**REPUBLIC OF KENYA**

**THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL APPEAL NO. 208 OF 2019**

**RECHO NAMAEMBA NYONGESA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Appeal from the original conviction and sentence in criminal case Number 1245 of 2016

in the Chief Magistrate's at Bungoma – G. P. Omondi (SRM) 5th December, 2019).

**JUDGMENT**

1. The Appellant, Recho Namaemba Nyongesa, was convicted for the offence of child sex tourism contrary to **section 14 (a) of the Sexual Offences Act**. It is alleged that on 10th December 2015 in Bungoma Central Sub-County within Bungoma County the Appellant organized a travel arrangement for another person with intent to facilitate the commission of sexual offences against a child of 16 years namely GNM (name redacted on account of her being a minor).

2. A brief summary of the prosecution evidence is that on 10th December 2015, GNM was called by the Appellant who gave her kshs.150/= and instructed her to board a vehicle to go and meet someone at [Particulars Withheld] whom she described by dress code. At Kimilili, she met one Maurice at the stage who took her to his home and told her she would be his wife. Through communication with the Appellant Maurice changed their place of residence regularly to avoid detection and arrest.

3. GNM fell pregnant and in March 2016, they moved to Marakwet. Being unable to cope with mistreatment from Maurice, she decided to walk back home to Bungoma. One D found her and gave her a place to sleep. She took her to the referral hospital when she started bleeding vaginally. Her parents were called to the hospital and subsequently Maurice and the Appellant were traced, arrested and charged.

4. In her defense, the Appellant gave sworn testimony in which she denied committing the offence. She stated that she was being framed due to an ongoing grudge that exists between her and the family of PW2 with whom they were neighbours.

5. The Appellant called Vincent Nyongesa, her husband, who testified on her behalf that on 10th December 2015 he was at home the whole day and did not see the minor in his home nor did he see the Appellant giving the minor any money. He also alluded to there being bad blood between the two families.

6. At the close of trial the Appellant was convicted and sentenced to five (5) years imprisonment. Being disgruntled, she immediately lodged this appeal on the grounds that:

i. The charge had not been proved beyond reasonable doubt.

ii. Proceedings were not conducted in a language understood by the Appellant particularly on 22/10/2018, 14/12/2018, 19,3/2019/ 23/5/2019, 5/8/2019, 5/12/2019 and 10/12/2019.

iii. The Appellant was not permitted to submit on a case to answer as per section 211 of the Criminal Procedure Code;

iv. Her plea was not taken.

v. The age of the minor was not proved,

vi. Minor's testimony was not corroborated.

vii. The court failed to analyze and consider testimonies of the Appellant and her witness.

viii. Judgment did not conform to the law and procedure.

ix. The charge sheet was not drawn by authorized person.

x. The sentence was harsh and excessive

7. This matter was canvassed by way of written submissions. The Appellant submitted that the prosecution had not proved its case beyond reasonable doubt because they had failed to give crucial evidence pertaining her guilt. She contended that the chain of events espoused by the prosecution did not add up. It was also her submission that the correct trial procedure was not followed as she did not take plea and the proceedings were conducted in a language she did not understand. Further hat the trial court failed to take into consideration her defense, which exonerated her.

8. M/S Nyakibia Mburu for the state opposed the appeal. She submitted that, the prosecution called 5 witnesses who corroborated the minor's allegations. On the allegation that plea was not taken, the state counsel submitted that the matter had been mentioned prior and the file reconstructed. It was also their submission that the proceedings were conducted in a language understood by the Appellant.

9. This being a court of first appeal, the court is under an obligation to reevaluate the all the evidence and to draw its own conclusions on the same. As stated in the case of ***Ajode –Vs- Republic (2004) 2 Klr 81***, *"In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that"*

10. The main issues for determination are;

- Whether proper procedure was followed in charging the appellant.
- Whether the evidenced produced was properly analyzed.
- Whether the sentence meted in the circumstance was harsh and excessive.

11. The ingredients of the offence of child sex tourism are delineated as follows; **section 14 (a) of the Sexual Offences Act** which reads;

> **A person including a juristic person who makes or organizes any travel arrangements for or on behalf of any other person, whether that other person is resident within or outside the borders of Kenya, with the intention of facilitating the commission of any sexual offence against a child, irrespective of whether that offence is committed; is guilty of an offence of promoting child sex tourism and is liable upon conviction to imprisonment for a term of not less than ten years and where the accused person is a juristic person to a fine of not less than two million shillings.**

In a charge of child sex tourism, the prosecution must prove that the Appellant organized and facilitated the travel of the minor to Kimilili and that it was for purposes of using the minor sexually.

12. The Appellant submitted that crucial witnesses were not called, especially the one who directly implicated her in the crime apart from the minor. The record indicates that the prosecution called five (5) witnesses being the minor's father (PW1), the minor (PW2), The minor's mother (PW3), the minor's Cousin (PW4) and the Investigating officer (PW5). It is trite law that a case can be proved through testimony of a single witness.

