REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 72 OF 2017

CALVIN OTIENO OKELLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction dated 13th September, 2017 and sentence dated 14th September, 2017of the subordinate court in Criminal Case No. 283 of 2015 at Kilgoris Law Courts before Hon. R.M. Oanda (P.M.)

JUDGMENT

1. The appellant, Calvin Otieno Okello, was charged with three counts. The first was child trafficking contrary to section 14 (a) of the Sexual Offences Act. The particulars for that charge were that on 22nd January, 2015 in Transmara West District of the Narok County, he knowingly and intentionally took MN a girl aged 16 years out of custody of her parents from L to R Area about 100 kilometres away with intent of facilitating the commission of any sexual offences against the said MN.

2. The second count was defilement of a girl contrary to section 8 (1)as read with section 8(3) of the Sexual Offences Act. The particulars were that on 22nd January, 2015 at R area in Rongo District of the Migori County, he caused his penis to penetrate into the vagina of MN a girl aged 16 years.

3. In the third count, the appellant was charged with assault causing actual bodily harm contrary to section 251of the Penal Code. The particulars for this charge were that on 22ndJanuary, 2015 at R area in Rongo District of the Migori County, he unlawfully assaulted MN thereby occasioning her actual bodily harm.

4. The trial court found the appellant guilty of all three charges and sentenced him to 10 years' imprisonment in the first count, 20 years' imprisonment in the second count and discharged him in the last count. These sentences were to run concurrently.

5. Being dissatisfied by that decision, the appellant has appealed against the entire decision of the trial court. His grounds of appeal are set out in his petition of appeal and elaborated in his written submissions. He contends that the testimonies given by the prosecution witnesses were contradictory and could not sustain a safe conviction. That his trial had not been conducted procedurally as the court had not allowed him to start the case afresh and had failed to have him tested for mental illness. That the court had erred in finding him guilty of the offence of child trafficking and also protested the length of his sentence.

6. Counsel for the state opposed the appeal. He submitted that the appellant had been positively identified as the person who had taken the victim as a wife during which time he had defiled her. The minor was 16 years of age and could not consent to having sex or living with the appellant as a wife. PW2 had found

the minor at the appellant's home and the medical evidence by PW3 had confirmed that she had been defiled. That the appellant had been rightly convicted of the offences. Counsel observed that the minimum sentence for the second count was 15 years and he suggested that the sentence be reviewed.

7. I will proceed to analyse the evidence afresh and draw my own inferences and conclusions, making allowance for the fact that I neither saw nor heard the witnesses. ***(See Okeno v. Republic (1972) E.A. 32).***

8. The prosecution called 4 witnesses in support of its case. PW1 stated that she was a 16 year old pupil in class 8. She told the court that on 22nd January, 2015, she was at home helping a bereaved family when she met the appellant whom she said was a nephew of the deceased. The appellant asked her to board a motorcycle with him and escort him to hospital but he instead detoured and took her to his house where he pronounced that she was his wife. She protested and asked the appellant to let her finish her primary education and also asked to seek her parent's consent but the appellant beat her up and had sex with her thrice on that day. The appellant forbade her from leaving and she ended up living with him for two months during which time the appellant assaulted her and had sexual intercourse with her. She managed to contact her father and informed him of her whereabouts. She testified that her father was only able to free her when he went to the appellant's house in the company of police officers and found them together in bed.

9. The complainant's father PW2 testified that on 22nd January, 2015 at around 7:30 p.m. his daughter MN disappeared from home. He tried to locate her and after about a month of searching, his daughter called him and told him that the appellant had married her. He reported the matter to the police who asked him to locate the complainant before they could assist him. He met the appellant's parents and uncle and told them that the complainant was still in school but they declined to release her saying that she was already married. He procured warrants of arrest and returned to the appellant's house in the company of police officers where they found the appellant asleep with the complainant in the same room. The appellant was arrested and charged.PW2 confirmed that the complainant was aged 16 years at the material time.

