Narok County, did intentionally and unlawfully cause travel arrangements of a child within borders of Kenya with the intention of facilitating a sexual offence against that child aged 13 years.

4. The Appellant was acquitted of the 1<sup>st</sup> charge and its alternative limb but was convicted on the second count and sentenced to twenty (20) years imprisonment.

5. The Appellant who was unrepresented both before the lower court and on appeal appealed against both the conviction and sentence. He set forth the following grounds of appeal:

1. **That the learned trial magistrate neither erred in law and fact by failing to appreciate that I was neither directly nor indirectly connected to the alleged offence since the complainant was alleged to have been found at Kamagambo, far much away from Kilgoris town where I was arrested.**
2. **That the trial magistrate erred in law in failing to observe that I was arrested prior to the date of the incident which still points to my innocence since accordingly to PW4, his daughter got lost on 27<sup>th</sup> September 2010 yet I was arrested as early as 26<sup>th</sup> September 2010.**
3. **That the trial magistrate erred in law and facts by failing to scrutinize and evaluate the evidences that would link me to the alleged offence. The evidences were not proved beyond any reasonable doubt My Lords.**
4. **That I pray to be served with true and justified (sic) with true and justified with true and certified copies of lower court proceedings to enable me lodge more rounds of appeal.**

6. The Appellant canvassed his appeal by way of ‘*home-made*’ written submissions in which he stated that the trial magistrate did not weigh the evidence of PW1 and PW2 which he alleged was contradictory, and evidence of PW4 and PW5 which gave conflicting/different dates regarding when the case was first reported to the police.

7. The Appellant further took issue with the fact that the trial magistrate failed to furnish him with all the documents and the charge sheet relating to the case. He added that the magistrate did not take into account the fact that the prosecution did not avail to the court, an independent eye witness to corroborate the complainant’s case but relied on evidence availed as an afterthought.

The Appellant contended that the sentence passed against him was not fair and that the case against him was a frame-up.

8. In response to the Appellant’s submissions, Mr. Otieno counsel for the State supported both the conviction and sentence of the Appellant while stating that it was the Appellant who led the investigators to where he had hidden the complainant at his rural home. Mr. Otieno added that even after the Appellant had been charged in court, he repeated the offence by taking away the minor from the court premises before she could testify whereupon he hid her from court and she could not be found to testify for close to 2 months.

9. Mr. Otieno added that the Appellant had sexual intercourse with the minor at least once and stated that even though **Section 13(a) of the Sexual Offences Act** under which the Appellant was charged and convicted had been repealed, the said law was still in force as at the time of the conviction and sentence.

10. Mr. Otieno emphasized that the prosecution’s case against the Appellant was proved to the required standards and that all the ingredients of the charge (Count 2) had been satisfied.

On sentence passed against the Appellant, Mr. Otieno submitted that the same was lawful as the minimum sentence provided for by the law is 10 years and therefore the 20 years sentence was appropriate considering the prevalence of the offence in the region. Mr. Otieno urged the court to uphold the sentence and conviction.

11. The main issue arising in this appeal and that ought to be determined by this court is whether the offence contained in the 2<sup>nd</sup> count, being child trafficking contrary to **Section 13(a) of the Sexual Offences Act No.3 of 2006** had been proved and if so, if the Appellant was the perpetrator of the said offence.

12. This being a first appeal, this court is under a duty to re-evaluate all the evidence adduced before the court in order to arrive at its own independent finding while bearing in mind that it never had the advantage of seeing or hearing the witnesses testify. (See **Okeno –vs- Rep. [1972] EA 32**).

13. The prosecution called a total of 5 witnesses in support of its case as follows:

**PW1 E O** was the mother of the complainant who testified that on 27<sup>th</sup> September 2016, the Complainant, then a standard 4 pupil at *[particulars withheld]* Primary School left home for school but never came back thereby prompting her to launch a search for her and report the disappearance to the police. She however suspected that the Appellant who was then her immediate neighbor, to be behind the complainant's disappearance and when the Appellant was arrested by the police, he led the police to his rural home in Kamagambo area in Rongo where the Complainant was found. PW1 stated that she later on in January 2011 enrolled the complainant at *[particulars withheld]* Primary School only for her to disappear once again on 13<sup>th</sup> March 2011.

14. **PW2 R. M. (name withheld)** was the Complainant. She testified that on 26<sup>th</sup> September 2010 at about 1.00 p.m., the Appellant lured her out of school put her on a taxi and took her away to his home in Rongo where he lived with his wife. She stated that the Appellant had taken her to his home before as he could come for her from school under the pretext that he was her father's messenger. She testified that the Appellant had sex with her in the sugar cane plantation and told her that he would marry her as a second wife. The complainant, who was then a class 5 pupil, added that the Appellant started to seduce her when she was in class 3.

Upon being cross-examined by the Appellant, PW2 stated that the second time the Appellant took her away to his home, he got her at the court premises when he lied to her that the court case was over and he would open a shop business for her. She narrated how the Appellant attempted to have sex with her on numerous occasions.

15. **PW3 Philip Ooko Blasto** was the medical doctor attached to Trans Mara District Hospital who on 30<sup>th</sup> September 2010 examined the complainant and filed the P3 form which he produced in court as an exhibit. He confirmed that PW2 had been defiled at least 4 days before the date of the examination as her labia majora was torn and the hymen broken.

PW3 also did an age assessment on PW2 whose age he determined to be 13 years.

