REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO

Criminal Appeal 4 of 2009

KENNETH KIPLANGAT RONO…… APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

JUDGEMENT

I: Background

1. Kenneth Kiplangat Rono, a male adult was charged in the Senior Resident Magistrate's Court at Bomet with two counts under the **Sexual Offences Act** being:-

Count I

Defilement of a girl under the age of 15 years {old} contrary to ***section 8(3)*** *of the Sexual offences* ***Act No. 3/2006.***

Particulars of offence.

That on the 18th and 19th June, 2008 at Chepngania village in Bomet District within the Rift Valley Province unlawfully had carnal knowledge of MC a girl under the age of 15 years old.

Count II

Child trafficking contrary to **section 18(1)** of the Sexual Offences **Act No. 3 of 2006.**

Particular of offence

On diverse dates between 18th June, 2008 and 20th June, 2008 in Bomet District within the Rift Valley Province detained MC a girl under the age of 15 yeas old for sexual exploitation.

2. A plea of not guilty was entered by accused in the Subordinate Court. A trial was conducted in which evidence was adduced that a minor/girl complainant was put in a vehicle with her brother and travelled to the accused house. The brother left and went away but the minor/girl was left with the accused person. She was a vagina and was sexually exploited for two to three days. Her parent went to the police and were able to trace the minor girl. A medical report was filled out by a clinical officer who acknowledged that the minor had a white discharge emanating from her virgin but stated in her report that there was no sexual penetration and or evidence that she was defiled.

3. The trial magistrate acquitted the appellant on count No. 1 on defilement but convicted the appellant on the 2nd count on trafficking. He sentenced the appellant to a term of imprisonment of 15 years or Kshs. 2 million fine.

4. The appellant being dissatisfied with the conviction and sentence filed an appeal on the 20th January, 2009. He had been represented in the lower court by M/S Matwere and co. advocates. In the appeal M/S Mitey & associates advocates represented him.

II: <u>Appeal</u>

5. The Petition of appeal against the conviction and sentence passed on 16th January, 2009 by the trial magistrate was on the grounds that

i) There was no sufficient evidence that the complainant was under the age of 15 years.

ii) The magistrate erred in law and fact in convicting the appellant when all the ingredient of the offence under Section 18(1) of the sexual offences act were not proved.

iii) The trial magistrate failed to appreciate that PW1 (Minor/complainant) was neither a credible nor a truthful witness.

iv) The magistrate misdirected himself in that having found no evidence of defilement on PW1 in count 1 of the charge sheet he convicted the appellant on count 2.

v) That the sentence imposed on the appellant is harsh and excessive.

A) <u>Argument by the appellant</u>

6. The arguments put forward by Hon. Mr. Justice Mitey (*retired)* was basically that there was uncertainity as to the minor's age. That in evidence it turned out that she was indeed 15 years of age. Proof of her age was nonetheless required which was not given.

7. The offence before the Court was not one of child trafficking. **Section 18(1)** he argued should never have applied but **Section 13** of the Act.

8. Thirdly, the minor was examined but was found with no injuries at all whereby to indicate to the Court that there was defilement. The clinical officer confirmed that there was no sign of sexual intercourse.

9. Fourthly, the minor was not detained by force. She was found in the accused /appellant home outside the house sitting with the mother. The question of detaining by the appellant does not arise.

10. Further, there was no evidence at all of defilement. He, the trial magistrate proceeded to convict the accused /appellant on count No. 2 knowing that there was no evidence on the first count and therefore the inconsistency. The magistrate's decision left a lot to be desired having not complied with **Section 169** of the Criminal Procedure code.

11. Finally, the sentence was extremely excessive. The appellant was only twenty three years old. He is not yet married and was treated as a first offender. The trial magistrate imposed an alternative sentence.

B) <u>In reply</u>

12. The state did not support the conviction and sentence. The evidence to his opinion was not sufficient. There was material inconsistency. More so on the medical evidence. The **section 13 and 18** of the Sexual Offence Act dealing with trafficking refers to a child being taken outside the country and

not within the local jurisdiction. **Section 13** nonetheless refers to a justice persons and not a natural person

III: <u>Opinion</u>

13. The Sexual Offence Act, 2006 is a recent legislations specifically enacted by Parliament to make "*provision about sexual offences this definition, prevention and the protection of all persons from harm, from unlawful sexual acts and for connected purposes"*

14. The appellant was charged with defilement contrary to **Section 8(3)** of the Sexual Offences Act. The issue that I wish to first handle is that of the age of the minor. In her evidence she stated that she was aged 14 years old and was born sometime in December, 1993. That would mean that her next birthday would be in December 2008 when she would have turned 15 years old. Under the Act the minor is within the brackets of between 12 and 15 years of age. The clinical officer gave the age of 15 years as an expert witness she is required to verify this and ascertain this is the correct age.

