



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 177 of 2011

STANLEY KINOTI KAHINGO .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From original conviction and sentence in criminal case Number 281 of 2010 in the Principal Magistrate's Court at Kikuyu – C. A. Otieno (RM) on 31<sup>st</sup> May 2011)*

JUDGMENT

1. **Stanley Kinoru Kahingo** the appellant herein was convicted for the offence of abduction contrary to **Section 259** of the **Penal Code** in count I, and defilement of a child contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offence Act No. 3 of 2006** in count II. In the alternative, he was charged with the offence of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**.
2. Brief facts were that on the 15<sup>th</sup> day of February 2010 at M[...] village, the appellant abducted N. W. M aged 15 years without the consent of her parents, and thereafter he wilfully and unlawfully penetrated her genitals. He was convicted on 31<sup>st</sup> May 2011, and sentenced to serve 18 months and 20 years imprisonment in counts 1 and 2 respectively.
3. He appealed against both conviction and sentence, on grounds that his rights under **Section 200(3)** and **214** of the **Criminal Procedure Code** were violated; from the record, only the *voire dire* examination of the minor was conducted before the principal magistrate Miss Doreen Mulekyo. All the witnesses in the case were heard before Resident Magistrate, C. A. Otieno.
4. The question of violation of the appellant's rights under Section 200(3) does not therefore arise. There were no witnesses who were heard before one court whom the appellant required to be notified of his right to recall before a subsequent court.
5. Further, when the prosecution applied and was granted leave to amend the charge sheet, the amended charge sheet was read and every element thereof explained to the appellant. The appellant pleaded to the new charges. **Section 214 Criminal Procedure Code** was therefore complied with.
6. Secondly, the appellant urged that the court disregarded the requirements of **Section 124** of the **Evidence Act** (Cap 80 laws of Kenya) and the Oaths and Statutory Declarations (Act Cap 15 laws of Kenya); Section 124 provides that notwithstanding the provisions of Section 19 of the oaths and statutory Declaration Act, where evidence is admitted in accordance with this section on behalf of the prosecution it must be corroborated by other material evidence in support thereof implicating the accused person.

7. The appellant's submission is that this provision of the law was disregarded in his case. The proviso to **Section 124** of the **Evidence Act** however provides that:

**“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”**

8. In the learned magistrate's own words she summed up thus in reference to the complainant.

**“The complainant struck me as a faithful witness who was obviously traumatised by her ordeal at the hands of the Accused person.”**

I respectfully agree with the learned trial magistrate that the complaints by the minor against the appellant would not further her grandfather's cause in the land dispute, if indeed it existed, in any way.

9. The appellant further urged that the character of **PW1** contravened **Section 163(1) (d)** of the **Evidence Act**, and that a vital witness was not summoned to testify before the court. Firstly it is not evident which vital witness was not summoned to testify, and secondly I note from the judgment of the learned trial magistrate that she was impressed by the demeanor of the complainant and was convinced that her testimony was truthful.

Section **163(1)(d)** of the **Evidence Act** provides that:

**“when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character.”**

10. There is no evidence that the complainant was generally of immoral character. Even if that were the case, the complainant was a minor aged 15 years at the time of the offence and her character immoral or otherwise, would not exonerate the appellant from guilt for his actions.

11. Miss Kuruga, the learned state counsel opposed the appeal on behalf of the state. The learned state counsel reiterated the complainant's testimonial that on 15<sup>th</sup> February 2010 the appellant lured her from her home with a promise of a job in Nairobi. That he brought her to M[...] where he stayed with her and a roommate called Muchui for some days, until the roommate left the house on 21<sup>st</sup> February 2010, leaving the appellant and the complainant alone. The appellant then turned upon the complainant, and would lock her during the day and defile her during the night till the 23<sup>rd</sup> March 2010 when the police rescued her.

12. The offence of abduction is found under **Section 259** of the **Penal Code**. The said section provides *inter alia* that:

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

13. The complainant's testimony was that the appellant had from 15<sup>th</sup> February 2010 to the time she was rescued on 23<sup>rd</sup> March 2010, been locking her up in the house during the day when he was away. She was therefore not free to come and go from his house as she pleased. It was her evidence that the appellant had lured her with the promise of securing a job for her in Nairobi.