13. Counsel for the Appellant submitted that on the day the minor disappeared, her mother questioned the Appellant who denied seeing the minor. Further that other people were questioned but no arrests were made nor statements recorded to that effect. Counsel also submitted that PW1 did not immediately record a statement even though she claimed to have reported the matter at Chwele police station and the Bungoma Prosecution Office, none of whom were called to testify. Further, that Joseph, the Appellant's son, who was said to have revealed his mother's plot was not called to testify. The Appellant's case is that she was framed due to an ongoing grudge. Further that there was no corroborative evidence implicating the Appellant in the disappearance of PW2 and therefore that prosecution did not prove its case beyond reasonable doubt

14. In reply, M/s Counsel Mburu, counsel for the state submitted that, the prosecution called 5 witnesses who corroborated the claims of PW2. Further that PW2 gave a coherent statement on how the Appellant lured her to her home in the guise of providing her with medicine and eventually gave her money to travel to Kimilili to be married off.

15. The law places the burden of proof in criminal cases on the prosecution and that proof must be beyond any reasonable doubt. In the case of **Philip Nzaka Watu v Republic *(2006) eKLR***, the Court of Appeal held that for a conviction in a Criminal case to stand, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt. On the burden of proof, the Court of Appeal stated in **Stephen Nguli Mulili v Republic (2014) eKLR**,

> "It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases."

16. Proof beyond reasonable doubt does not mean beyond a shadow of doubt as such strict interpretation would culminate in miscarriage of justice. In the famous case of **Miller v Ministry of Pensions[1947] 2 All E R 372**, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

17. The question thus is, whether the evidence of the 5 witnesses called by the prosecution was sufficient to prove the prosecution case beyond reasonable doubt. PW2 testified that prior to her disappearance she had interacted with the Appellant on several occasions. That the Appellant offered her medication for a wound she had and on the particular day, she offered her money to travel and meet one Maurice in Kimilili town.

18. PW4 gave sworn testimony that she was informed by the Appellant's son, about the Appellant marrying off the minor, to her kin. This court is alive to the Appellants testimony that Maurice is her nephew, which lends credence to the minor's testimony that it is the Appellant who sent her to meet Maurice since she had not met him before.

19. This case stands on the evidence of a single witness, the minor. **Section 124** of the **Evidence Act** on corroboration in criminal cases allows for evidence of children who are victims of sexual offences to be taken without corroboration, provided the court is satisfied that the victim is telling the truth. I find no reason to disbelieve the minor's accounts on what happened to her. In this case the minor had nothing to gain by claiming that the Appellant instructed and facilitated her travel to [Particulars Withheld] to meet Maurice with a view of marriage.

20. In support of the claim that she was being framed for a crime she did not commit, the Appellant submitted that the minor's family had a grudge against her and that she had previously been hurt by the minor's father. She contended that the trial court failed to take into consideration the circumstances under which the allegations arose. The Prosecution on the other hand refuted these claims and submitted that they had provided sufficient evidence implicating the Appellant in the crime.

21. After careful analysis of the evidence, I find that there is no evidence in support of the Appellant's allegations of being framed due to bad blood, or that she had made any report of having been assaulted by the minor's father to the police.

22. On the ground that the trial court failed to give due consideration to the Appellant's defense, the Record shows that the Appellant gave sworn testimony and called one witness in her defense. At page 4 of the judgment of the trial Magistrate, it was evident that the learned trial Magistrate considered the Appellant's defense and submissions and came to the conclusion that these amounted only to a mere denial. The trial court dismissed that defense. At the end of the trial, the court considered the Appellant's mitigation and further ordered for a probation officers report which it took into consideration before imposing the sentence. This allegation therefore lacks merit.

23. On the issue of procedure, the Appellant argued that the learned magistrate failed to conduct proceedings in a language understood by the Appellant on several occasions. The Prosecution on the other hand submitted that failure to indicate the presence of a translator in the proceedings was only by error and omission and that a translator was available throughout the trial.

24. I note from the record that the Appellant informed the court that she could not understand the proceedings at her first appearance on 2.8.2018, upon which Anthony a Bukusu, Kiswahili and English interpreter was availed.

25. The Appellant singled out several dates in the proceedings when she said the proceeding were carried out in language she could not understand. I have perused the record to ascertain what transpired on each of those dates.

26. On 22/12/2018, the record shows that the proceedings were conducted in Kiswahili/English and Anthony the interpreter was present. The Appellant did not at any time raise the issue of language barrier and proceeded to cross-examine the witnesses in a manner clearly indicating that she understood the proceedings. On 19/3/2019, the Appellant cross-examined a witness. On 23/5/2019, the court record indicate as follows;

**Court: Sec 211 of the CPC is explained to the accused and the accused responds as follows.**

**Accused: I will give sworn testimony and call one witness**

The Appellant did not indicate her wish to submit on no case to answer.

27. On 14/12/2018 and 5/8/2019, the matter was adjourned thus no prejudice would have been occasioned to the Appellant. On 5/12/2019 the Appellant gave her mitigating statement and on 10/12/2019 sentence was passed.