10. PW3, a clinical officer at Lolgorian sub-district hospital testified that he examined the complainant and noted soft tissue injuries on her buttocks, bite marks on her lower limbs and injuries which were a week old. On examining her genitalia, he noted that she was menstruating. There was no discharge and her hymen was absent. He conducted an age assessment of the complainant and confirmed that she was 16 years old. He produced copies of the P3 form and age assessment report he had prepared.

11. PW4, the investigating officer, testified that when they received the report about the disappearance of the complainant, they had tried to locate her but could not trace her. After sometime, PW2 was able to locate the complainant. They asked Rongo police station to effect arrest of the appellant and charged him accordingly.

12. The appellant gave his defence after the court found he had a case to answer. He stated that he was in the business of mining stones and that on 28th December 2015, PW4 had brought him a sack of stones worth Kshs. 20,000/=. The stones were stolen from him and he had no means of refunding PW4. He told the court that he decided to go home when PW4 threatened him and when he got there he found that his father had fallen sick. The appellant claimed that he stayed with his ailing father until 11th March 2015, when he had some money to pay off PW4. He received a call informing him that he had visitors and when he went home, he was arrested and charged. He insisted that he had been arrested because of the differences he had with PW4 and that he knew nothing of the charges facing him.

13. Upon considering the evidence and submissions made, I find that the issues raised for determination in this appeal are:

a. Whether the hearing process was conducted in a fair manner;

b. Whether the appellant's conviction for the offences of child trafficking, defilement and assault were based on sufficient evidence; and

c. Whether the appellant's sentence was excessive.

14. On the first issue, the appellant contends that the hearing process before the trial court was not fair for the reason that the charges against him were not clearly read to him. It is however evident from the record that the substance of the charges and the elements of all three counts were read to the appellant in Swahili, after which the appellant pleaded not guilty to the charges against him. The record also shows that the statements were provided to the appellant and he had ample time read them and prepares his defence.

15 The appellant further contends that the trial court did not comply with **Section 200 (3)** of the **Criminal Procedure Code** which provides that:

> *"3. Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."*

16. In considering this section Court of Appeal in ***Joseph Kamora Maro v Republic Criminal Appeal No. 57 of 2014 [2014] eKLR*** held:

> *"The position in law is that a trial Magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial has taken, because if it has taken too long, chances are that some witnesses may have left the jurisdiction of the court as was the case here or some may even have died. To this extent we are in agreement with the learned Judges of the High Court that "this provision does not oblige the succeeding magistrate to start de novo" but what is mandatory is to inform an accused of his right under section 200(3) of the Criminal Procedure Code."*

17. The record shows that the appellant was informed of his right to have the matter reheard when the succeeding magistrate Hon. Oanda took over the matter. The appellant elected to have the matter start *denovo*, but the prosecution through the investigating officer, PW4, informed the court that the witnesses could not be availed. The trial court then ordered that the matter proceed from where it had reached having duly considered the appellant's request to have the matter reheard. I find that the trial court fulfilled its mandatory duty to inform the appellant of his right under section 200 (3) and was not obligated to start the matter *denovo* having found this option infeasible.

18. The appellant's argument that the trial court did not have him subjected to a medical test to ascertain his mental capacity is similarly rejected as an afterthought. This issue was never raised during trial and moreover **Section 11** of the **Penal Code** establishes the presumption in law that every person is sane and therefore responsible for his actions. On the whole, I find that the appellant's trial was conducted procedurally and in a fair manner.

19. Moving to the second issue, the first charge the appellant faced was of child trafficking contrary to **section 14 (a)** of th**e Sexual Offences Act**("The Act").The Act provides:

> *"14.* ***Child sex tourism***
>
> *A person including a juristic person who—*
>
> *(a) 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."

