



GEOFFREY MOI OCHOKI APPELLANT

VERSUS

REPUBLIC RESPONDENT

**(From original conviction and sentence in the Resident Magistrate's Court at Kehancha
Criminal Case No.10 of 2007 by J. R. NDURURI ESQ., RM)**

JUDGMENT

The appellant was charged with abduction of a child contrary to section 13(1) of the Children Act 2001. The particulars of the offence were that on the 24th day of August, 2007 at Gukihuru village, Kokeharaka Location in Kuria district of the Nyanza Province, the appellant, willfully and unlawfully abducted a child namely G. M. aged 13 years, who was under the care and protection of her parents, thereby denying her education at a local primary school where she was in class 6. The appellant pleaded guilty to the said charge and was convicted and sentenced to three years' imprisonment.

The facts of the case as read out by the prosecutor were that on the material day, the appellant was attending a wedding together with the said child and without the permission of her parents; he abducted the child and took her to his house. The parents started looking for her and after two days they were informed that the child was at the house of the appellant where she had been locked in. The area chief raided the house and rescued the young girl.

In his mitigation, the appellant, who was aged 22 years at the time, said that he intended to marry the girl. He thought that she was 18 years old. The appellant filed an appeal against his conviction and sentence. He raised the following grounds:

“(i) The learned trial magistrate erred in law and fact by failing to ensure that the plea was clear and unequivocal hence led to travesty of justice.

(ii) The learned trial magistrate erred in law and fact by entering a plea of guilty while the appellant had raised an explanation which amounted to a defence to the alleged offence.

(iii) *The learned trial magistrate erred in law and fact by convicting the appellant without ascertaining the age of the complainant by means of assessment by an expert.*

(iv) *The learned trial magistrate erred in law and fact by handling a sentence that was harsh and excessive on the appellant.*

(v) *The learned trial magistrate erred in law by convicting the appellant on a defective charge.*

(vi) *The learned trial magistrate erred in law by handing down a sentence that was unlawful.”*

Mr. Kweyu for the appellant submitted that the charge was defective because section 13(1) of the Children Act does not create any offence and neither does it provide for any penalty.

The section states as follows:

“13.(1) A child shall be entitled to protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction by any person.”

Mr Kweyu further submitted that the charge was omnibus and the appellant could not understand what he was charged with and prepare his defence accordingly. There was the issue of abduction and the other one of denying the complainant the right to education.

With regard to the sentence, counsel submitted that the same was unlawful and cited the provisions of section 20 of the Children Act which are as follows:

“20. Notwithstanding penalties contained in any other law, where any person willfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in sections 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months; or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine.”

Mr. Kemo, Senior Principal State Counsel, opposed the appeal against conviction. He submitted that the plea was properly taken and the appellant pleaded guilty to the same and admitted that the facts as read out were correct. He further submitted that section 13 of the Children Act protected a child from; inter

alia, abduction and exploitation. He added that failure to cite section 20 of the Act, which provides for penalty upon infringement of a child's rights, as spelt out under section 13 of the Act did not occasion a miscarriage of justice. In any event, Mr. Kemo added, the error or omission in the said charge was curable under the provisions of section 382 of the Criminal Procedure Code, which states as follows:

“382. Subject to the provisions hereinbefore

contained, no finding, sentence or order

passed by a court of competent jurisdiction

shall be reversed or altered on appeal or

revision on account of an error, omission

or irregularity in the complaint, summons,

warrant, charge, proclamation, order,

judgment or other proceedings before

or during the trial or in any inquiry or

other proceedings under this Code, unless

the error, omission or irregularity

has occasioned a failure of justice:

Provided that in determining whether

an error, omission or irregularity has

occasioned a failure of justice the court

shall have regard to the question whether

the objection could and should have been

raised at an earlier stage in the

proceedings.”

Regarding the sentence that was passed by the trial court,

Mr. Kemo conceded that the same was unlawful since the maximum sentence is twelve months' imprisonment, which had been exceeded.

The purpose of a charge is to inform an accused person the nature of allegations that have been made against him/her so that he may prepare his defence accordingly. Every charge should contain a statement of the specific offence or offences with which an accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence allegedly committed. The charge sheet should also refer to the penalty section of the law, which the accused is alleged to have breached.

With regard to the charge that was preferred against the appellant herein, the statement of the offence

committed and the particulars thereof were sufficient. However, the penalty section, in this case, Section 20 of the Children Act, was not cited. That notwithstanding, there was no failure or miscarriage of justice. The appellant clearly understood the charge and pleaded guilty. His plea was unequivocal. His conviction was therefore proper in law. His mitigation that he thought that the young girl was eighteen years and that he wanted to marry her could not detract from the fact that he had committed a grave offence. Section 14 of the Children Act protects children from, inter alia, early marriages or other cultural rites, customs or traditional practices that are likely to negatively affect their life, health, social welfare, dignity or physical or psychological development. The appellant knew that the child was in class six and his act of abducting her from her parents' care was going to curtail or negatively affect her education. Men must realize that any dealing with any girl under the age of eighteen years which dealing is likely to negatively affect the girl's life, be it sexually, socially or physically, is an offence under the Children Act. It matters not what the man's intentions are or what he believes the child's age to be. Even where a man intends to marry a girl, as was alleged by the appellant, it is his responsibility to positively verify her age.

The appellant's mitigation could not therefore amount to a valid defence to the offence committed as stated in ground two of the petition of appeal.

Consequently, I dismiss the appeal against conviction.

As regards the sentence that was passed by the trial court, I agree that the same was illegal because the maximum sentence for such an offence as committed by the appellant is twelve months' imprisonment or a fine of fifty thousand shillings or both. The learned trial magistrate was therefore plainly in error when he sentenced the appellant to three years' imprisonment. I set aside the said sentence and substitute therefor a sentence for the period already served since 30th August, 2007. The appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at KISII this 14th day of July 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Kweyu for the appellant

Mr. Kemo, Senior Principal State Counsel for the Republic

D. MUSINGA

JUDGE