16. **PW4 M O O** was the father of the Complainant who confirmed that she went missing from home on 27<sup>th</sup> September 2010 thereby prompting him and PW1 to make a report to Kilgoris Police Station. He suspected that the Appellant was behind the disappearance of PW2 and indeed, when the Appellant was arrested he admitted having ferried PW2 to his rural home at Rongo in Kamagambo. The police managed to get PW2 at the Appellant's home only for her to disappear with the Appellant second time.

17. **PW5 P.C. Elizabeth Onduso** was the investigating officer who testified that she received the report of the Complainant's disappearance on 29<sup>th</sup> September 2010. The Appellant was arrested as a suspect following the Complainant's disappearance and he admitted knowing the whereabouts of PW2 who was later found at his home in Rongo Kamagambo after the Appellant led the police to his home.

18. As already noted in this judgment, the Appellant was convicted on the second count of child trafficking contrary to **Section 13(a) of the Sexual Offences Act No.3 of 2006**. Even though the said section was repealed by the **Counter Trafficking in Persons Act No.8 of 2010 (2<sup>nd</sup> Schedule Sections)**, the operations of the said Act commenced on 11<sup>th</sup> October, 2012 and this means that **Section 13(a) of the Sexual Offences Act** was still in force at the time the Appellant was alleged to have committed the offence being 27<sup>th</sup> September 2010.

19. **Section 13(a) of the Sexual Offences Act No.3 of 2006** states as follows:

*“A person including a juristic person who, in relation to a child –*

- a. *Knowingly or intentionally makes or organizes any travel arrangements for or on behalf of a child within or outside the borders of Kenya, with the intention of facilitating the commission of*

*any sexual offence against that child, irrespective of whether the offence is committed;*

*Is, in addition to any other offence for which he or she may be convicted, guilty of the offence of child trafficking and is liable upon conviction to imprisonment for a term of not less than ten years and where the accused person is a juristic person to a fine of not less than two million shillings.”*

20. At the close of the trial the lower court found that the prosecution had proved the Appellant's guilt on the second count. The Appellant has challenged the said conviction citing contradiction in the evidence of PW1 and PW3 in whom he alleged gave contradictory/different dates on when the case was first reported to the police. I find that even if there were difference in the dates of the first report, that difference was inconsequential and did not affect the main gist of the case which was that the Appellant intentionally and unlawfully caused travel arrangement of a child with the intention of facilitating a sexual offence against the child.

21. PW2 testified that the Appellant had sexual intercourse with her and even promised to marry her as a second wife after luring her out of the school. I find that the testimony of the Complainant was consistent and was not impeached or shaken upon cross-examination by the Appellant.

22. The Appellant's guilt was further compounded by the fact that even after being charged in court, he still managed to lure the Complainant (PW2) back to his rural home in Rongo while lying to her that the case against him had been concluded. This brazen level of impunity exhibited by the Appellant is in my view beyond comprehension.

23. In this regard, the Complainant testified as follows:

**“When I reached school, I met the accused. Accused took me to his home. He told me that the case was over so we go to his home. He put me in a taxi and took me to Rongo.”**

24. The Appellant gave an unsworn statement before the trial court in which he denied any involvement in the disappearance of the minor. After re-analyzing the evidence tendered before the lower court.

25. I find that the prosecution's case was clear and straight forward. It was proved that the Complainant was a child of 13 years, she disappeared from school on 27<sup>th</sup> September 2010 the Appellant was the main suspect and she was found in the Appellant's rural home after the disappearance and indeed when he was arrested, he admitted having taken the child to his home, he led the police to his home where the complainant was found.

26. To further fortify the prosecution's case, the Appellant in a show of contempt of lack of respect for the court, once again even after being charged in court, lured the child from the court premises while lying to her that the case was over. The court record shows that for a long time during the trial of the case, PW2 went missing.

27. The Appellant's act of luring the minor out of school and from the court while the case was still pending portrays him as a hard-core sex pest and child molester who has no regard for the rule of law and common decency.

28. The Appellant took advantage of the trust placed upon him as an adult and immediate neighbour of the Complainant's parents to not only seduce their minor daughter, but also freight her away from her parent's home with the intention of sexually assaulting her. As an immediate neighbor of PW1 and PW4, the Appellant was expected to be under an obligation to be his brothers-read neighbour's keeper. The Appellant action of preying on a neighbour's child was callous to say the least.

29. PW3, the medical officer confirmed having assessed the Complainant's age to be 13 years.

30. Finally, my comment on the defence of the Appellant is that it cannot be true that he was arrested by the police without any justifiable cause and was framed. His defence must have been an afterthought because after his arrest, he led the police to his rural home in Rongo where the minor PW2 was found. I reject the Appellant's defence.

31. I also reject his claim that he was threatened and framed up. PW1 and PW4 were the Appellant's immediate neighbour's and it was not shown that they had any grudge against him that would cause them to implicate him for such a heinous crime.

32. Ultimately, my finding is that the prosecution's case was proved beyond reasonable doubt. The Appellant intentionally and unlawfully made travel arrangements of a child (PW2) with the intention of committing a sexual offence against her. The sentence passed against him was lawful as the minimum sentence for child trafficking is given as 10 years. I find that this appeal lacks in merit and I hereby dismiss it. It is so ordered.

**Dated, signed and delivered in open court this 21<sup>st</sup> day of January 2016**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Otieno for the State
- Appellant in person
- Omwoyo: court clerk