



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCRA NO. 11 OF 2017**

**MARY REGINA KANEE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant herein MARY REGINA KANEE was charged with benefiting from child prostitution contrary to section 15 (d) of the Sexual Offences Act No. 3 of 2006.

2. She pleaded not guilty and after trial she was convicted and sentenced to serve 10 years in jail.

3. Being aggrieved by the above decision, she filed an appeal setting out the following grounds:-

**i. THAT** the learned trial Magistrate erred in fact and in law in failing to find that there was no sufficient evidence to sustain the Appellant conviction.

**ii. THAT** no sufficient proof was tendered to establish the ingredients of the charges against the Appellant.

**iii. THAT** the charge sheet was defective.

**iv. THAT** the learned trial Magistrate erred in fact and law failing to note that the Key material witnesses were not called as prosecution witnesses.

**v. THAT** the learned trial Magistrate erred in fact and in law in failing to find that the evidence presented to court was at variance with the charges preferred against the Appellants.

**vi. THAT** the learned trial Magistrate erred in fact and law by relying on prosecution witnesses whose testimonies were inconsistent.

**vii. THAT** the learned trial Magistrate erred in fact and law by failing to give the appellant to call the witnesses in defence of her case.

**viii. THAT** the learned trial Magistrate erred in fact and law offer the appellant an opportunity to mitigate before passing sentence.

**ix. THAT** the learned trial Magistrate erred in fact and law by failing to find that the appellants testimony unassailably contravened the prosecution's evidence, irreparably dented the veracity of the prosecution's case and irredeemably shaking the credibility of the prosecution's witnesses.

**x. THAT** the learned trial Magistrate erred in fact and law in upholding the prosecution witnesses' testimonies which prima facie was incredible whilst proceeding on extraneous considerations, which were not before the court to disregard the defence evidence, which was verifiable.

**xi. THAT** the learned trial Magistrate erred in fact and law in convicting the appellants while the prosecution had not proved its case beyond reasonable doubt.

**xii. THAT** the learned trial Magistrate erred in fact and law by passing an harsh and excessive sentence in the circumstances obtaining.

4. When matter came for hearing, the parties agreed to canvas same via oral submissions.

#### **APPELLANT SUBMISSIONS**

5. On page 38 of records of PW1 evidence, she testified that appellant didn't tell her to sleep with pastor.

6. On charge sheet the offence is alleged to have occurred on 25/06/2015 and 13/07/2015. See page 3 line 20. Talks of 17/07/2017 talks of date girl disappeared.

7. See also page 45 1<sup>st</sup> line, PW6 evidence. It is stated that complaint was made on 17/07/2015 against appellant. Same page, see also OB number given. See also PW2, she talks of 14/06/2015. See page 27 line 4 talks of 24/06/2015 time father talked of PW1 missing.

8. See page 35, line 5. PW1 says 26/06/2015 – 28/06/2015, I did not disappear. All these shows prosecution evidence was at variance.

9. PW5 her mother said she didn't know when PW1 disappeared. The Appellant was a neighbour. There were quarrels (constant) between complainant and accused family.

10. The offence was not proved beyond reasonable doubt. The pastor beneficiary was not called. Page 46 PW6 the Juma was arrested and booked. See page 16. Prosecutor's statement last 3 lines. See authority citing **GITHUNGURI** case.

11. There were loopholes from inceptions. There was a witness to be arrested. But same never happened. This is selective justice. There was defilement complaint against pastor by victim's mother.

12. On sentence same is abandoned since minimum is 10 years. The appellant defence was ignored. Defence page 53 DW1, DW2 page 57 see same. See PW1 page 10. See page 36. She contradicts herself on oath.

13. Relationship between appellant and complainant is that of a neighbour. Why did it take that long time to make a report of disappearance?

14. There was personal vendetta between 2 families of complainant and appellant. The appeal is sought to be allowed.

#### **RESPONDENT SUBMISSIONS**

15. The appeal was opposed by the prosecution. The complainant was a class 8 pupil. She knew accused as a neighbour. The accused knew the pastor very well. She lured complainant to the pastor. The pastor gave money.

