



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
Criminal Revision 7 of 2009

HILLARY KIPKEMOI MUTAI APPLICANT

VERSUS

REPUBLIC RESPONDENT

REVISION RULING

I: Procedure

1. M/S E.K. Koskei filed a Notice of Motion dated 5th October, 2009 seeking orders that this court do quash the conviction and sentence against Hillary Kipkemoi Mutai, a male adult who had been charged with the offence of abduction of a girl under 16 years old contrary to section 143 of the penal code.
2. The law of revision is found under section 362 of the Criminal Procedure Code which empowers the High court of Kenya to call and examine the criminal proceedings of any file before the subordinate court for purposes of satisfying itself as to the “correctness” “legality” or “propriety” of any finding sentence or order recorded or passed as is the regularity of any proceedings of such courts.
3. The procedure to come to court requires that a letter to the Deputy Registrar for the judge’s attention to deal with such revision.
4. In this matter the advocate has come in by way of a Notice of Motion deponed by the advocate and that would require a reply from the state, which is not the intention of revision.
5. I would deal with the merits of the application despite the application being defective.

II: Facts background

6. In a language put to the offender English/Kipsigis the offender admitted the charge of abduction of a girl under 16 years old contrary to section 143 of the penal code. The counts are two because on 15.9.09 and 21.9.09 two separate days the offender had sexual intercourse with the minor girl according to the offender the girl accepted him.
7. The offender pleaded guilty to both counts and was sentenced to ten years imprisonment. The trial magistrate did not indicate whether it was ten years imprisonment for count I or count II.

II: Findings

8. The section 143 of the penal code had been repealed in the year 2006. It deals with abduction. That

same section has been replaced with section 18(1) Trafficking for sexual explanation under the Sexual Offences Act.

9. When such a charge sheet comes before the court it must be struck out by the same court. In so doing the accused may be rearrested and recharged under the correct law.

10. In this case the offender had been convicted and sentenced. The advocate presented the case law of Jackan Kioko V R Cr. Rev 316/06

Sergon J (Mombassa)

Whereby the revision undertaken by the Hon. Judge on grounds that the sentence was an illegality and the plea unequivocal.

11. In this case the plea taking was correct save for sentencing where a second count would have been considered.

12. The girl herein was a minor. Whether she agreed to the offence of having sexual intercourse with the offender or not, the offender should have been charged under the sexual offences act of section 8. According to the age of the victim.

13. If the police wish to include the offence of abduction then it comes under the law of trafficking. This has raised certain opinion from my brother judge.

G.B.M. Kariuki J in the case of

Wesley Kiplangat Chebochok V R on the interpretation of Trafficking. This may be the reasons why the Republic has fallen back to section 143 of the penal code.

14. The Count Charge for abduction is Section 18(1) of the offence of Trafficking of the sexual offences Act.

In conclusion

15. The two counts against the offender is hereby quashed and sentence set aside. This court orders that the offender be subjected to a retrial under section 8 of the sexual offences act in two counts and under section 18(1) of the Sexual Offences Act in the alternative.

16. It is further ordered that the trial be heard before another magistrate at Kericho Law Courts.

DATED this 8th day of October, 2009 at KERICHO

M.A. ANG'AWA

JUDGE

Advocate

M/S E.K. Koskei & Co. advocates for the Applicant - absent