REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 67 OF 2011

PHIDESIO NTHIGA KITHUMBU................................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(An Appeal from the Sentence and Conviction of Principal Magistrate Siakago in Criminal Case No. 252 of 2011 on 26th April, 2011)

J U D G M E N T

This is an appeal against the judgment of the Principal Magistrate Siakago. The appellant in Count I and in the alternative charge to count II was convicted on his own plea of guilty for the offence of abducting with intent to confine contrary to Section 259 of the Penal Code and that of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He was sentenced to five (5) years imprisonment in count I and ten (10) years imprisonment in the alternative charge. The appellant denied the offense of defilement in Count II and pleaded guilty to the alternative charge. He was convicted of the alternative charge and the main charge is therefore not subject of this appeal.

Mr. Muraguri of Macharia & Muraguri advocates filed the petition of appeal on behalf of the appellant. He put forward the following grounds:-

1. *That the facts did not disclose the offence of abduction in that there were no elements of secrecy and wrongful confinement,*

2. *That the facts did not disclose the offence of committing an indecent act with a child;*

3. *That the facts did not support the particulars of the charge in the alternative charge;*

4. *That the plea was not unequivocal; and,*

5. *That the sentence meted out was harsh and excessive.*

Both parties filed written submissions in this case. The appellant argued in furtherance of his grounds that in the two offences in which he was convicted, the prosecution failed to give facts to support all the ingredients of the offences. It was argued that the complainant was aged seventeen years and that the accused was charged under the wrong section of the law namely Section 8(1) and (2) which applies to cases where the victim is aged 11 years and below thus rendering the charge defective. The victim though aged 17 looked like she was 18 years and thus may have caused the appellant to believe she was of age. It was further submitted that the prosecutor failed to adduce this evidence in court to prove that the appellant knew that the victim was below 18 years.

The victim was arraigned in court as a child in need of care and protection in Siakago Criminal Case No. 252 of 2011 and there was no mention that she was abducted in the facts given by the prosecutor. The appellant urges the court to find that the complainant went to live with the appellant out of her own free will. The sentence of 10 years imprisonment for the alternative charge was excessive according to the appellant.

Ms. Ingahizu for the respondent opposed the appeal on grounds that the facts disclosed the offences charged; that the plea was unequivocal; that the age of the victim was established through tendering a birth certificate; that the appellant is introducing new evidence on appeal in regard to the presumed age of the complainant; and that the sentence of 10 years was lawful being the minimum provided by the law.

It is the duty of the appellate court to evaluate and re-assess the evidence in order to make its own conclusions. This was stated in the case of ***DAVID NJUGUNA WAIRIMU –VS- REPUBLIC [2010] eKLR COURT OF APPEAL CRIMINAL APPEAL NO.5 OF 2008 AT NAIROBI;***

> *"that the duty of the 1st appellate court is to analyse and reevaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision".*

The offence of abduction is spelt out under Section 256 and 259 of the Penal Code as follows:-

Section 259

> *"Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years".*

Section 256

> *"A person will be guilty of abduction if he forcefully compels, or by any deceitful means induces any person to go from any place".*

The ingredients of the offence include kidnapping or abducting a person with intent to cause that person to be secretly and wrongfully confined. The facts read out by the prosecutor before the trial court were worded as follows:-

> *"On 10/4/2011 at 1.00 p.m the accused met the complainant at St. Anthony Siakago Day Secondary School, she is aged 17 years. He persuaded her and took her to his home. He stayed wit her thereat as wife and husband. The parents of the complainant went about looking for her on 17/4/2011 the student was traced at the accused's place. They found accused and complainant together. The accused was arrested and arraigned at Siakago police station. He was thereafter charged as herein. I produce the birth certificate of the complainant".*

These ingredients were included in the charge which read:-

> *"On the 10th day of April 2011 at Siakago township within Mbeere North District of Embu County with intent to cause JANNIS MUTHONI NGARI to be secretly and wrongfully confine, abducted the said JANNIS MUTHONI NGARI".*

The charge was therefore properly framed consisting all the ingredients of the offence. However, the facts of the case were that the appellant met the complainant and and persuaded her to go with him to his home where he stayed for seven days. The facts as presented to the trial court lack the critical ingredients of "forcefully compelling or by any deceitful means induced".

Evidence of the act of kidnapping or abducting the complainant with intent to cause to her to secretly or wrongfully confined is lacking. It is my considered opinion that the ingredients of the offence as clearly spelt out under Section 259 and 256 and in the charge sheet were not backed or supported by the facts. It was a misdirection on part of the trial magistrate to convict the appellant of the offense of abduction contrary to Section 259 of the Penal Code.