16. See page 10, PW1 evidence. On 29/07/2015 the complainant was taken by a pastor to a plot. The appellant conceded pastor was having sex with the victim. The appellant was a pimp for the pastor.

17. The girl was school going child. She would stay at pastor house as a worker therein. The appellant and pastor worked in cahoots. She would leave without parents' permission.

18. See page 24, PW2 there was a lot of influence over a minor by the appellant. The pastor would use the girl as house help. See page 34 of record. That's all.

#### **EVIDENCE ADDUCED**

19. PW1 R K M stayed at Kasikeu. She attended school at [particulars withheld] Primary and was in class 8. She knew the accused persons. Regina Kanee was their neighbour. Mama Mercy was the 2<sup>nd</sup> accused. She knew the accused persons well.

20. On 26/06/2015 at around 3.00 p.m., PW1 was in church. She was with Regina. On that day she left school at 1.00 p.m. and on her way home Regina called her and asked her why she left school early. PW1 told Regina that she was going for a pregnancy test and she had been told to go back to school with parents.

21. Regina told PW1 they go to church at Kisaulu. Regina gave PW1 some money. They went to church. According to PW1 testimony, Regina told her that she was taking her to church so that the pastor prays for her and her problems come to an end. Then Regina gave PW1 Kshs. 400/=.

22. They met pastor Juma in church. Juma prayed for some soil and he gave PW1 the soil to take home. Juma gave Kanee Kshs. 1,000/= to take her to Kiundwani. Then PW1 went home.

23. On 29/06/2015, Juma took PW1 to Kiundwani and he opened a vacant plot and told the lady who was there to let PW1 stay at the plot. Juma gave the lady some money. On 26/06/2015, they went for an overnight kasha and PW1 slept in church. PW1 stayed in the church till midnight.

24. Juma told PW1 to get into his car and she got it. Juma undressed PW1 and she had sex with him in the car. On Saturday morning, at around 7.00 a.m., PW1 went home. Her mother asked her where she was the previous night and she told her she had gone for a kasha in Juma's church.