28. It has been stated time and again that the court record must reflect all the proceedings that transpire therein. There appears to have been an omission on the part of the court to record, at the beginning of each day of the proceeding the language used. Be that as it may it is evident from the above analysis of the record that the Appellant on those specified dates, understood the proceedings. For the Appellant to raise the issue belatedly on appeal, when she could have raised it during trial, if indeed she could not follow the proceedings, appears to be an afterthought. In the premise, this ground cannot succeed.

29. As far as taking pleas goes, the rights of an accused person are clearly elaborated and protected under **Article 50** of the **Constitution**.

**Article 50 (2) b** of the **Constitution** provides that **"the right to a fair trial includes the right of the Accused to be informed of the charge, with sufficient detail to answer to it"**. Under Section 134 of the Criminal Procedure Code, it is clear that the formal charge sheet laid before the court is intended to give the person charged adequate notice of the charges against him/her, and **"such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."** The information in the charge must be brought to the attention of the person Accused at the time of plea, hence the procedure set out in Section 207 of the Criminal Procedure Code.

30. The purpose of the process of taking plea was elaborated in ***J A O v. Republic [2011] eKLR*** by this Court held as follows:

> "The requirement under Section 207 of the CPC for calling upon the accused person to plead serves the purpose of determining whether he admits the offence charged, in which case there would be a summary determination of the case, or denies the truth of it in which case a formal trial would be held.

31. Although the Appellant failed to submit on ground 3 and 4, being; failure to take plea and failure to submit on a case to answer, this is a ground that must be examined by this court. It appears that part of the record was missing. From the record, however, the Appellant was given the opportunity to participate fully in the trial process. At no stage in the trial, was there any indication that the Appellant was ready to plead guilty nor was there any complaint raised.

32. This Court is guided by its decision in the case of ***Julius Oremo V R, Cr No. 176 Of 2010 [Unreported]***, in which the court stated:

> "As correctly observed by Ms Nyamosi, the trial proceeded as if a plea of not guilty had been entered and the Appellant was given full opportunity to cross examine all the witnesses and to testify on his own behalf. At no stage of the trial was there any indication that the Appellant was ready to plead guilty nor was any complaint raised at all. We think in all the circumstances, therefore, that there was no failure of justice occasioned by the irregularity belatedly complained of and we find it was curable under **section 382 of the CPC**."

33. Prosecution counsel submits that the failure to take plea was due to the matter being mentioned severally before the court file was reconstructed. The record shows that the Appellant was present throughout proceedings in the trial court in which she not only cross-examined witnesses but also mounted a defense and called an additional defense witness. Affirming the Appellants right to take plea, this court is also cognizant of **section 382** of the **Criminal procedure Code** that requires proof of miscarriage of justice for an appellate court to reverse, or alter the finding of a trial court on account of an error, omission or irregularity.

34. From the foregoing it is clear that the Appellant acted as though she had entered a plea of not guilty and there is also no indication that she would have otherwise pleaded guilty if given a chance. It is my finding therefore, that no prejudice was occasioned to the Appellant by failure to take plea or submit on a case to answer.

35. The Appellant raised a ground that an unauthorized person drew the charge sheet but failed to submit the same. The Appellant's only submission on the charge is that the minor's entire family and a non-governmental organization conspired to frame her. However, a quick glance at the original charge sheet as well as the amended charge sheet indicate that they were signed by the OCS Bungoma and both bear a stamp of the officer in charge of Bungoma police station. That being said, it should be noted that the decision on whether or not to lay charges lies exclusively with the Director of Public Prosecutions, and no other person.

36. On the third and final issue regarding sentencing, the Appellant did not submit on the same but she asked this court to quash the conviction and set-aside sentence because it was harsh and excessive. Prosecution counsel submitted that the sentence meted was proper and urged the court to uphold the same. The Appellant was charged with the offence of child sex tourism as per **section 14 (a)** of the **Sexual Offences Act.** This provision also provides guideline on sentencing in case of a guilty verdict as follows;

> **A person including a juristic person who makes or organizes any travel arrangements for or on behalf of any other person, whether that other person is resident within or outside the borders of Kenya, with the intention of facilitating the commission of any sexual offence against a child, irrespective of whether that offence is committed; … is guilty of an offence of promoting child sex tourism and is liable upon conviction to imprisonment for a term of not less than ten years and where the accused person is a juristic person to a fine of not less than two million shillings.**

37. From the above provision it is clear that on the contrary the trial court's sentence was lenient. A perusal of the judgment shows that the trial magistrate took into account mitigating factors and a probation report. The Appellant has a family who rely on her as the sole breadwinner. It thus, in its discretion sentenced the Appellant to five (5) years imprisonment.

38. The prosecution opposed the probation officers report during sentencing asserting that a probation sentence would be too lenient in the circumstances. They were however agreeable to any other non-custodial sentence.

39. The Appellant has served 2 years out of the 5 years sentence and I also take note of her age, the probation report as well her mitigation.

40. The upshot is that this appeal on conviction lacks merit and is consequently dismissed. The sentence imposed by the trial court is reduced to the period served. The Appellant is therefore set at liberty forthwith unless otherwise lawfully held.

**DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 13TH DAY OF OCTOBER, 2021**

**.....**

**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of.....Appellant in Person.**

**In the presence of.....State Counsel.**