



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CRIMINAL APPEAL NO. 12 OF 2012**

**JOHN OPAR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the conviction and sentence made by the learned Senior Principal magistrate at Kericho court (Hon.J. Kwena) in Kericho Chief Magistrate's court criminal (S.O) case No. 70 of 2010 on 22.2.2012)*

**JUDGMENT**

The appellant herein, **JOHN OPAR** was tried on a charge of two counts. In the first count, he faced a charge of child trafficking contrary to **Section 13(b)** of the **Sexual Offences Act No.3 of 2006**. In the second count, the appellant was accused of defilement of a girl aged 15 years contrary to **Section 8 (1) (3)** of the **Sexual Offences Act No. 3 of 2006**. At the end of the trial the appellant was convicted in both counts and was thereafter sentenced to serve 10 years in each count. Being aggrieved, the appellant put forward the following grounds on appeal:

1. **That my lordship the learned trial Magistrate erred in law and fact by misdirecting herself by holding that the charge was proved beyond reasonable doubt where as she had noted an omission of the essential elements of the charge yet proceeded to convict I the appellant.**
2. **That my lordship, the learned trial Magistrate erred in law and fact by not seemingly that even medical report was openly showing that I did not commit the offence hence the trial Magistrate didn't consider the same seriously.**
3. **That my lordship, the learned trial Magistrate furthermore erred in law and fact by overlooking that the evidence adduced in court was contradicting and in consistent due to the names on the travelling tickets.**
4. **That my lordship, my alibi defense was not considered as required by the law.**
5. **That my lordship, the trial Magistrate erred in law and fact when she maliciously based the conviction on the purported evidence adduced in court by the complainant without circumspect that the same were not credible hence great care was supposed to be put on the doubtful evidence adduced by the complainant which fell short of proof.**
6. **That my lordship, the trial Magistrate once more erred in the matter of law and fact by not considering that the sentence of 10 years imprisonment was extremely harsh, excessive, in human and oppressive to the appellant and it was below the standard needed by the law of the land.**

When the appeal came up for hearing, Miss. Muthee, learned Stated Counsel, conceded this appeal on various grounds. Before considering the substance of the appeal let me set out in brief, the case that was before the trial court. It is the evidence of the prosecution that one **S N**, a girl aged 15 years and the

complainant herein, on 20/8/2010, visited the home of her friend L, where she was served with tea. It would appear the tea was drugged because the complainant became dizzy and confused thereafter. The complainant was taken to Kericho town by L's mother who handed her over to the appellant herein at Tuskys Supermarket. The appellant is said to have boarded a bus with the complainant for Mombasa at Kericho Total Petrol Station. The complainant is said to have fallen asleep throughout the journey but managed to regain her conscience on arrival at Mombasa city. It is alleged that the appellant took the complainant to a room where she defiled her for a whole week. The complainant's mother made frantic efforts to search for her missing daughter. She was told by Peterson Ombogo (P.W.3) that he had seen the complainant at Kericho with her friend L on 20/8/2010. L later reported the matter to Maramara Police Post. The appellant got wind that the complainant was being looked for all over the place. He decided to bring back the girl to Kericho. He lend the complainant his phone to get in touch with her mother. The complainant requested her mother to come for her to Kericho. Meanwhile, the appellant took off and went into hiding. The complainant's mother reported the complaint to the children's officer and thereafter at Kericho Police Station. Investigations were launched. The girl was taken to hospital where upon examination she was found to have been defiled and infected with a sexually transmitted disease. In the meantime, the appellant surrendered himself to the police and informed the police that he wanted the complaint to be settled out of court with the complainant's family. He was nevertheless arrested and charged with the offences he was later convicted for.

When placed on his defence, the appellant denied the offence and gave unsworn testimony. He claimed he had travelled to his rural home hence he did not go into hiding. The appellant also summoned witnesses claiming he had settled the dispute with the complainant's parents. He further alleged that the case was a frame up by the complainant's mother who had a score to settle. After considering the evidence from both sides, the trial Magistrate concluded that the prosecution's case was proved beyond reasonable doubt.

I have already stated that on appeal, the State conceded. On the first ground, it is argued that Count I is based on a non-existent provision. Miss. Muthee was of the view that the defect was incurable under **Section 382** of the **Criminal Procedure Code**. The charge is dated 23rd September 2010. **Section 13** of the **Sexual Offences Act** by then had been repealed hence the appellant was tried on a charge based on a non-existent provision of the law. With respect, I agree with the argument of Miss. Muthee that the defect cannot be cured under **Section 382** of the **Criminal Procedure Code**. A critical look at the second count will show that the same is based on **Section 8(1)(3)** of the **Sexual Offences Act No.3 of 2006**. Again, such a section does not exist. Of course one may infer that the drafters of the charge meant to charge the appellant for an offence premised on **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No.3 of 2006**. Unfortunately, this court has no discretion to make inferences on such a serious lapse on appeal.

Without belaboring to go in detail the other grounds of appeal, I am convinced the appeal should be allowed. Consequently, the appeal is hereby allowed. The conviction is quashed and the sentence set aside. The appellant is hereby set free forthwith unless lawfully held.

**Dated, Signed and delivered this 22nd day of November, 2013.**

**J.K.SERGON**

**JUDGE**

**In open court in the presence of:**

Mr. Nyaingiri, learned advocate for the Appellant

Appellant in person

In the absence of Director of Public Prosecution but with Notice

Mr.Korir- Court clerk