14. The complainant's evidence was supported by that of **PW4** CPL Joseph Koome Nderi, an Administration Police officer stationed at M[...] and **PW5** Faith Wangare Kuria the area assistant chief, who, acting on information that there was a man living with a minor as his wife, they went to the said house on 23<sup>rd</sup> March 2010 at 10.p.m. and found him alone in the house with the complainant. They confirmed that her report to them was that the appellant had lured her on the promise of helping her to secure a job.

15. On the 2<sup>nd</sup> count the appellant was charged under **Section 8(1)** as read with **Section 8(3)** of the **Penal Code** which provide as follows:

Section 8(1)

**“A person who commits an offence of defilement with a child is guilty of an offence termed defilement.”**

Section 8(3)

**“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”**

The complainant’s evidence was that between 21<sup>st</sup> February 2010 and 23<sup>rd</sup> March 2010, the appellant had sexual intercourse with her on several occasions as he held her captive in his house at M[...]. Her evidence and that of **PW2** her father, and **PW3** the clinical officer at Tigoni hospital who examined her for purposes of filing the P3 was that she was aged 15 years at the material time.

16. **PW3** examined the complainant 2 days after she was rescued from confinement. Her findings were that her hymen was perforated and a vaginal swab revealed that she had been infected with candidiasis. The clinical officer formed the opinion that the complainant had been sexually assaulted.

17. The same conclusion had been reached by the medical personnel at Nairobi Women’s hospital who examined the complainant only a day after she was rescued from the appellant’s house, and whose findings the clinical officer took note of compiling in her examination report.

18. The appellant’s testimony was that indeed the complainant came to his house to get assistance in finding a job. That she did find a job as a house girl in Githurai which she held for only one week. That she returned to his house the following Monday to seek bus fare back to her home. It was while she waited for bus fare that the police arrived and arrested the appellant. He therefore denied both offences.

19. To lend credence to his evidence the appellant called **DW2** his father who testified that the appellant had been framed because of a land dispute that existed between **DW2** and the complainant’s grandfather who is his half-brother. He too was aware that the appellant brought the complainant to his home to assist her secure a job.

20. I have anxiously considered the defence evidence in the context of the rest of the evidence on record and I find that it is untenable. If there was such bad blood between the families of the complainant and the appellant, the appellant would not have offered and the complainant would not have agreed to travel with him to M[...] to find employment. There was no dispute that the appellant did bring the minor from her home to M[...] for that reason.

21. Secondly, it is not the complainant’s grandfather nor her parents who made the initial report of defilement to the police or the Assistant Chief. The evidence of **PW4** and **PW5** was that they received that report from members of the public who were concerned that an adult man was living with a minor as his wife. They went to the house in question and found the complainant and the appellant alone at 10.00 p.m. The two witnesses were not accompanied by the complainant’s father or grandfather at that point and it was the complainant who reported both offences to them.

22. In sum I find that the prosecution discharged the burden of proof placed upon them by law and proved the guilt of the appellant on each count beyond reasonable doubt, and that evidence from the defence did not manage to displace the prosecution’s case on any of the counts.

23. On the sentence, the learned trial magistrate considered the appellant’s mitigation and sentenced him to imprisonment for 18months and 20 years on count 1 and count II respectively. Upon conviction **Section 259** of the **Penal Code** provides for a sentence of upto 7 years while imprisonment **Section 8(3)**

of the **Sexual Offences Act** provides for a sentence of not less than twenty years. The sentences imposed herein, and which were ordered to run concurrently were within the law and cannot be said to have been harsh or excessive in view of the provisions of the law.

**24.** I therefore find that the learned trial magistrate directed herself properly to the facts before her and the law applicable in convicting and sentencing the appellant on each count and this appeal is lacking in merit.

The appeal is dismissed accordingly.

**SIGNED DATED and DELIVERED** in open court this **25<sup>th</sup>** day of **February 2013**.

**L. A. ACHODE**

**JUDGE**