

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 63 OF 2012

BENSON MATWA OPOLLO APPELLANT

V E R S U S

REPUBLIC ACCUSED

J U D G M E N T

(Appeal against conviction and sentence from judgment of [E. OLWANDE, SRM] dated 16.9.2011 in the Senior Principal Magistrate's Court Butere in Criminal Case No. 544 of 2010)

The appellant was charged with the offence of trafficking contrary to **section 13 (a)** of the Sexual Offences Act. The particulars of the offence are that the appellant *on the 23.8.2010 at [particulars withheld] in Butere district within Western Province intentionally facilitated the travel of M A S a girl aged 15 years from Mabola area to Butere Lower Market within the borders of Kenya with intent to defile the said M A S after the journey.*

The appellant was convicted and sentenced to serve 10 years imprisonment. The grounds of appeal are that he pleaded not guilty to the charge, there was contradiction in the prosecution case and that his alibi defence was not considered. The appellant filed written submissions which expounds on the grounds of appeal. He contends that some of the witnesses were on a drinking spree and their evidence ought not to have been relied upon. There was evidence that he was Sura Bar to collect a client who testified in his favour.

Miss Ngovi, State Counsel, opposed the appeal and submitted that the evidence of PW1 was corroborated by that of PW2 and PW3. The conviction is proper and there was no alibi defence. The appellant was at the scene and was seen with the girl.

Before the trial court **PW1 M A S** was the complainant. She testified that she was 15 years old and on the 23.8.2010 at about 7.00 p.m. the appellant stopped his motorbike while PW1 was heading home. The appellant told her to board the motorcycle and he took her to Sura Bar at the market. PW1 did not know the appellant. The appellant held her hand and started leading her to lodging. She was told to sit outside the lodging on a seat. The appellant started talking to another person who informed the appellant that PW1 was a child. The appellant started walking away. There was a teacher whom PW1 knew and asked her about her age. The appellant was arrested and both of them were taken Butere police station. PW1 suspected that the appellant wanted to sleep with her.

PW2, N K was a worker at Sura Bar. On the material day at about 6.00 p.m. the appellant went to the Bar in accompany with PW1 and asked for a room. He told the appellant that PW1 was a child. PW1 was seated in the hall. The appellant said he was going to another bar. There were other people including an education officer who arrested the appellant and took him to Butere police station. He knew the appellant as a boda boda operator. **PW3 B O** is the mother to PW1. On the 23.8.2010 at about 8.00 p.m. she noted that PW1 was not at home. PW1 had gone to Butere town and upon inquiry she got to find out that PW1 had been arrested and was at the Butere police station. She went to the police station the following day. It is her evidence that the appellant was born in 1984.

PW4, V O N, was a clerical officer at the Butere District Education office. He was at Sura Bar on the material day at about 8.00 p.m. when he saw the appellant carrying a young girl. The appellant parked his motorcycle beside the bar and the two went inside the bar. Upon seeing many people the girl

looked surprised and she refused to go into the bar. The man entered the bar while the girl remained on the veranda. They called the girl and one of them recognized her. The girl recognized one M who was a teacher. The appellant came out and told them that PW1 was his wife and they were to release her. They arrested the appellant and took him to Butere police station.

PW5, PC INVIOLATA LUMATI, was based at the Butere police station dealing with children and gender issues. On the 24.8.2010 in the morning she was assigned the matter and saw the appellant and PW1 in the cells. She investigated the matter and had the appellant charged. The complainant was taken for age assessment and was found to be 15 years old.

The appellant was put on his defence. In his unsworn evidence he testified that on the 23.8.2010 he went to Sura Bar in the evening to collect a passenger (DW2). While there another passenger called him and he informed the passenger he could only carry him together with another passenger and the passenger agreed. There were patrons drinking at the bar. He looked for his passenger and when he went back he found the patrons talking to his other passenger and the patrons started beating him up. He was arrested and taken to Butere police station. **DW2, CHRISTINE AWINO** testified that she was at Sura Bar at Butere lower market on the 23.8.201 at 6.00 p.m. She wanted the appellant to take her to Butere Town as he was to travel to Nairobi the following morning. The appellant told her that he had another customer and inquired whether she did not mind being carried together with the other customer, to which she agreed. While there a large group of people appeared and arrested the appellant. **DW3, WYCLIFFE OKUSIMBA WITENDE** was selling his omena and chicken at the bar. He saw the appellant coming to the bar with a passenger and left her there. The appellant then went to collect some luggage for a certain woman at the market and suddenly four people went to the bar and claimed that the appellant was taking a child to a bar. DW3 went to inform the appellant's relatives after he was arrested.

The charge sheet indicates that the appellant was charged under **section 13(a)** of the Sexual Offences Act No. 3 of 2006. According to the Act that particular section was repealed in 2010. In essence therefore there is no **section 13(a)** under the Sexual Offences Act. It appears that the prosecution intended to charge the appellant under section 14(a) of the said Act which provides for Child Sex Tourism. The particulars of the offence falls within the provisions of **section 14 (a)** of the Act. From the prosecution evidence it is established the appellant picked the complainant and took her to Sura Bar in Butere lower market. According to PW2 the appellant went to ask for a room. PW1 was not with the appellant when the appellant went to ask for a room. According to PW4 they suspected that the appellant wanted to stay with the PW1. The defence evidence is to the effect that the appellant had gone to pick another passenger who was at the bar. Indeed DW2 testified that she was the passenger to be picked. The evidence of DW3 shows that the appellant went with PW1 to the bar. Given the prosecution evidence, it is not established that the appellant intended to get a room and have sex with the complainant. It is highly doubtful that PW1 could have boarded the motorcycle at that time in the evening and go with appellant to the bar yet she did not know the appellant. It also raises doubt in my mind taking into consideration the fact that PW1 informed the court that she had had sex before. The defence evidence raises some doubt on the prosecution case. According to DW3 the appellant had gone to collect a luggage when he was arrested by four people. It is possible that PW4 and his colleagues only suspected the appellant's intention. It is possible that the appellant could have taken his passengers to Butere town and come back and spent the night at Sura Bar either alone or in the company of another person.

In the end, I do find that the appellant was charged under none existent section of the law. The prosecution evidence does not prove the case beyond reasonable doubt. The appellant is hereby acquitted of the offence of child trafficking and shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 18th day of February 2014

SAID J. CHITEMBWE

J U D G E