REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 191 OF 2009

PATRICK NJOGU NGARI……………………...….. ……..APPELLANT

VERSUS

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

J U D G E M E N T

Patrick Njogu Ngari herein after referred to as the Appellant was jointly charged with another before the Wanguru Senior Resident Magistrate Court with the offence of **Defilement of a Girl Contrary to Section 145(1) of the Penal Code.**

In the alternative, they were jointly accused of indecently assaulting her contrary to **Section 144(1) of the penal Code.**

They were also charged with a 3rd count of ABDUCTION contrary to **Section 143 of the Penal Code** where they were charged with jointly abducting the complainant a girl under the age of 16 years without the consent of the parents.

They both pleaded not guilty to the 2 principal charges as well as the alternative charge. Evidence was called and at the close of the case, they were found guilty of abduction Contrary to Section 143 as charged and convicted accordingly. They were each sentenced to serve 5 years imprisonment but being aggrieved by the conviction and sentence, the Appellant filed this Appeal.

He filed the Appeal through the firm of Rugaita & Co. Advocates who have proffered 6 grounds of Appeal.

The learned state counsel told the court that she partly concedes the appeal for the only reason that *voire dire* was not conducted by the learned trial magistrate when the complainant's evidence was taken. The learned state counsel nonetheless appears to misapprehend the law and procedure on the requirement of *voire dire.* This relates to children of tender years and not everybody below the age of 18 years. In this case the complainant was aged 13 years in class 7 and *voire dire* was not necessary.

A child of tender years is one aged below 10 years and unless there is cause for the trial magistrate to believe that a child older than that is unable to comprehend the process of giving testimony or understanding the nature or purporse of taking an oath, then the *voire dire* exercise is not necessary.

Given the complainant's evidence and the length of the cross examination, it was not necessary to carryout any *voire dire.* The Appeal was therefore conceded for the wrong reasons.

That said, I come to the merits or otherwise of this Appeal. Following the trial, the learned trial

magistrate found the main count of defilement fatally defective and thus acquitted both Accused persons on the defilement and indecent assault charges. I agree with him that the charge was fatally defective as each Accused ought to have been charged in a separate charge for defilement or indecent assault.

This appeal therefore relates only to the conviction on the Abduction charge. I will briefly re-evaluate the evidence adduced before the trial court in respect of this count.

The complainant was said to have been walking alone to school on the material date and time. While on her way, she found the Appellant and the other Accused person with a motor vehicle stopped beside the road. The Appellant is said to have been standing outside the motor vehicle while his accomplice was behind the steering wheel. The Appellant offered the complainant a ride but when she declined, he grabbed her and forced her onto the back seat of the motor vehicle and drove off. She was driven into a bush where she was dragged out of the motor vehicle and the Appellant forcefully had carnal knowledge of her. They are said to have driven off leaving her at the scene. A passerby found the complainant there and took her to her aunt's house. They also went to her school and reported the matter. The matter was reported to the police station and she was issued with a P3 form for treatment. The medical officer who examined her confirmed that indeed she had been defiled. The complainant who said she could identify her assailants later spotted them within the township. She reported the matter to her teacher who reported the matter to the police station. The Appellant and the co-Accused were arrested and later charged with the said offences which they denied. Their evidence was purely on how they had been arrested.

My finding is that had the charges been properly drafted, the Appellant could have been properly convicted for defilement. I say so because, the incident happened in broad daylight. There was therefore sufficient light. The Appellant was talking to the complainant before she was blindfolded and forced into the motor vehicle. She clearly saw her assailants and that was why she was able to lead to their arrest some months thereafter. In my considered view, that identification was proper and could not have been faulted. This in turn means therefore that the complainant was able to see and clearly identify the persons who abducted her. I have considered the grounds of appeal raised by the counsel for the appellant. It was not unlawful for the trial magistrate to convict on the uncorroborated evidence of PW1. I note that the learned trial magistrate in his judgment analyzed the evidence of the complainant and he satisfied himself that she was telling the truth. He had the advantage of seeing and assessing her demeanor which I do not have. He found her to be a truthful and credible witness. I have no basis to impeach that finding. I am therefore satisfied that the Appellant and the co-Accused were properly identified by the complainant and grounds 1 & 2 of the petition of Appeal must fail. An identification parade could not have served any purpose as it was the complainant herself who had pointed out the Appellant to the police for him and the other accomplice to be arrested.

On the supplementary ground of Appeal that;

"The learned magistrate erred in law when he found the Appellant guilty on provision of law other than the one stated in the charge sheet..",
I beg to differ with learned counsel. In convicting the Appellant the magistrate clearly stated;

"I therefore find both accused guilty of the offence of abduction contrary to Section 143 of the penal code and convict them under Section 211 of C.PC."

He convicted the Appellant under Section 143 of the penal code and not Section 142 as submitted by counsel. What the learned magistrate did however is attempt to apply the definition of abduction under Section 142 of the penal code to Section 143. These 2 sections, which have since been repealed related to totally different circumstances and none could have been applied to define the other. The learned magistrate did therefore falter in referring to the definition given under section 142 of the penal code. He did nonetheless convict the Appellant for the offence he was charged with i.e. under section 143 of the penal code. What I do not however understand is the relevance of Section 211 of the C.P.C. in the whole scenario. I can only assume that the magistrate intended to refer to section 215 of C.P.C. and not 211 C.P.C.

That mistake did not however affect the conviction and is curable under section 382 of the C.P.C.

My finding therefore is that the Appellant was properly convicted under section143 of the penal code as charged. That said however, it is noted that abduction under that section is a misdemeanor. Where a person is convicted for a misdemeanor and no sentence is provided for, like in this case, then section 36 of the penal code comes in to play.

The maximum custodial sentence under section 36 is a prison term of not more than 2 year imprisonment. The learned trial magistrate therefore erred in law in sentencing the Appellant to 5 years imprisonment. That sentence was not sanctioned by the law.

As far as the conviction is concerned, my finding is that the same was sound and safe. I have no basis of interfering with the same. The Appeal against the conviction is therefore dismissed. I nonetheless allow the Appeal on sentence. The sentence of 5 years imprisonment is hereby set aside and in its place, I substitute one of 2 years imprisonment.

The 2 years imprisonment to be computed from the date of conviction and sentence by the trial court.
It is so ordered.

W. KARANJA
JUDGE

Delivered, date & signed at Embu this 18th day of November 2010.
In presence of:- Appellant & Ms. Matiru for the State.