REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Appeal 42 of 2005

ERICK OCHIENG SENDA ……………….……………APPELLANT

VERSUS

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

(From original conviction and sentence in Criminal Case No. 2602 of 2004 of the Senior Resident Magistrate Court at Mombasa)

J U D G M E N T

The appellant herein, Erick Ochieng Senda, was tried on a charge of Abduction of a girl under the age of 16 years contrary to Section 143 of the Penal Code. The particulars of the offence are said to be that on the 26th day of July 2004, at Queensland Academy, Changamwe Location in Mombasa District within Coast Province unlawfully abducted Lydia Mutua an unmarried girl under the age of 16 years out of the custody or protection of the mother and against the will of such mother. After undergoing a trial, the appellant was convicted and sentenced to serve four (4) years imprisonment. Being aggrieved the appellant preferred this appeal.

On appeal the appellant put forward six grounds in his petition of appeal. He was granted leave to rely on written submission duly filed before this court and served upon the learned state counsel. When the appeal came up for hearing, Miss Mwaniki, learned state counsel conceded to the appeal on two main grounds namely: first that the sentence meted out was harsh and excessive. Secondly that the evidence tendered by the prosecution in support of the charge did not establish the offence hence there was no proof beyond reasonable doubt.

I have re-assessed and re-evaluated the evidence tendered in support of the charge. The prosecutions case before the trial court is supported by the evidence of three witnesses. Miriam Mutua (P.W.1) told the trial court that on 16.7.2004, she called the headmaster of Queensland Academy, the school where her daughter, Lydia Mutua was studying. P.W.1 wanted to inquire about the academic performance of her daughter. P.W.1 said that when her daughter heard she was calling her school she escaped from her home to an unknown destination. P.W.1 made frantic efforts to trace her whereabouts by involving the school administration and the police. She said she went to the school but she did not see her child. The appellant who was her child’s teacher was not also present in school. She claimed she made inquiries and was told that the child may have gone to the appellant’s house in Bombolulu. On 16th August 2004, P.W.1 said she managed to find the girl at the appellant’s aunt’s house. The girl was taken to Changamwe Police Station where she was released to P.W.1. The Police visited the house where the girl was found the next morning upon which they retrieved the girl’s belongings by breaking the door to gain access. Kasine Gandi (P.W.2) told the trial court that the appellant was arrested in Mutomo where he had gone to seek for forgiveness for abducting the daughter of P.W.1. P.W.2 claimed that P.W.1 came to identify the appellant who was being held in Mutomo Police Station custody. It is important to note that P.W.1 stated in her evidence that she did not know the appellant before the incident. This renders the evidence of P.W.2 to be so weak to be relied upon. P.C. Judith Mweni (P.W.3) said P.W.1 booked a report of the abduction of her child on 30/7/2004. She said that the girl was later found in the accused’s house. It is also important at this stage to note that the evidence of P.W.3 is at variance with that of P.W.1. It is the evidence of P.W.1 that the girl was found in the house of the appellant’s aunt as opposed

to his house as per the evidence of P.W.3. According to P.W.3, she booked the report on 30.7.2004 but P.W. 1 is of the view that she made the report on 16.7.2004. According to P.W.3, the offence took place at the school of the girl. This obviously contradicts the evidence of P.W.1.

The appellant gave sworn testimony in his defence. He told the trial court that he quit his job on 9.7.2004 and shortly after Ikuthe Girls' Sec. School advertised a teacher's vacancy. On the way to Ikuthe Girls' Sec. School he said he was arrested by the girl's uncles who confiscated his certificates. The appellant denied ever abducting the girl.

The trial Magistrate considered the evidence tendered by both sides and she came to the conclusion that the appellant being the girl's teacher had a lot of influence over her. She found that the appellant physically abducted the girl and also made inference to the effect that the appellant influenced the girl to run away from school and home.

I will start by considering the dictionary meaning of the word 'abduction'. According to the Concise Oxford Dictionary, to 'abduct' is carry off or kidnap a person illegally by force or deception. In this case it was incumbent upon the prosecution to establish that the appellant kidnapped by force or by deception Lydia Mutua. The evidence tendered by P.W.1 points to the effect that the girl was found in the house of the appellant's aunt. This evidence is contradicted by the evidence of P.W.3 who said that the girl was found in the house of the appellant. There is no evidence as to where the girl was abducted. The evidence which stands uncontroverted is that the appellant was Lydia Mutua's teacher at Queensland Academy. The evidence tendered by P.W.1 indicates that the girl escaped from her home when P.W.1 attempted to make inquiries from the girl's school about the girl's performance and behaviour. The evidence also shows that the appellant was very close to the teenage girl who was obviously in a Critical stage in her life. At that age, a child is in a very confused state and hence capable of being influenced. There is strong suspicion that the appellant took advantage of the girl to the extent that she was influenced to escape from her home. Unfortunately strong suspicion cannot be relied upon in proving an offence. The prosecution failed to call for the evidence of the girl's school principal nor the girl's evidence. In the absence of these crucial evidence then the case cannot be said to have been proved. After a careful consideration of the evidence on record I am convinced that the trial magistrate's holding cannot stand. There was no cogent evidence to prove that the appellant physically and or influenced the girl to flee her home to join him. This is one of those cases which was poorly prosecuted. Why was the girl not put in the witness box? Because I am in doubt, the appellant will benefit from that doubt. In the end I commend Miss Mwaniki, the learned state counsel for conceding to the appeal against conviction.

I have already stated that the learned state counsel conceded to the appeal as against sentence. It is her view that the offence of abduction is a misdemeanor hence the appellant should not have served more than 2 years. I do not think Miss Mwaniki is correct in this respect. I cannot blame her because she may not have been made aware of the amendments introduced by legal notice No. 5 of 2003 in which the offence under section 143 was made a felony as opposed to a misdemeanor. In view of the fact that the appeal on conviction succeeds then there is no need to make a finding on the appeal as against sentence.

In the end I allow the appeal as against conviction by quashing the conviction with a result that the sentence is set aside. The appellant is hereby set free unless lawfully held.

Dated and delivered at Mombasa this 23rd day of July 2007.

J.K. SERGON

J U D G E

In open court in the presence of Miss Mwaniki and the appellant.