The other issue is whether the charge for the offence of committing indecent act with a child was defective and whether it was supported by sufficient evidence. Section 11(1) of the Sexual Offences Act provides:-

Section 11(1)

> *Any person who commits an indecent act with a child and is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term not less than ten years.*

The definition of “indecent act” under the Act is any unlawful intentional act which causes;-

> *(a) any contact between the genital organs of a person, his or her breasts and buttocks with that of another person; or*
>
> *(b) exposure or display of any pornographic material to any person against his or her will, but does not include any act which causes penetration.*

The first definition is the relevant one in this case based on the particulars of the charge. The charge is worded as follows:-

> *PHIDESIO NTHIGA KITHUMBU*
>
> *Between 10th and 16th day of April 2011 at Kianthawa village Nthawa location in Mbeere District of Embu County unlawfully committed an act of indecency with Jannis Muthoni Ngari, a girl aged 17 years by touching her vagina.*

The ingredient included in the charge is “touching her vagina”. Section 134 of the Criminal procedure Code provides that:-

> *“every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.*

The issue of a defective charge was dealt with by the court of Appeal in the case of ***YOSEFU & ANOTHER VS UGANDA [1969] EA 236.*** The court held:

> *the charge was defective in that it did not allege an essential ingredients of the offence, i.e. that the skins came from animals killed, etc in contravention of the Act.*

The appellant in the Ugandan case had been convicted by the court of the offence of unlawful possession of trophies (namely animal skins) contrary to Section 14 of the Ugandan Game (Preservation and Control) Act without a licence. The charge was worded in such a manner that it left out the ingredient of “skins from an animal which had been killed).

The charge in this appeal concerns the first definition of an indecent act with a child cannt be said to be was not defective because it contained the ingredient of “touching her vagina”. The issue which now requires to be determined is whether the charge was supported by the facts before the court.

In reading the facts, the prosecution produced a birth certificate which was sufficient proof of the complainant's age. She was 17 years at the material time and was therefore a child.

The definition of a child in the Children's Act is as follows:-

“any human being under the age of 18 years”.

The other relevant fact is that during the seven days that the appellant stayed with the complainant, the pair stayed as husband and wife. Further that at the time of arrest, the appellant and complainant were found together. The defence argued that even assuming that the charge was defective, the commission of the offence was not proved from the facts. I am not convinced by this argument. It is my considered opinion that when the appellant and the complainant stayed together for seven days as husband and wife in one house where they were found together, the act of sexual intercourse took place, as state in the facts which were admitted by the appellant.

However, there was no medical evidence tendered to prove the offence of defilement which was the main charge in count II and to which the appellant pleaded not guilty. For proof of indecent act with a child, no medical evidence was required. I reach a conclusion that with the evidence contained in the facts, the offence of committing an indecent act with a child was proved.

The contention by the defence in its submissions that the complainant looked to the appellant like she was eighteen years was not supported by any evidence. The appellant did not raise it as a defence during the trial. This defence is not available to an offender charged with an offense under Section 11(1) of th Act. The appellant pleaded not guilty to the charge of defilement and was convicted of the alternative charge.

The defence contended that it is the parents of the complainant who reported the matter to the relevant authorities and not the complainant. Being a minor, the parents were under a legal duty to accord the child the care and protection she needed. It was therefore in order for them to report the matter concerning her disappearance from home.

Similarly the charging of the appellant with defilement under Section 8(1) which I agree was improper since the complainant was aged seventeen years is also outside the ambit of this appeal. It was neither a ground of appeal nor was it only raised in the defence submissions.

The issue of staying together out of the complainant's free will as stated in the petition of appeal does not arise since the complainant was under age and not capable of making a decision to cohabit with a man. The conviction was therefore safe based on the facts and considering that the plea was unequivocal.

Section 11 of the Act provides for a sentence of imprisonment of not less than 10 years. The appellant was given the minimum sentence. Depending on the circumstances of the offence, the court has power to sentence an accused person to a period of imprisonment of more than 10 years. The sentence meted out was therefore lawful and this court has no legal basis if interfering with it.

The appeal is partly successful and I conclude by making the following orders:-

(a) *That the conviction of the offence of abducting with intent to confine contrary to Section 259 of the Penal Code is hereby quashed ad sentence set aside.*

(b) That the conviction and sentence on the offence of an indecent act with a child are hereby upheld.

It is hereby so ordered.

DELIVERED, SIGNED AND DATED AT EMBU THIS 18TH DAY OF DECEMBER, 2014.

F. MUCHEMI

JUDGE

In the presence of:-

Appellant

Mr. Muraguri for Appellant

Ms. Matere for Respondent

F. MUCHEMI

JUDGE