25. PW1's brother S M came and she also told him she was in a kasha the previous night. She did not tell them what she did in church.
26. On Sunday, Regina and PW1 went to church and after church PW1 went back home. On Sunday, she was also given soil at church and was told to take it home. On 29/06/2015, PW1's brother S took her to school. The head teacher Mr. Mbuvi asked where she was on Friday and Saturday and she told him she was in church for prayers.
27. On 29/06/2015, PW1 went to hospital again and went home at 1.00 p.m. On her way, she met Regina and she told her she had been told to go home. Regina gave her 400/= again and they went to church. Regina told Juma to take her to Kundwani so that she stays there.
28. PW1 entered Juma's car with Regina and she alighted at Kasikeu. PW1 went with Juma at Sultan Hamud then they went to Kundwani. At Kundwani, they entered a vacant house and Juma put a bottle and soil on the table. Juma prayed for PW1 and put some substance on her head.
29. Juma told PW1 that she should be talking to Regina Kanee and that PW1's mother should not be asking her where she was. Regina forced PW1 to go with Juma against her wish. Regina tricked PW1 to go to church yet she knew PW1 would go to Kiundwani.
30. Regina gave PW1 Kshs. 400/= so as to trick her to go to church. Regina told her that she would hand her over to Juma so that she goes to Kundwani.
31. While giving her testimony, PW1 was stood down because her evidence was contradicting with her statement. The prosecution was further given more time to carry out a further pre-trial with PW1 and go through the witness statements.
32. On 31/05/2016, PW1 was re-sworn and continued with her testimony. She said that she met Regina when she was coming from school and went with her to pastor Juma's church. At the church, Regina was given money by Juma so that she does not reveal where PW1 was.
33. Pastor Juma took PW1 to Kundwani and they entered a plot. PW1 did not know the name of the owner of the plot but she saw him. The owner of the plot opened the door and Juma and PW1 got in. Regina was given Kshs. 1,000/- by Juma in her presence of which she didn't know what was the money for.
34. Juma and PW1 had sex in his car as they were going to Kundwani. PW1's brother had come to take her from Nduku's place. PW1 was working for Nduku at the time. She was passing along the way at Sultan Hamud when she met Nduku. Nduku was asking her where she was going and if she wanted a job. They then went to Nduku's house and took a bath and spent the night there.
35. Later PW1 gave Nduku her brother's number so that she call them. Nduku told PW1 that she had called her mother yet she had called Regina. According to PW1 Nduku did not force her to go to her house.
36. While at Kiundwani, PW1 was given money to go to the shop but took a matatu and went home. On her way home, she met her sister W and went to Sultan Hamud police station. PW1 stent that night at Sultan Hamud.
37. PW1 was taken to Sultan Hamud hospital and was examined to confirm if she had an infection or pregnant.
38. PW1 told the trial court that Regina did not give her any money out of the Kshs. 1,000/= given to her by Juma.
39. Upon cross examination by Amutala, PW1 told the trial court that on 26/06/2015 she was at school and that she left home at 1.00 p.m. as the head teacher had told her to get a pregnancy test done.
40. She denied of having wayward or bad behavior of sleeping with men. She said that save for 26/06/2015 to 28/06/2015 she did not disappear any other day.
41. PW1 recorded her statement at Sutan Hamud station where the police did write the statement basing on what she told him. She did not state everything which is in her statement in court. According to her statement on 03/07/2015, the head teacher sent PW1 to hospital to have another test done.
42. Upon cross examination by the trial court, PW1 stated that she stayed at Kundwani for 1 month. She was staying with pastor Juma for the 1 month. There was a lady who used to bring her food at the house every day. She had been locked up in that house and she had never used to go outside.
43. She had stayed at mama Mercy's home for 2 days. However she could not recall the days she was at Mercy's home before she went to Kiundwani.
44. At Mercy's home, she used to do house work like washing clothes and the house. Mercy never told PW1 to have sex with anyone for the time she was there. S came with pastor Juma to Mercy's house and Juma suspected PW1 was with Mercy as he had seen her standing with Mercy along the way.
45. Upon re-examination, PW1 stated that she met Regina on 26/06/2016 on her way from school. Regina did not tell her to sleep with Juma between 26/06/2016 – 28/06/2016. Regina just talked with pastor Juma. Between 26/06/2016 – 28/06/2016, PW1 was at Kundwani. In July 2016, she did not sleep outside her home.

46. PW2 V W M is sister to PW1 who worked at [particulars withheld] factory in Gatundu. She stated that on 14/06/2015, PW1 went to Regina Kanee without obtaining permission from their parents. Regina and PW1 went to pastor Juma's church at Kisaulu. PW1 did not come home that day.

47. On 15/06/2015, PW2 went to Regina and asked her where PW1 was. Regina promised to call pastor Juma so that he tell them where PW1 was.

48. On 16/06/2015, Regina came and told PW2 pastor Juma had told her where PW1 was. Regina gave S M (PW3) Juma's number and talked to Juma. According to PW2 testimony, PW3 enquired from Juma the whereabouts of PW1 and was told PW1 was at Sultan Hamud and on 16/06/2015 in the evening PW3 came with PW1 at home.

49. PW2 stated that on 22/06/2015, her brother PW3 took PW1 to school at [particulars withheld] Primary School when she was in class 8 at that time. That week PW1 went to school every day. On 28/06/2015, PW1 disappeared and did not come to school again. Later on that day PW3 found PW1 and they came back home.

50. PW2 stated that on 13/07/2015 when PW1 went to school, she did not came back home and on 17/07/2015, PW3 (S) told them that he was to inform the village elder of K disappearance. On 21/08/2015, Kavute (PW1) came home and PW2 took her to her to Sultan police where they were told to take PW1 immediately she came home. They then came to court and case proceeded.

