REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 76 OF 2012

JOSEPH OCHIENG AJWANG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 3675 of 2010 Republic vs Joseph Ojwang in the Senior Resident Magistrates Court at Kapsabet by A. Lorot, Senior Resident Magistrate dated 30th April 2012)

JUDGMENT

1. The appellant was charged with kidnapping contrary to section 259 of the Penal Code. The particulars were that on the 27th October 2010 [particulars withheld] School, Nandi South District within the Rift valley Province he kidnapped GKR from Nandi Hills Town; and caused him to be secretly and wrongly confined [particulars withheld] in Nakuru Town.
2. The appellant was convicted and sentenced to seven years imprisonment. He has appealed against his conviction and sentence. The appeal was first heard by Ngenye-Macharia J. The learned judge reserved her judgment for 28th October 2014. On the latter date, the judge could not deliver judgment for two reasons: she overlooked the fact that she did not have the original transcript of the lower court; and, she did not have a copy of the original charge sheet. In the meantime, the judge was transferred. On 28th January 2015, I took over the proceedings. It transpired that the appeal had not been formally admitted for hearing. I ordered the appeal to be admitted. On 23rd March 2015, I heard the appeal *de novo*.
3. The grounds in the petition of appeal can be condensed into six: first, that the investigations into the offence were not conclusive. In particular, the investigating officer was not called to the stand. Secondly, that the appellant was granted less than twenty four hours to call his witnesses. The appellant contends the time was insufficient because he was in custody; thirdly, that no exhibits were produced particularly the mobile phones or pictures; fourthly, that the appellant was denied sufficient opportunity or time for cross examination. The appellant contended that the learned trial magistrate allowed him only three minutes for every witness; fifthly that there was no medical evidence or examination by the government chemist to prove he had drugged the complainant; and, lastly, that his defence of *alibi* was not taken into account.
4. At the hearing of the appeal, the appellant abandoned his earlier submissions dated 24th June 2014. He relied wholly on his hand-written submissions filed on 22nd March 2015. He added the following: that from the evidence of the complainant, the complainant was roaming freely in the streets raising doubts that the appellant had kidnapped him from Nandi Hills. He submitted that he was not given in advance all the evidence that the prosecution intended to rely on. He also claimed that the evidence in chief of the complainant was taken in his absence; and, that PW2 gave unsworn evidence. He contended that the motive of the offence was not established; and, that his

conviction was unsafe.

5. The State contests the appeal. In a nutshell, the case for the State is that there was sufficient evidence to prove the charge; that all the elements of kidnapping were established; that the rights of the appellant to a fair trial were not violated; that the appellant was positively identified; that his defence was a red herring; and, that there was consistent and reliable evidence establishing the culpability of the appellant. The State also submitted that the sentence handed down was commensurate with the serious felony committed by the appellant. I was accordingly urged to dismiss the appeal.
6. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw my own conclusions. In doing so, I have been very cautious because I neither saw nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
7. PW1 was a male minor. After a *voir dire* examination, the Court found that he possessed sufficient intelligence; and, understood the duty of telling the truth. He was sworn. The true purpose of a *voire dire* examination is to establish whether a child of tender years understands two things: the nature of an oath and the need to tell the truth. See *Republic v Peter Kiriga Kiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445. The minor here was *fifteen* years. He was *not* a child of *tender years*. I think the learned trial magistrate acted purely out of an abundance of caution.
8. PW1 testified that he was a student [particulars withheld] School in Nandi Hills. On 27th October 2010 he was sent away to buy a pair of trousers. At Nandi Hills, he met the appellant. The appellant was, until July 2010, a teacher at the school. The appellant convinced him to accompany him to Nakuru. The complainant knew the appellant as his former teacher. The appellant took him to a hotel at Nandi Hills where he bought him some food. PW1 could not recall the name of the establishment. The complainant said that after consuming some juice given to him by the appellant, he lost his memory. He only regained it at a bus terminus in Nakuru Town. He said the appellant asked him to follow some directions to High School. He was hosted there for the night by a watchman named Pius. He said Pius was expecting him. The following night the appellant took him to his house at a place known as *Free Area*.
9. PW1 said he was still recovering from his memory loss. He asked to be allowed to speak to his parents. The appellant refused. On the following Monday the complainant managed to sneak out of the place. He was escorted back to Nakuru Police Station. The police laid a trap for the appellant. The complainant was given a mobile phone and called the appellant. He lied to the appellant that he was stranded in Nakuru. The appellant asked him to go to Nakuru *Gate House*. He went towards that direction. The appellant came. He was arrested by PW5. PW1 was later taken to Nakuru Provincial General Hospital for medical check-up. The tests were negative.
10. PW5 was the arresting officer. When cross-examined by the appellant, he said he arrested him at about 6:00 in the evening along Kenyatta Avenue at the roundabout next to *Gate House*. He conducted a search at the appellant's house. He testified that a *Nokia* phone was recovered from the appellant. The *screen saver* had a picture of PW1. He also recovered three photographs of PW1 from the appellant's house. He did not produce the exhibits. He said he handed them over to the investigating officer. The latter was not called to the stand.
11. The appellant gave sworn testimony. He denied committing the offence. Upon cross-examination, he conceded that he knew PW1. He taught him chemistry in form one. He denied that he met PW1 in Nandi Hills, treating him to a meal or travelling with him to Nakuru. He said on 27th October 2010 he was in Nakuru. He conceded that PW1 had his phone number. He testified that PW1 had previously visited him in Kericho to see the appellant's niece called Sharon. It was during a party in June. He denied that he gave PW1 money. He said PW1's mother sent him money via his cell phone for fare to a place called Sosiot.
12. When questioned by the learned trial magistrate, the appellant said he was trained at Kenyatta University Faculty of Education from 1995 to year 2000. He could not produce any academic certificates or other evidence. He confirmed that he was not employed by the TSC. He said he was newly employed by the Samoei School's Board of Governors. He said he taught at
13. the school for five months.
14. Before I re-evaluate the evidence, I have noted that the learned trial magistrate examined the

