REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO 90 OF 2011

J.M. ….....…….....……APPELLANT

VERSUS

REPUBLIC …….....……..RESPONDENT

JUDGEMENT

J.M. was jointly charged with Julius Injeethi Imbensi with the offence of abducting with intent to confine, contrary to section 259 of the Penal Code. On 23/11/09 the appellant was convicted on her own plea and was sentenced to serve three years imprisonment. She was aggrieved by the conviction and sentence and filed the appeal. The grounds upon which the appeal is preferred are as follows:-

1. That the court failed to warn the appellant of the consequences of pleading guilty to the offence;

2. That the court failed to appreciate that the appellant was a minor;

3. That the sentence was excessive;

4. That being a minor the appellant should have been accorded trail under the Children's Act.

When the appellant indicated that she is a minor, the court ordered that an age assessment be undertaken at the Provincial General hospital. The doctor opined that the appellant was at least 18 years old. The offence which the appellant faced was committed in the year 2009.

It means therefore, that the appellant was a minor at the time of commission of the offence. However, she was jointly charged with an adult and that is why she could not have been charged in the Children's Court.

The plea was taken on 25/11/09 in the Kiswahili language and she answered that she took the child of the complainant secretly and confined the child because she wanted the complainant to pay her ksh5,500/=. The particulars of the charge read that on 23/4/09 at Provincial General Hospital Quarters in Nakuru, with intent to deprive Rachael Chemutai, a parent who has the lawful charge of Vincent Kipkoech jointly with others not before court, caused the said Kipkoech to be secretly and wrongfully confined.

Even if the complainant had the appellants money, the appellant had no right to wrongfully confine the child . After the facts were read to the appellant, she did accept them to be true. This court finds that the plea was unequivocal. The conviction was safe.

The appellant was a minor at the time of commission of the offence and arrest and

the court should have taken into account the Children's Act as respects sentence. Once the prosecutor said that the appellant was a first offender, the court should have conducted some investigation on the minor before sentencing her to 3 years imprisonment without considering the other options. The maximum sentence provided under section 259 of the Penal Code is 7 years imprisonment . The appellant was under 18 years and therefore a child as defined under the Children's Act, **"a child is anybody under the age of 18 years"**. The trial court should therefore have been guided by the provisions of section 190 and 191 of the Children Act. In this respect, I find that the sentence meted on the appellant was excessive in the circumstances.

I hereby quash and set aside the sentence. The offence is very serious and on the increase. I direct that the Probation Officer do prepare a report on the appellant before the court can decide on how to sentence her.

Mention on **5th July 2011** for Probation Officers Report.

DATED AND DELIVERED THIS 21st DAY OF JUNE 2011

RPV WENDOH
JUDGE

Present

Appellant in person
Nyakundi for state
CC: Kennedy Oguma