51. PW2 had asked PW1 where she was but she could not answer as she appeared confused. PW2 took PW1 to police station and did not go back with her at home. The following day, they went back to the station and PW1 recorded her statement.

52. PW2 knew both 1<sup>st</sup> and 2<sup>nd</sup> accused. She knew the 2<sup>nd</sup> accused when PW1 disappeared. She said that Regina was their neighbour and she knew her before the incident. When PW1 asked where she was she just mentioned Kithimani.

53. Upon cross examination by Amutala, she stated that her sister (PW1) disappeared and she did not tell her where she was going. ON 14/06/2015, PW2 did not see Regina. They were given pastor Juma's number.

54. PW2 stated that she didn't have Juma's number in court at that time and did not see Juma before and in court. PW2 recorded her statement but couldn't remember the date she recorded.

55. PW2 clarified to court that the statement that was recorded on 30/08/2015 was not similar to the photocopied one which she had.

56. PW2 told court that Regina came to their home but Nduku had never appeared in their home.

57. Upon re-examination PW2 told court that S M M was given pastor Juma's number. The signature on the statement that was shown to her was not hers and the trial court to believe her testimony.

58. PW3 S M M stayed in Kasikeu location as a foreman at a construction company. He stated that on 24/06/2015 he was at home with his sister W and other siblings. He was informed that his sister (PW1) had left and did not come back home. His mother was the one who told home of his sister's disappearance and he was told that PW1 went with Kanee to church.

59. PW3 upon asking Kanee the whereabouts of PW1, he was issued with a Juma's number and proceeded to call him. Then Juma told him to meet at Sultan Hamud at the petrol station. He went to the place and met Juma. Juma told him to be patient so that he calls whoever was staying with PW1.

60. PW3 proceeded with Juma to the place where K was. They reached at Sultan Hamud, Masaini area where they met the 2<sup>nd</sup> accused who is said to have been staying with PW1. They found PW1 at the 2<sup>nd</sup> accused's house and she was washing clothes. PW1 said she had been employed by the 2<sup>nd</sup> accused.

61. PW3 told the 2<sup>nd</sup> accused that PW1 was a child and she released her to him and they went back home. Later K (PW1) went back to school and after 1 week she disappeared again.

62. PW3 later learnt that Kanee had taken K (PW1) again to Juma's church and they took her to Makindu. PW3 reported case to the police and went to the 2<sup>nd</sup> accused's house but did not find PW1.

63. Upon cross examination by Amutala PW3 said that Regina came to their home on 24/06/2015 where she told him whereabouts of PW1. Regina admitted that she was the one who took PW1.

64. PW3 knew Juma before as his church was in his home area. The 1<sup>st</sup> accused did not take PW1 to Makindu but took her to pastor Juma. PW3 was there when K was taken by 1<sup>st</sup> accused to pastor Juma who later Juma took PW1 to Makindu.

65. PW3 narrated his statement to the police who wrote his statement. PW3 wrote his statement on 20/07/2015 which was the replica of his evidence in court. He told the police that he took PW1 to school and the head teacher told PW3 to take PW1 to hospital for a pregnancy test but in examination in-chief, PW3 did not say PW1 went to hospital for a pregnancy test.

66. PW3 never saw the 1<sup>st</sup> accused give PW1 money. He had never seen the 2<sup>nd</sup> accused giving PW1 money. He had not known if K (PW1)

and 1<sup>st</sup> accused were friends but there was no relationship between PW1 and the 1<sup>st</sup> accused, 2<sup>nd</sup> accused.

67. PW3 told court that he knew pastor Juma for over 1 year but he didn't know where pastor Juma stays or his children neither does he know Juma's marriage life or his wives.

68. PW4 Agnes Mueni Mulwa was a village elder at Kasikeu. She knew R K (PW1) from the same village. She also knew the 1<sup>st</sup> accused from her village.

69. PW4 knew 2<sup>nd</sup> accused due to the case. She never knew Nduku (2<sup>nd</sup> accused) before.

70. On 17/07/2015, PW4 was at home in the morning hours when one M M came and told her that her daughter PW1 had disappeared from home. She learnt that PW1 disappeared on 13/07/2015.