appellant at great length. A court is entitled, by dint of section 173 of the Evidence Act, to ask any witness any questions at any time. But there is still need for *caution* to avoid wading too deep into the trial or being perceived as biased. The appellant had already been cross-examined by the prosecutor. The questioning by the court went into a full handwritten page of the transcript (half a page of the typed record). I set out part of the examination above. I think the learned trial magistrate went a little too far as to prejudice the rights of the appellant.

15. As a result of that extensive examination by the trial magistrate, he formed the impression that the appellant was a "pathological liar" and a "scheming sociopath". He found as follows-

> *"When he came to court he had the audacity to lie to me that he is a teacher at Nakuru High School and on whose strength he secured bond. His goose was cooked when the lies crumbled like the proverbial cookie. He then went further to state he is a teacher at Homa Bay High School. In fact the evidence is clear the accused is nothing but a scheming sociopath. He functions by invading the weak education system and pretending to be a newly posted teacher and to bid his time in a school.*
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> *"I believe that he harbored bad intentions on the boy. He was possibly seeking to have the boy harmed and was cleaning his tracks so there is no connection to him. His schemes as is usual with all such schemes collapsed. The prosecution has wrested the burden of proof. There is no escape for the accused. He is guilty as charged. I proceed to convict the accused as charged under section 215 of the CPC."*

16. With respect, the prejudice to the appellant became rather obvious. There was no cogent evidence that the appellant was "*invading the weak education system and pretending to be a newly posted teacher and to bid his time in a school"* or that he *"he harbored bad intentions on the boy [or] possibly seeking to have the boy harmed and was cleaning his tracks so there is no connection to him"*. The appellant was *not* charged under section *260* of the Penal Code which relates to kidnapping for purposes of causing harm, slavery and so forth. The appellant was charged under section *259* of the Code for kidnapping with intent to confine. It could be presumed he had ill motives. But this was a criminal trial and such presumptions were flawed.
17. I agree that the appellant lied that he stopped teaching at Samoei High School due to hostility from the local community after the 2005 constitutional referendum. The truth, as narrated by PW2, was that he was *dismissed* for want of papers and testimonials. He lied he was a teacher at Nakuru High School to get a free bond at his trial. He pretended to sympathize with the parents of PW1. He feigned ignorance about the whereabouts of PW1. But the appellant was still entitled to a *fair trial*. In his final judgment the learned trial magistrate went as far as referring to his routine prison visit where the appellant raised some grievances. When the learned trial magistrate lost faith in the appellant, he cancelled his bond. That was on 24th June 2011.
18. I will start with the matter of identification. PW1 met the appellant at Nandi Hills. They knew each other. The appellant used to be a teacher at PW1's school. It was during the day. I readily find that the appellant was positively identified. This was recognition. Evidence of recognition is stronger than simple identification. *Wamunga v Republic* [1989] KLR 424, *Republic v Turnbull & others* [1976] 3 All ER 549, *Kiarie v Republic* [1984] KLR 739. In any case, the appellant conceded that he knew PW1 and his parents. I have reached the conclusion that the appellant is the person who met PW1 on 27th October 2010 at Nandi Hills and that PW1 later stayed in the appellant's house at *Free Area* in Nakuru for a few days.
19. The next key question is whether the charge was proved beyond reasonable doubt. The charge facing the appellant was that on the 27th October 2010 he kidnapped PW1 from Nandi Hills Town and caused him to be secretly and wrongly confined at *[particulars withheld]* in Nakuru Town. I have already found that the appellant met the complainant at Nandi Hills on that day. PW2, the Deputy Headmaster, confirmed he had given permission to PW1 to leave the school compound until the 28th October 2010. He testified that the appellant was dismissed from employment in July 2010 when he failed to present papers or testimonials confirming his qualifications. PW2 testified that someone had called the school saying the appellant was a teacher in Rwanda and that his papers were being processed at *Jogoo House*, Nairobi. It turned out later that the appellant had no such employment papers. It was a fraud.

