



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 18 OF 2011.

JUSTUS WELOBA SIMIYU ::: APPELLANT.

VERSUS

REPUBLIC ::: RESPONDENT.

(Being an appeal from the original conviction and sentence of T.A. Odera – SRM. in Criminal Case No. 2148 of 2010 delivered on 16th February, 2011 at Kitale.)

J U D G M E N T.

The appellant, **Justus Weloba Simiyu**, appeared before the Senior Resident Magistrate at Kitale charged with child stealing contrary to section 174 (1) (a) of the penal code, in that on the 5th February, 2010, in Trans Nzoia West District, he fraudulently took S N, a child aged nine (9) years with intent to deprive her “parent” RM, who had lawful charge and possession of her.

After a full trial, the appellant was convicted and sentenced to serve seven (7) years imprisonment. He was dissatisfied with the conviction and sentence and opted to file this appeal on the basis of the grounds in the petition of appeal filed herein on 23rd February, 2011. He appeared in person at the hearing of the appeal and orally submitted that the key witness (PW3) failed to properly explain how he tendered over the child to take to a certain place he (witness) did not know. That, the child was taken to somebody whose name the witness did not know nor did he provide witness to show that he handed over the child to him (appellant).

The appellant further submitted that the child was later recovered on 25th November, 2013 when he appeared in court, a fact confirmed by the prosecution counsel. That, the person found with the child was never charged and was possibly a relative of the child.

On sentence, the appellant submitted that the trial court was too harsh such that no consideration was given to the fact that he was a first offender. He pleaded for the appeal to be allowed by this court.

In response to the foregoing submissions, the learned prosecution counsel, **M/s. Limo**, contended that the evidence before the trial court was sufficient in establishing the offence against the appellant. That, the five witnesses clearly explained how the child was handed over to the appellant to deliver her to her aunt but he did not do so.

The Learned Prosecution Counsel urged this court to dismiss the appeal and stated that the prosecution are not aware that the child was recovered and if indeed there was recovery the circumstances for the same are not known by the prosecution.

Having considered the appeal on the basis of the supporting grounds and the rival submissions by both

sides, the duty cast upon this court was to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the opportunity of seeing and hearing the witnesses.

In that regard, this court has carefully re-visited the evidence forming the basis of the prosecution case i.e. the evidence adduced by the child's aunt, **RM S (PW1)**, a boda-boda cyclist, **Bernard Wanjala (PW2)**, the child's previous guardian, **DEW (PW3)**, the investigating officer, **P.C. Lucy Nyaboke (PW4)** and an Assistant chief, **Joseph Kimaiyo Togom (PW5)**.

The evidence adduced by the appellant in his defence was also given careful consideration by this court.

From the evidence, it was apparent and undisputed that the person to whom the child was to be taken (i.e. PW1) did not receive the child as expected and the person who had handed over the child (i.e. PW3) to a boda-boda cyclist was made aware that the child had not reached her destination. This therefore implied and established that the child had fraudulently been taken away from her guardians. (i.e. PW1 and PW3).

Evidence from the boda-boda cyclist (PW2) was that he received the child from her guardian (PW3) and handed her over to the appellant with a request that she be taken to her aunt. The appellant was a fellow boda-boda cyclist. He accepted that he did not take the child when asked by the guardian (PW3) but vehemently denied in his defence that he had anything to do with the child or her theft. The guardian (PW3) made efforts but could not trace him (appellant) until the 27th July, 2010, almost six months after the child vanished. He apparently went underground when the search for the child intensified. This was strong circumstantial evidence that he had something to do with the disappearance of the child.

The learned trial magistrate believed the boda-boda cyclist (PW2) and disbelieved the accused and in so doing, found the accused guilty of child theft.

As at the time of the court's judgment the child had not been traced.

This court having considered the evidence in its totality would fully agree with the learned trial magistrate that the prosecution established its case against the appellant as required by law.

The defence raised by the appellant was effectively discredited and although he alleged in this appeal that the child has since been recovered, the offence had already been committed. The recovery did not and could not have vitiated the offence.

The appellant's conviction by the learned trial magistrate was thus sound and safe and is hereby upheld.

With regard to the sentence, the seven (7) years imprisonment was lawful but rather excessive for a first offender. The same is hereby reduced to three (3) years imprisonment.

Otherwise, the appeal is dismissed.

[Delivered and signed this 5th day of August, 2014.]

J.R. KARANJA.

JUDGE.