71. PW4 told court that M had told her that Kanee had gone to church with PW1. Then they went to Kanee's home. They passed by the Chief's office and went to Sultan police station to make a report.

72. The police accompanied them to pastor Juma and they went to a house in Sultan Hamud where they found Nduku in the house. Then they went with Nduku to Sultan Hamud police station.

73. Upon cross examination by Amutala, PW1's mother told PW4 that PW1 disappeared on 13/07/2015 and that PW1's mother suspected that Kanee was with PW1. They went to Sultan Hamud with M (PW1's mother) to a certain house whose the owner was not known to them.

74. PW4 told the court that she knew Juma before but didn't knew who had PW1.

75. PW5 was F M who stayed at Kasikeu. She said that she knew K R (PW1) and she is her biological daughter. She could not recall when R was born. She had the birth certificate for R but it is was at home. She had the child health record for PW1. She didn't knew the age of PW1 and PW1 does not go to school but initially at [particulars withheld] primary school.

76. In June 2016, PW5 told court that PW1 disappeared from home but to them she had gone to church. Regina told PW5 that the complainant had gone to church. PW5 went to ask Regina the whereabouts of PW1 but was told that PW1 had declined to come home and remained in church.

77. PW5 approached Regina the 2<sup>nd</sup> time and asked her the whereabouts of PW1 and was told that PW1 had gone for a kasha and that she was a grown up. Upon searching for PW1, she found out that PW1 was in a church at Kisaulu. The church belonged to Juma. She was later told that PW1 was at Sultan. PW5 told PW3 to accompany her to Sultan and get PW1 from where she was.

78. According to PW5, PW3 went to Sultan and on the same day he came back with PW1. PW5 asked PW1 where she was and told her that she was at Sultan Hamud at Nduku's home. PW1 told her that she went with Regina to church. She said that when she left church with Regina, she met Nduku along the way and went to her home.

79. PW5 told Regina to leave PW1 alone as she was a child. PW5 went to report to the manager that K had disappeared. Agnes was the manager.

80. PW1 had disappeared the 2<sup>nd</sup> time and that was why she went to report to the village manager. They also went to the chief who was called Tete. PW5 went with Agnes and Regina to Sultan police to report.

81. Upon cross examination PW5 gave birth to PW1 at home but does not know her age. The school which PW1 was attending was a day school. PW1 was never told to go to school with her parents.

82. PW5 learnt that PW1 was instructed to undergo a pregnancy test. She couldn't remember the date and month she recorded her statement at Sultan Hamud police station. She also told court that she didn't know the exact dates when K disappeared from home.

83. According to PW5, Regina used to come to her home and call PW1 then they go to church. She couldn't recall the exact dates Regina came to call PW1 but it used to be in the morning. At times they went in the afternoon for prayers and for kasha.

84. PW1 had never told PW5 she was forced to go anywhere. PW1 said she was given money at Kasikeu. PW5 was not present when money was exchanged. PW5 did not know Juma before the case but Regina was the one who told her about Juma. PW1 told PW5 that she had sex with Juma.

85. PW5 reported to police that Juma defiled PW1. PW5 knew Nduku but she had never seen Nduku with PW1 at her home. She was never told by PW1 that Nduku had given her money. She never told her that Nduku forced PW1 to leave home. She had never told PW5 that Nduku went to church with her. The only time PW1 disappeared was in June 2015.

86. PW6 was corporal Washington Okaka who was based at Sultan Hamud police station, crime department for 6 years. He produced corporal Langat's statement in connection to the case. He knew the handwriting of corporal Langat and statement was signed on 19/07/2015.

87. From the statement, corporal Langat stated that a complaint was made on 17/07/2015 and it was against one Regina. The person

reporting stated accused called Regina had taken away her daughter and handed her over to one pastor Juma. It was further reported that the child was traced in pastor Juma's house but the pastor was not in but his wife was in. The reportee said she had been unable to trace pastor Juma but that he traced the accused person.

