

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal Case 321 of 2007

**FRANCIS MUHORO NJOGU.....
.....APPELLANT**

VERSUS

**REPUBLIC.....
.....RESPONDENT**

(Appeal against Conviction and Sentence in the Senior Resident Magistrate's Court at Kigumo in Criminal Case No. 2572 of 2007 dated 8th August 2007 by S. M. Mokua Senior Resident Magistrate)

JUDGEMENT

The Appellant, FRANCIS MUHORO NJOGU was charged with offence of Trafficking for sexual exploitation contrary to *Section 18 (a)* of the Sexual Offences Act. The particulars of the charge were that on 3rd August 2007 at Kianjiru-ini village in Muranga South District within Central Province the Appellant knowingly arranged the travel of Pauline Wambui Njuguna for sexual exploitation. The Appellant pleaded guilty to the charge and the facts of the case and which were admitted by the Appellant were given as follows:

“On 28th July 2007 Njeri Nguguna reported that she had been at Limuru for two (2) years due to struggle (sic) with her husband. She learned that one of her daughters had gone missing. She learned that sexual intercourse (sic) between the said daughter and one Kikuyu male Adult Francis. The Complainant confirmed that the act was committed on 3/8/2007 at the residence of the accused. She reported the incident and established that the accused had accommodated her, gave the Complainant 70/= to facilitate her transport to Thika. Accused was arrested and charged as herein.....”

The Appellant admitted all these facts and the trial Magistrate (Mokua – S.R.M.) having convicted him sentenced him to fifteen years imprisonment. The Appellant's appeal to me is one of mercy on the basis that the sentence of fifteen years imposed on him was manifestly harsh and excessive in all the circumstances.

I, of course, have the right to interfere with a sentence such as the one before me if I am satisfied that in coming to that sentence, the trial Magistrate did not take into account a relevant fact, or that he took into account an irrelevant fact or that in all the circumstances of the case, the sentence imposed is harsh and excessive. However, I should never forget that sentencing is an exercise in discretion of the trial Court which should readily not be interfered with as long as it is executed judicially and not capriciously.

Besides the harsh sentence imposed in this case, another issue arises. Whether the facts as led by the Prosecution above support the charge laid or indeed any other offence known in law. Cognisant of this fact, Mr. Orinda, Learned Senior Principal State Counsel readily conceded the appeal on conviction as well. According to the learned Senior Principal State Counsel, the facts did not disclose any offence

known in law. I quite agree with this submission of the Learned Senior Principal State Counsel. The offence charged was one of trafficking for sexual exploitation. One would thus have expected that the prosecution would lead facts as to show the nature of trafficking and that the said trafficking was for sexual exploitation at the instigation of the Appellant. However, the facts merely disclose a sexual relationship between the Appellant and the Complainant. There is nothing in the facts to show that, that sexual relationship was non-consensual. Indeed it had all the hall marks of consensual sex. There is nothing in the facts to suggest that the Complainant was a minor as to make the sexual intercourse between the two illegal. Following that one night sexual stunt, it is alleged that the Appellant then parted with Kshs. 70/= to facilitate the Complainant's transport to Thika. As far as I can see, there is nothing wrong with the Appellant giving Kshs.70/= to the Complainant. It was not remotely suggested that the Kshs.70/= given was to facilitate the Complainant's transport to Thika so as to engage in sexual activities or trade for the benefit of the Appellant.

All in all taking a mature girl as Complainant herein to a house, accommodating her, having sex with her thereafter and in consequence thereof giving her money to facilitate her transport to wherever she wanted to go cannot amount to any offence known in law and in particular under the Sexual Offences Act.

For one to be convicted for the offences of trafficking for sexual exploitation, it must be shown by facts that the Appellant intentionally or knowingly arranged or facilitated travel within or across the borders of Kenya of another person for purposes of sexual exploitation. Regrettably this was not the case here! The facts as narrated by the prosecution failed to disclose the essentials of the offence of Trafficking for Sexual exploitation.

The Appellant was thus convicted for an offence unknown in law and or that the facts narrated did not support the charge preferred. Indeed the facts were at variance with the Charge Sheet.

For all the foregoing reasons, I find that the appeal has tremendous merit. Accordingly I allow it, quash the conviction and set aside the fifteen years imprisonment term imposed on the Appellant. The Appellant shall be set at liberty forthwith unless held for some other lawful cause. These shall be the orders in this appeal.

Dated and delivered at Nyeri this 29th day of January 2009.

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M. S. A. Makhandia

JUDGE