20. PW3 and PW4 were the parents of PW1. They received information that their son had not reported back to school. They suspected the appellant. Earlier in July 2010, they had been summoned to the school on allegations that their son and other boys were spending time in the appellant's house at odd hours. PW1 finally found his way to his aunt's house in Kericho. He said he had been in the appellant's house. As stated earlier, the police laid a trap and arrested the appellant.
21. PW1 never said where exactly he met the appellant at Nandi Hills or the hotel where they had food. This is important because it was before PW1 lost his memory. But PW1 could remember the appellant trying to convince him to accompany him to Nakuru. The investigating officer was not called. The appellant denied buying the complainant food or drink at Nandi Hills on that day. There is a yawning gap in that evidence. Doubt is added by the fact that when the complainant came to, he found himself at the bus terminus in Nakuru. He said the appellant instructed him to go to High School and talk to a watchman called Pius. He went *alone* on foot to School. He spent the night in the house of Pius.
22. Up to that point, it would be illogical to say the complainant was being secretly confined at *[particulars withheld]* Nakuru by the appellant. If the appellant had kidnapped the complainant, why did he not take him to his house or a secret location immediately? Why did he leave PW1 free to look for directions to High School? If he was acting in secret, why would he send the complainant *alone* to the watchman Pius? Why did the complainant not seek assistance?
23. I am reminded that the complainant and other boys used to spend time in the appellant's house during *odd* hours. It became a matter of inquiry by the school authorities. That was back in July 2010. PW3 and PW4 (his parents) were summoned to the school over the incident. That information was confirmed by PW6, another teacher at [particulars withheld] Secondary School. I got the impression that PW1 was not entirely honest. When cross-examined by the appellant, there were allegations he had stolen another student's trouser. PW2 confirmed in the cross that he sent the complainant to replace a trouser. PW3, his father, said *"a trouser had been found around [PW1's] clothes and he was forced to go buy a new one"*. The complainant denied pinching items from colleagues. The appellant on the other hand was not completely candid about *his* relationship with the complainant. But it was *not* for the appellant to fill in gaps for the prosecution. The onus of proving the offence rested entirely with the shoulders of the prosecution.
24. The complainant said in re-examination that he was held at *Free Area* against his will. He said the house had a fence around it and was always locked. PW5 contradicted that evidence. He said there were six houses in two rows; and, that the house of the appellant was at the end. The other houses had tenants. PW1 alleged that the appellant threatened to kill him. On one occasion, the appellant left his phone in the house. The complainant used it to call his parents but the call went unanswered. He said he was refused permission to speak to his parents.
25. The complainant was fifteen. He might have been gullible. It is possible that the appellant took advantage of the teenager. PW1 said he had Kes 500/= on the day he escaped. He said the house had been left open. What I find intriguing is that instead of going straight to his parents' home in Nandi Hills, he went to his aunt's place in Kericho. That was interesting because the appellant used to rent a house in Kericho. During one mid-term break, the appellant alleged that PW1 visited his house to see the appellant's niece Sharon. The medical examination on the complainant was *negative*. There was no irresistible evidence showing that he was *drugged* at Nandi Hills or that it is the appellant who *did* it. The complainant alleged that the appellant removed the bottle of juice from his pocket. The medical tests on the complainant were *negative*. The truth about what made the complainant lose his memory is still out there.
26. The other gap is that the complainant was not held at *[particulars withheld]* Nakuru at all. That is the place the charge sheet stated. The complainant was staying in a house in *Free Area* or near *section 58* in Nakuru. The complainant said the appellant showed him around the area but instructed him not to leave the house. The appellant was arrested along Kenyatta Avenue at the roundabout next to *Gate House*. When he was lured by the police, PW5 said the appellant instructed PW1 to go to *Gate House*. There is thus a clear variance between the charge and the evidence.
27. To prove the offence of kidnapping under section 259 of the Code, the prosecution must establish the following: first, the kidnapping or abduction; and, secondly, the intention to cause that person to be *secretly* and *wrongfully* confined. From the evidence so far, I cannot with any confidence say