20. To prove its case for the first count, the prosecution should have presented evidence showing that the appellant facilitated the transportation of a child sex tourist i.e. a person travelling to a location with the aim of committing a sexual offence against a child. In this case, the particulars of the offence and the evidence tendered by the prosecution established that the appellant organized for the travel of the minor with the intention of committing a sexual offence against the child. The offence of child trafficking as framed was previously under **Section 13**(a) of the Act which was repealed by **section 5** of the **Counter-Trafficking in Persons Act.** That section provided as follows:

*"**13**. A person including a juristic person who, in relation to a child- knowingly or intentionally makes or organizes any travel arrangements for or on behalf of a child within or outside the borders of Kenya, with the intention of facilitating the commission of any sexual offence against that child, irrespective of whether the offence is committed;"*

21. It is trite that an accused should be charged with an offence known in law. The charge sheet should be clear and specific enough to enable an accused prepare for his defence. *(*See ***Sigilani vs Republic (2004)2KLR, 480****)*

22. I find that the appellant was charged with the offence of child trafficking under section 14 of the Sexual Offences Act, which offence does not exist in law. The charge sheet in terms of the first count was fatally defective. Consequently, his conviction is quashed and sentence for the offence of child trafficking set aside.

23. The appellant also faced the charge of defilement of a girl contrary to **section 8 (1)** as read with **section 8(3) of the Sexual Offences Act**. The Act provides:

"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.."

24. The ingredients to be proved for the offence of defilement are the age of the complainant, proof of penetration and the positive identification of the perpetrator.

25. The complainant's age was not in dispute. The complainant and her father PW2 testified that she was 16 years at the material time. This was affirmed by the medical evidence tendered by PW3 who conducted an age assessment of the minor.

26. For the second ingredient, the complainant testified that the appellant took her and kept her in his house against her will for a period of 2 months. During this time, he had declared that she was his wife and repeatedly had sexual intercourse with her. When PW2 finally knew where his daughter was being kept, he tried to get her back but the appellant and his relatives declined to give her back saying she was married. The complainant was eventually freed when PW2 went to the appellant's house in the company of police officers. He testified that on that day they found the appellant and the complainant in their bedroom together.

27. I note that the medical evidence did not specifically prove penetration. PW3 testified that his examination of the complainant's genitalia showed that she was menstruating and that there was no discharge and her hymen was absent. However the direct and circumstantial evidence of the complainant and PW2 overwhelmingly pointed to the fact of penetration of the complainant by the appellant. This position is fortified by the holding of the Court of Appeal in ***Kassim Ali v Republic Criminal Appeal No. 84 of 2005*** where the court stated:

"... [the] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

28. The last ingredient was also sufficiently proved. There was no case of mistaken identity. The complainant was in the appellant's company for a long duration. The appellant was found in bed with her at the time of his arrest. His defence that he was with his ailing father at the material time could not stand in the face of the prosecution's consistent evidence and was rightly rejected by the trial court.

29. Since the complainant was 16 years of age, the appropriate penalty section to be quoted in the charge sheet should have been Section 8 (4) as opposed to section 8 (3) of the Act. The ingredients for the offence were put to the appellant in a clear and concise language. This defect in the charge sheet did not occasion the appellant any prejudice in preparing for his defence. I find that the prosecution adequately proved the second count against the appellant and accordingly uphold his conviction on the second count.

30. The last count facing the appellant was assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. The complainant testified that the appellant had beaten her up severally using a stick and branches during their stay together. This was corroborated by the medical evidence of PW3 who noted that the complainant had soft tissue injuries which had been caused by a blunt object and bite marks on her body. I find that the last count was conclusively proved against the appellant and uphold the appellant's conviction and sentence.

31. Finally, the appellant has appealed against his sentence of 30 years' imprisonment. The trial court sentenced him to 10 years imprisonment on the first count and 20 years imprisonment for the second count which sentences were to run concurrently. The trial court in meting out the sentence, noted the gravity of the offence and the need to deter such acts. I concur, with the trial court's observations that such offences need to be strongly deterred. It is the constitutional right of children such as the complainant to acquire a basic education and be protected from abuse and early marriages.

32. Taking all the above, the following final orders do issue:

a. The conviction and sentence of the appellant on the count of child trafficking is set aside.

b. The appellant's conviction on the offence of defilement is affirmed and he is sentence reduced to 15 years' imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Act. His imprisonment will run from the date of sentencing by the trial court.

c. The conviction and sentence of the appellant on the charge of assault is affirmed.

Dated, signed and delivered at Kisii on this18thday of January 2019.

R.E.OUGO

JUDGE

In the presence of;

Appellant in person

Mr. Otieno for the State/ Respondent

Rael Court Clerk