88. As per the charge, the accused persons before court were charged with child stealing. According to PW6, the investigating officer did not record how accused persons were arrested.

89. PW6 had the OB extracts indicating the initial report. Initial report was in OB No. 16 of 17/7/2015 showing that Juliana Nduku had been booked in.

90. PW6 also had the birth certificate for PW1 which was issued on 27/02/2015. He produced the documents which he had identified in evidence. Statement of Corporal Langat as PEXH 2 and Birth certificate as PEXH 3.

91. Upon cross examination, PW6 had known corporal Langat for 3 years. Juma was later on arrested and booked at the station. The entries are for OB entries in 2013 and 2014. Investigations diary for OB No. 44/2/3/2014 – DMFI 1. Investigations diary for OB No. 16/3/2/2016 – MFI 2.

92. However the entries do not relate to this case. From Corporal Langat's statement it is not indicated that he visited the school for the complainant.

93. Langat did not verify if complainant was at school on 26/06/2015. Mr. Langat did not go to school to verify that the complainant was to undergo pregnancy test.

94. Pastor Juma was not charged alongside the accused persons. There was no proof between accused persons and the complainant. Mr. Langat has not stated the complainant was influenced to leave her home by the accused persons.

95. From the statement, PW6 told court that there was no indication that money was paid to the complainant. None of the accused persons went to the complainant's home. Mr. Langat says the complainant disappeared from home and went missing.

## **DEFENCE**

96. DW1 Mary Regina Kanee was a housewife at Kasikeu and that the case before the court got her by surprise. The witnesses gave false evidence against her.

97. She remembered a certain Monday in June 2015, she saw the brother to PW1 S K taking her to school. They passed by her home. The following date, K mother called her and told her that PW1 had disappeared.

98. DW1 told court that PW1's mother told her that she (DW1) with another woman were aware of the whereabouts of PW1 and that she was at Sultan Hamud with a pastor.

99. In reply she told PW1's mother that she didn't know where PW1 was. The following day, she saw S standing at her gate and he told her to tell him where PW1 was. She told PW3 she would not go near him as he was holding a panga. PW3 insisted DW1 to show him where PW1 was or he cuts her in pieces.

100. When DW1 saw the village headman, they went to PW1's home where she saw PW1 was at home. DW1 told court that K mother said that she took K to Sultan Hamud to a woman so that she can be sexually exploited and she be paid.

101. They all went to the chief and then proceeded to Sultan Hamud police station where at that time Kavute was not there. S was the one who was there and he was holding a rope. They decided to go to Juliana's house in Sultan Hamud as that is where PW1 was.

102. The chief gave police officers to escort them to Juliana's home. They wrote statements at the station. The OCS told DW1 that she had started a business of sexual exploitation. She was then re-arrested by the police and locked up. The police then went to Juliana's house and she was arrested.

103. DW1 told court that she had never seen Juliana and that was the first time she was seeing her. Juliana also confirmed she does not know DW1.

104. DW1 said that the PW1's family hates her a lot and they keep on harassing and mistreating her. The parents of PW1 had lodged a series of complaints against her which were not true.

105. When DW1 went to K school, the teacher told her that K had escaped from school on several occasions and she was a girl of bad behavior. The teacher said if summoned, he will come and give evidence in court.

106. Upon cross examination, DW1 goes to church at Kisaulu Ministry of Revival which is at Kisaulu. The pastor was Juma. She knew PW1 well as she also attends the same church.

107. DW1 told court that she had never told PW1 that there is a kasha in church and told her to accompany her to the church. She told court that PW1 used to pass by her home on her way from school but never accompanied her to church. DW1 always went with other women to

church but not PW1.

108. DW1 also knew S brother to PW1. She told court that she never told S where PW1 was. Although she had pastor's number she never gave out Juma's number to S. Pastor Juma is the one who gave S his number and told him K has a problem.

109. DW1 told court that she had never gone to Juliana's house and had never been there before. She was not told where Juliana's house is.

