REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

HIGH COURT CRIMINAL APPEAL NO. 376 OF 2013

(Appeal from the Original Conviction and Sentence in Criminal Case No. 3412 of 2010 dated 13th December 2011 in the Chief Magistrate's Court at Thika by Hon. B. J. Ndeda - SRM)

REHAB WAITHERA NJUGUNA…………………………..APPELLANT

VERSUS

REPUBLIC………………………………………………..RESPONDENT

JUDGEMENT

The Appellant herein Rehab Waithera Njuguna was tried and convicted for the offences of kidnaping and stealing contrary to Sections 262 and 275 of the Penal Code. After the trial she was found guilty and sentenced to imprisonment for 7 years on the first count and 2 years on the second count respectively.

She now appeals to this Court against the conviction and sentence. In her Appeal, the Appellant set out the Grounds of Appeal as follows:-

1. That the sentence on count 1 is very harsh and excessive.
2. That the trial Magistrate erred in fact and in law by failing to require the attendance of the investigating officer who was a crucial witness.
3. That the sentences run concurrently
4. That the trial Magistrate did not consider the time spent in remand of one year and six months when meting out the sentence.
5. That the Appellant is deeply repentant and remorseful.

During her Appeal, the Appellant appeared in person while the State was represented by Mr. Okeyo. The Appellant urged the Court to find that the conviction was not safe and in her written submissions advanced the defence of being a co-wife to the mother of the victim. The Appellant had been the house-help of the parents of the victim at the time of the offence. She stated that she was remorseful and had acquired skills such as dressmaking and soap manufacture while in prison.

Mr. Okeyo for the State supported the conviction and stated that the scenario presented at the trial was one of a person who was hired and served as the house-help for PW1 and PW2 who were the mother and father of the child the Appellant was accused of kidnapping for a ransom. He submitted that the Appellant while working as aforesaid disappeared with the child of the employers and demanded 60,000/-. She was given 10,000/- and she released the child.

Mr. Okeyo stated that the Appellant was sentenced to serve 7 years while the law provides for a maximum of 7 years. He thus left the Court to make a decision.

The Appellant in her brief reply reiterated that she did not kidnap the child arguing that if she was to kidnap the child she would have been the one to receive the ransom. She stated that the statement from the mobile service provider Safaricom shows that the Appellant did not receive the money.

The evidence led was from the father and mother of the victim and a police officer. Her co-accused was given the benefit of the doubt.

Kidnapping may be defined as the taking away or transportation of a person against that person's will, usually to hold the person in confinement without any legal authority. Kidnapping may be done for a ransom or in furtherance of another crime, or at times in connection with a child custody dispute. In this case the Appellant alleges she was the wife of PW2. He however denied this and his testimony was unequivocal. Whereas the theory of co-wife was floated it was not tenable as the analysis of the evidence on record reveals that the Appellant merely attempted to raise it but it seemingly did not float.

The evidence on record suggests there was a joint criminal enterprise between the Appellant and the co-accused but the evidence adduced was not found to be sufficient to sustain a conviction and she was this acquitted.

Section 262 of the Penal Code provides a maximum of 7 years and upon conviction the Appellant was given 7 years. The child was found safe and unharmed and the fact that the evidence on record does not reveal that the Appellant deserved the maximum sentence places the sentence in precarious position.

This being a first Appeal, I must evaluate the evidence and ascertain if sentence meted out was proper. The guiding principle in determining whether this Court should interfere with the sentence imposed by the trial court is thus: is the sentence meted manifestly harsh and excessive or is it inordinately low? The Court is guided by the cases of **Diego v Republic [1985] KLR 621** and **Dismas v Republic [1984] KLR 634**. In the case before me, the Appellant was convicted and sentenced to the maximum possible punishment for the offence while in the totality of the transaction of the offence it was apparent there was the involvement of the co-accused. The sentence meted out was to my mind inordinately excessive. The minor was recovered unharmed and within a relatively short period of time.

On the other hand, the trial Court fell into error on the law while handing the sentences as he neither specified if the sentences were to run concurrently or consecutively. This error though not fatal to the conviction and sentence makes the sentence uncertain to that extent.

Having carefully considered Grounds and Petition of Appeal together with the submissions of the Appellant and the State, I find that the sentence of 7 years on the first count relating to the kidnapping was rather excessive in the circumstances.

Consequently, the present Appeal succeeds to the extent that the sentence imposed by the learned trial magistrate is hereby set aside and substituted with one covering the period already served by the Appellant.

On a side note, the record of Appeal had many errata and confusing sentences and phrases. That however did not affect the outcome of the Appeal.

Dated signed and delivered this 27th day of November 2013

Nzioki wa Makau

JUDGE