15. I am satisfied that the minor is aged 15 years old in 2008 and falls within the brackets of the 12 to 15 years old.

16. With this in mind I look at the evidence of count 1 on defilement. The trial magistrate acquitted the appellant on the evidence by the clinical officer. To my opinion the lady clinical officer is said to not have physically examined the minor but took blood and urine sample only. She stated that there was no sign of sexual intercourse but was able to give evidence that the minor had white discharge.

17. In the case law of **<u>Jacob Odhiambo Omolo V R Ksm Cr.a 80/08 Omollo, O'kubasu Aluoch JJa ksm.</u>** The issue arose as to the 'voire Dire' examination of the minor. That issue does not arise in this case but the Magistrate's Court, the High Court and the Court of Appeal believed the evidence of the minor and upheld the conviction against the appellant in that case.

18. In this present case the minor, a school going child informed the Court how the appellant went to the accused house with a brother in a vehicle. The brother left and the accused told her there was no vehicle so she could not go, but sleep. They slept till morning. She was a virgin and had never had sex in all her life. She did not consent to this and stated that he forced her. The time she first entered his house was 4.00p.m. At 7.00p.m he left and returned at 8.00p.m. His sisters brought her food. He then had sex with her from that evening till 7.00a.m. He left returned at 7.00p.m. He never locked the door. He had sex with the minor the second night till morning. His parents question her the next morning. Later her father, the police and the accused came to pick her up. She was issued with a P3 form.

19. The trial magistrate explained the acquittal on this count on the grounds that the accused may have used condoms and thus there was no trace of sexual intercourse.

20. I do not find that evidence before Court. I note that the minor evidence is credible. That she was defiled and there was indeed was penetration on the discharge of the white substance.

21. The act committed was " **intentionally** and unlawful" under **section 43** of the Sexual Offence Act intentional and unlawful acts "… **if committed in respect of a person who is, inter alia, incapable of appreciating the nature of an act which causes the offence**"

22. The minor appeared, from the evidence not to have been forced in her relationship. The minor stated that she indeed was forced but the appellant's advocate tried to point out that she was never detained as such. There is **Section 44(1)** a complainant is not to be taken to have consented to the act unless sufficient evidence is deduced. That further under **Section 44(2).** A minor is not capable of giving consent and therefore I can conclusively hold that indeed the minor was compromised and interacted with the accused to be defiled. I would reinstate the charge of defilement and reverse the decision of the trial magistrate. I convict the said appellant with the offence of defilement.

23. As to the second count on child trafficking I require to go back to the history of this under the penal code **Cap 63 Section 260 and 261** it was originally dealing with the offence of kidnapping and abducting in order to subject to grevious harm, slavery and wrongfully concealing or keeping in confinement kidnapped or abducted person. These two sections have been replaced by **Section 14 and 18** of the Sexual Offence Act.

24. It is not correct, as the state counsel stated, that it is only an act of trafficking outside the country that applies- The section deals with incidence within the country.

25. The minor was lured into a vehicle. The appellant is a driver of a matatu vehicle cum **TOUT**. He ferried the minor and her brother to his house then detained her. The act of ferrying her to his house is trafficking or under the section/old act abduction. Once she arrived at the house he gave her no choice but to remain there by stating that there was no transportation back from the accused home. His parents were not aware of her presence.

26. She was subjected to the act of sexual intercourse and submitted to it. She is a minor and was therefore a person who was "*incapable of appreciating the nature of an act which causes the offence*". On the face value one cannot say that no offence has been committed. An offence indeed had been committed herein where the minor was constantly defiled for two nights.

27. I would hold herein that the conviction on both counts be and is hereby upheld.

28. I now turn to the issue of sentencing.

Under Count I

Section 8(3) the term of imprisonment is 20 years. I accordingly impose this sentence.

Under Count II

The term is not less than 15 years imprisonment. The trial magistrate gave a fine of 2 million and 15 years imprisonment. I would rule that a 2million fine not to be in default and or imposed and is set aside.

To this extent the sentence of 20 years imprisonment and 15 years imprisonment are to run concurrently.

DATED this 25th day of March, 2009 at **KERICHO**

M.A. ANG'AWA

JUDGE

Advocates

W.R. Kiprono advocate from M/S W.R. Kiprono & Co. advocates instructed

to hold brief for M/S Mitey & Associates for the Appellant – present

R.K. Koech senior state counsel instructed by the Attorney General

for the state/Respondent - present