110. DW1 told court that pastor Juma never told her to take K to him so that he pays her school fees. Pastor Juma has never come to DW1's place. Maybe pastor Juma came to her home when she was already locked up at Wote o that they search for K.

111. DW2 Mary Ndinda worked at Enguli Secondary in the school canteen at [particulars withheld]. She knew PW1 as her neighbor. Regina never abused K or use her for sexual gains. K used to go to school and she was at the adolescence stage and used to go around with boys.

112. According to DW2, the head teacher told them that there are children with bad behavior at school and PW1 was one of them. They were told she had a behavior of running away from home. She heard that PW1 was possessed with an evil spirit of sleeping around with men and PW1 said she will run away from home.

113. PW1 disappeared from home for 3 days and went to see her boyfriend. K parents said Regina is the one who took K to church. K was found and taken to school but the teacher said he does not want her at school as she was seducing young boys at school.

114. K brother beat up PW1 and another boy stabbed her in the mouth with a knife. K ran away from home and said she would not go back home.

115. DW2 told court that she heard PW1 said that she would run away from home and was perturbed when accused was arrested due to PW1's disappearance.

116. DW2 said she went to see Regina at the police station and she told her she heard PW1 being beaten and she said would run away. Regina cannot use a child for sexual exploitation as DW2 knew her very well.

117. K used to go to the same church with Regina so that the pastor can pray for her and exorcise the demons which she had. K used to disappear then comes back home on her own.

118. DW2 told court that PW1 came to her home and told her daughter that she ran from home on her own and she would run away again and go back to her men. PW1 said that she would run away from home as her mother and brother S had sent demons to her.

119. Upon cross examination, DW2 told court that PW1 used to be in primary school with her children. Her children are the ones who told her that PW1 is ill mannered. The teacher at the school also announced in the parents meeting that PW1 was ill mannered. PW1 was at her adolescent stage and it was easy for someone to abuse her or misguide her. Regina never took advantage of PW1.

120. DW2 told court that on a Friday, she heard PW1 say she would run away and never to come back. She overheard PW1 telling her mother she would ran away as her brother kept on beating her up. Regina does not know Sultan Hamud. DW2 didn't know if Stephen was told by Regina that PW1 is at Sultan.

121. DW2 used to leave school at 7.00 p.m. and reach home at 8.00 p.m. PW1 used to leave school at 6.00 p.m. DW2 used to meet PW1 on some days and tell her to return home. PW1 never used to go directly at home. On other days, she could find PW1 at her home.

122. Upon cross examination by court, DW2 used to go to Catholic church. PW1 used to attend Catholic church but she left and joined pastor Juma's church. She knew Regina goes to the same church with K and at times she used to go to church to attend Kesha.

123. DW2 told court that PW1 came to her farm and told Regina she wants to go to her church but Regina declined and told her to go on her own. PW1 said she did not know where pastor Juma's church was and she went on the road and went with other girls who were going to the church.

124. DW2 told court that she knew K went to pastor Juma's church for a kasha but did not come back home. On that day, Regina did not go for the Kesha.

### **ISSUES, ANALYSIS AND DETERMINATION**

125. After going through the evidence on record the charge sheet and the parties submissions, I find the issues are;

***Whether the prosecution proved its case beyond reasonable doubt?***

126. **SECTION 15 OF THE S O A NO 3 O 2006.**

Any person who –

**“d) takes advantage of his influence over, or his relationship to a child, to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show;**

**Commits the offence of benefiting from child prostitution and is liable upon conviction to imprisonment for a term of not less than ten years.”**

127. The charge was to the effect that;

***“On diverse dates between 25/6/2015, and 13/7/2015 at Kasikeu location Mukaa district of Makeni county, being close friend of K M child aged 16 years, took advantage of her relationship to procure her for sexual intercourse”***

128. The appellant complained that the prosecution case was mixed grill of the elements of incredible, contradictory evidence, and evidence that was in variance with contents of the charge sheet thus charge sheet was defective.