that the *actus reus* and *mens rea* of the offence were proved. Certainly, they were not proved *beyond reasonable doubt*. There was circumstantial evidence pointing towards the appellant. He possibly drugged or lured the complainant to Nakuru. There are strong suspicions fuelled by the conduct of the appellant. There is however *no* room for such *presumptions* in a criminal trial. The test in a matter of that nature was well stated in *R v Kipkering arap Koske & another* 16 EACA 135 where the court held-

> *"In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"*

28. The defence tendered by the appellant was a complete farce. He was lying through his teeth. Two major lies stood out. He stated that he was a teacher at Homa Bay High School. On 24th December 2010, he had informed the trial court that he was a teacher at Nakuru High School. He even gave his TSC number. It turned out to be false. As a result, the trial court cancelled his bond on 24th June 2011. The second lie was that he left his job at Secondary School because of the hostility generated by the 2005 *Yes or No constitutional referendum*. The truth is that he was *dismissed* for want of papers or testimonials. The other lie was that he was in Nakuru the whole of 27th October 2010 and his pretences that he never knew the whereabouts of the complainant. But it remained the duty of the State to prove the twin elements of the offence of kidnapping under section 259 of the Penal Code.
29. Subject to section 111 of the Evidence Act, the legal burden of proof rests with the prosecution. See also *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332 at 334, *Abdalla Bin Wendo & another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported). The accused may have lied; he might have held some cards close to his chest; or he might have concealed vital information. Quite apart from his denials and lies under oath, he was entitled under our Constitution and the Criminal Procedure Code to remain mute. The onus of proof never shifted to him.
30. I remain alive that under section 143 of the Evidence Act, no particular number of witnesses is necessary to establish a fact. See *Joseph Njuguna Mwaura and others v Republic* Court of Appeal Criminal appeal 5 of 2008 [2013] eKLR, *Bernard Kiprotich Kamama v Republic*, High Court, Eldoret, Criminal Appeal 123 of 2010 [2013] eKLR. But the intricate web of the alleged kidnapping called for more detailed and thorough investigation by the police. The investigating officer was not called. Vital exhibits like the mobile phones recovered from the accused or pictures were not produced. No data was submitted tracking communications between the appellant, the complainant or accomplices. The watchman at High School, who hosted the complainant for one night, was not called. Too many loose ends were left hanging.
31. Before I leave the matter, I wish to revisit some grounds of appeal. The appellant had alleged that he was absent from court when PW1 testified in chief. The typed record gives that *erroneous* impression. I have compared it with the original handwritten transcript. It shows the appellant was present. The person marked as absent on the *coram* is a Mr. Kopot. Doubt is removed completely because towards the end of the evidence in chief, PW1 pointed to and identified the appellant in the dock. The appellant had also alleged that PW2 gave unsworn evidence. Again, the typed record is misleading. In the handwritten transcript there is a record stating *"PW2 M/A/C/S/ States in English…"*. That line is omitted from the typed record. I presume it means PW2 was a *Male Adult Christian Sworn.* It exposes the danger of abbreviating vital requirements of criminal procedure.
32. The appellant had also contended that he was not given sufficient time to prepare for his defence or cross examine witnesses. The appellant took plea on 5th November 2010. The prosecution closed its case on 13th February 2012. On 15th February 2012, the appellant was placed on his defence. He said he would give sworn testimony; and that he had three witnesses. He identified them by name. The case was fixed for the following morning. The appellant said his witnesses were absent. But he said he would testify and close his case. He did not seek an adjournment. From the record, the appellant conducted extensive cross-examination of all the witnesses. I cannot then say that the court denied him fair opportunity to conduct his case.
33. In the end I am not satisfied that the prosecution *proved* beyond reasonable doubt that the accused

on the 27th October 2010 kidnapped the complainant from Nandi Hills Town and caused him to be secretly and wrongly confined at [particulars withheld] in Nakuru Town. It must follow as a corollary, that the conviction was unsafe. I set aside the conviction and sentence. I order that the appellant be set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 19th day of May 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Appellant in person.

Mr. J. W. Mulati for the State.

Mr. J. Kemboi, Court clerk.