



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 5 of 2012

JOSEPH PARASHUKU APEPLLLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence in Kilgoris PM's court by

Hon. B. Ochieng, PM, dated 30th December, 2011 in criminal case No.1082 of 2011)

JUDGMENT

1. The appellant herein Joseph Parashuku was charged with child trafficking contrary to **section 13(a)** of the **Sexual Offences Act No.3 of 2006**. He also faced an additional charge of being unlawfully in Kenya contrary to **section 13 (2) (c)** of the **Immigration Act Cap 175 Laws of Kenya**. The particulars of the 1st count were that on the 7th December 2011 at Kilai village in Transmara District of the Narok County knowingly and intentionally took Juliana Sabaya a girl under the age of 18 years out of the custody of her parents from Lolgorian to Tanzania with intent of facilitating the commission of any Sexual Offences against the said Juliana Sabaya a girl aged 15 years.
2. The particulars of the 2nd count were that on the 29th December 2011 at Kilgoris area in Transmara District of the Narok County being a Tanzanian citizen was found being in Kenya unlawfully.
3. The appellant pleaded guilty on both charges and the prosecution summarized the facts of the case as follows:-
4. On 6th December 2011 at Kilai village Lolgorian Transmara County the complainant (a young girl of 15 years) and a pupil at Kilai primary school in class 4 met the appellant who told her of his intention to marry her and was ready to take her to Tanzania. That at about 8.00 a.m. on 7th December 2011 the complainant was sent by her mother to take breakfast to casuals on their farm. She took the breakfast, met the appellant who told her that they were to proceed to Tanzania and they proceeded through Kawai by foot.
5. The two then boarded a motorcycle to Maranda, spent the night in a lodging and on 8th December 2011 at 9.00 a.m., boarded a motorcycle to Talek where they took lunch, proceeded to Olotemu spent a night again and the following day proceeded for Tanzania. That they went to appellant's homestead, appellant introduced complainant to his 1st wife, complainant was given a house and they both stayed there as husband and wife.

6. That on 14th December 2011 appellant left complainant in his homestead and proceeded back to Kenya. All this time the mother of the complainant was looking for her after she got a report that the appellant had taken her. The complainant's brother proceeded to Tanzania and with the help of Tanzanian police they went to the appellant's home, arrested him together with the complainant and brought them back to Lolgorian police station.

7. The complainant was then taken to Transmara District Hospital for age assessment. Meanwhile the appellant was brought before court and charged with the above offence.

8. The age of the complainant was assessed to be between the age of 15-17 years. The P3 form in respect to the complainant's age was produced as **exhibit P2**.

9. When asked to confirm or deny the facts as given by the prosecution, the appellant stated that some of the statements were true, that he and the complainant had agreed about the arrangement and that if the facts showed that they had not agreed the facts would not be true. He also said that he often crossed the Kenya-Tanzania border as a maasai.

10. A plea of guilty was then entered by the court and the appellant was convicted on his own plea of guilty. After hearing both the prosecution and the appellant the trial magistrate sentenced him to 10 years imprisonment on the 1st count and on the 2nd count the appellant was sentenced to 5 months imprisonment. The sentences were however to run concurrently.

11. Being aggrieved by both conviction and sentence, the appellant appealed to this court. In his petition of appeal filed in court on 11th January 2012 the appellant appealed on grounds inter alia that as a Tanzanian layman he was not conversant with matters of law; that the sentence of 10 years was harsh and excessive in the circumstances, and that as a breadwinner to his young family in Tanzania his imprisonment was bound to cause a lot of suffering to them. The appellant prayed that his sentence be reduced to a lesser one.

12. This is a first appeal. The duty of this court as a first appellate court has been cut out by the Court of Appeal in such cases as **Pandya –vs- R [1957] EA 336** and **Okeno –vs- Republic [1972] EA 32**. This court is under a duty to reconsider and evaluate the evidence afresh with the view of reaching its own conclusions in the matter. In the instant case in which the appellant was convicted on his own plea of guilty, this court is under a duty to ascertain whether the steps required to be taken by the trial court in entering a plea of guilty were all taken. In the case of **Adan –vs- Republic [1973] EA 445** the Court of Appeal set out the following steps for purposes of confirming that a plea of guilty is unequivocal:-

“(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(iv) if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.”

13. After carefully analyzing the record of the lower court, the issue that arises for determination is whether these steps were complied with. During the hearing of the appeal, the appellant reiterated the facts as given by the prosecution but added that he believed that the complainant was over 18 years of age. Of course, the appellant did not say so when responding to the facts before the trial court, but on the

basis of his submissions, he asked this court to quash the conviction and set aside the sentence of 10 years' imprisonment.

14. The appeal was opposed. Counsel for the respondent submitted that from the grounds of appeal, the appellant is only challenging the sentence and not the conviction. Counsel further submitted that 10 years' imprisonment was the minimum sentence prescribed under the law and that in the circumstances, there are no good grounds given by the appellant to warrant this court's interference with the said sentence.

15. I have now carefully read the lower court record and the law under which the appellant was charged. I have also carefully considered the plea as taken, and the sentence imposed upon the appellant. Two issues arise for determination:- (a) whether the plea was unequivocal and (b) whether this court should interfere with the sentence imposed upon the appellant and finally whether the relevant provisions of the law under which the appellant was charged and eventually convicted were still in the statute books by the time the charges were brought against the appellant.

16. In the 1st count the appellant was charged with child trafficking contrary to **Section 13 (a)** of the **Sexual Offence Act No.3 of 2006**. Although the above said section has been repealed by the **Counter Trafficking in Persons Act No. 8 of 2010 (2nd Schedule section 5)** the said Act commenced on 11th October 2012. This only means that by the time the appellant committed the above offence **Section 13 (a)** of the **Sexual Offences Act No.3 of 2006** was still in operation.

18. **Section 13 (a)** of the **Sexual Offences Act No.3 of 2006** states:-

“A person including a juristic person to 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.

19. The appellant was convicted on his own plea of guilty which was unequivocal and the prosecution summarized how he knowingly and intentionally organized travel arrangements to Tanzania with the intention of making the complainant his wife. The complainant's age has been assessed to be between the ages of 15-17 years. Therefore she was still a child in accordance with the definition of a child in the children's Act Cap 8 of 2004.

20. The issue of consent in this case does not suffice as a child cannot consent to having sexual relations with an adult. The appellant in his petition of appeal raises the issue that he did not know that the complainant was underage. However, he did not adduce any evidence to the trial court showing the steps he undertook to determine the age of the complainant especially knowing the fact that she was a school going girl. I therefore will not disturb the trial magistrate's conviction and sentence regarding the 1st count.

21. With regard to the second count I find the charge sheet fatally defective as the charging law had already been repealed. The correct law in this case should have been the **Kenya Citizenship and Immigration Act No.12 of 2011** and in particular **section 33** thereof.

22. In conclusion I allow the appeal partly regarding the second count. The appeal on the 1st count is dismissed. R/A within 14 days.

Dated and delivered at Kisii this 31st day of January, 2013.

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Present in person for Appellant

Mr. Shabola (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.