129. On charge sheet the offence is alleged to have occurred on 25/06/2015 and 13/07/2015. On page 30 line 20 pw4 the p1 father talks of 17/07/2017 as date the girl disappeared.

130. See also page 45 1st line, PW6 evidence. It is stated that complaint was made on 17/07/2015 against appellant. Same page, see also OB number given of 17/7/015 of the initial report. See also PW2, she talks of 14/06/2015 as the day pw1 disappeared. See page 27 line 4 talks of 24/06/2015 where pw3 brother to pw1 says pw1 disappeared from home. His mother told him of PW1 disappeared from home. See page 35, line 5. PW1 says “safe for **26/06/2015 – 28/06/2015, she did not disappear any other day**”.PW5 her mother said she didn’t know when PW1 disappeared. All these shows prosecution evidence was at variance and the charge sheet was defective.

131. In any event the relationship set out in the charge sheet was of close relationship of accused and the PW1. However the prosecution dwelt on proving that the accused and the PW1 were neighbours. There was no evidence proving the element of close friendship of the two.

132. In the case of **HASSAN VS R 2015 E KLR** the court held that;

***“... in effect therefore though the charge is related to prostitution, the prosecution is not required to prove prostitution in the common sense of offering sex for material gain. The prosecution is required to prove that, the victim was a child .It also required to prove relationship and influence over.....it is imperative for the persecution to prove that the appellant did persuade or influence the complainant to have sexual intercourse.”***

133. On the issue of prove of the case beyond reasonable doubt, the prosecution case was that vide PW1, that she was introduced to pastor Juma by the accused and subsequently she had sex with him. The pastor Juma gave accused Kshs. 1000. The PW1 was then 16 years.

134. The pastor was arrested and released without charge. The PW1 was not medically examined to prove any sexual offence ingredients. The PW1 never complained of any sexual offence against the accused or the pastor. PW1 on cross-examination stated that the accused never told her to have sex with the pastor. There is no reason why the pastor was not called as a witness.

135. If pastor had sex with PW1 as alleged, then he committed defilement act under SOA. Failure to prosecute the pastor implies that the police had no evidence to charge him with an act of having sex with a minor (defilement). Thus the omission negates the finding of accused having influence over,..... (PW1) a child, to procure the (PW1) child for sexual intercourse.

136. The ingredients of the offence charged were not proved beyond reasonable doubt thus the burden of prove placed on the prosecution to prove beyond doubt was not discharged.

137. It is a fundamental common law principle that a person who is charged with a criminal offence is presumed to be innocent until proven guilty. The presumption of innocence, which was developed at common law towards the end of the 18<sup>th</sup> century, 1 is inextricably linked to the requirement that the prosecution must prove the guilt of an accused person beyond reasonable doubt.

138. This has been described as “the golden thread of English criminal law”, and regarded as “a cardinal principle of our system of justice”. The presumption of innocence is such an important fundamental principle supported by “ordinary notions of fairness, and is an integral part of “the broader concept of a fair trial entrenched in common law”.

139. It is a bedrock principle that not only protects the innocent from wrongful conviction, but also promotes the rule of law<sup>7</sup> (which an independent judiciary is duty bound to uphold and safeguard).

140. Apart from its entrenchment at common law, the presumption of innocence is protected by the International Covenant on Civil and Political Rights: and even our bill of rights in our constitution.

141. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

142. The court also ignored a vital element of defence that there was personal vendetta between 2 families of complainant and appellant. This piece of evidence emanated from the defence and was not rebutted by the prosecution

143. n nor shaken by the prosecution in the cross-examination.

144. The totality of the above findings, leads court to convincingly conclude that the prosecution case was not proved beyond reasonable doubt, thus the appeal succeeds;

145. Thus the court makes the following orders;

**a) The appeal is allowed.**

**b) The appellant is set free forthwith unless she is otherwise lawfully held.**

**SIGNED, DATED AND DELIVERED THIS 7<sup>TH</sup> DAY OF MAY 2018.**

**C. KARIUKI**

**JUDGE**

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