REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 170 OF 2015

SHEIKH ALI SAMOJA ……. APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

JUDGMENT

The Appellant **SHEIKH ALI SAMOJA** has filed this appeal challenging his conviction on a charge of **CHILD SEX TOURISM, CONTRARY TO SECTION 14(a) as read with 14(c) OF THE SEXUAL OFFENCES ACT 2006.**

The particulars of the offence were that

> ***"On the month of July 2012 at unknown date at [particulars withheld] at Freehold Estate in Nakuru District within Rift Valley Province arranged and organized a travel of SHH a child aged 15 years old to Nairobi to [particulars withheld] to be taken to Lebanon intentionally and unlawfully the said SAYYID MURTADHA MURTADHA defiled the said S H"***

The prosecution led by **INSPECTOR OYIER** called a total of five (5) witnessed in support of their case.

PW2 HW O was the father of the complainant **'S'**. He told the court that he knew the accused as a teacher to his daughter at **[particulars withheld]** and the Imam of the Mosque the family attended. Sometime in early July **PW2** met the accused who told him that the complainant was among 3 students selected to travel to Lebanon for further studies. The accused told **PW1** that his child's travel documents would be processed in Nairobi. Both **PW2** and **PW3 F S** the mother of the complainant were agreeable to their daughter travelling to Lebanon for greater opportunities. They both gave their consent to the trip.

PW4 S H was the complainant in this case. She told the court that she was a student at the Madrassa in Bilal where she was a boarder and that the accused was one of her teachers at the Madrassa. In the month of July the accused informed the complainant that there was a sponsor willing to finance her to travel to Lebanon for further studies. Accused told the complainant to inform her parents about the opportunity. The complainant duly informed both her parents who were agreeable to her travelling to Lebanon.

During the same month the accused gave the complainant Ksh 500/= being her fare to Nairobi where she was to be met by one '**SHEIKH MURTADHA'** who would process her travel documents to Lebanon. The accused gave complainant a piece of paper bearing his own phone number as well as that of the said **'Sheikh Murtadha'**. The complainant travelled to Nairobi and was met by **'Sheikh Murtadha'** who took her to his house in Westlands.

After staying in the house for about one week **PW4** testified that the **'Sheikh Murtadha'** came into her room one night where she was alone at about 8.00pm. He told the complainant that **"he cannot stay in a house with a beautiful girl".** He proceeded to tear her t-shirt and skirt and defiled her. After the act the Sheikh left and locked the complainant inside the room.

Four days later the accused called and **'Sheikh Murtadha'** gave the complainant the phone. The accused warned the complainant to stop being rude as he had taken her to Sheikh Murtadha to ***'kamliwaza'*** or comfort him. The complainant developed stomach and back pains and called her sister who lived in Nairobi to pick her. She went to her sister's home but did not reveal the defilement to anyone. After some days the complainant returned to the home of **'Sheikh Murtadha'** to await processing of her documents. She left when the Sheikh's wife packed her clothes and chased her away. The complainant then returned to Nakuru. Later the complainant returned to their [particulars withheld] school in Nakuru. She reported to the accused that **'Sheikh Murtadha'** had defiled her. The accused replied that **'what was done was already done'.** Later when the incident became known complainant took an overdose of pills in an attempt to commit suicide. She was rushed to hospital. It is only then that complainant revealed to her father about her defilement. She was examined at Provincial General Hospital Nakuru. The perpetrator **'Sheikh Murtadha'** absconded to the Middle East and has not been traced to date. The accused was then arrested and charged with the present offence.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. He opted to make a sworn statement in defence in which he categorically denied having organized the transport of the child **'Shakila'** to Nairobi for purposes of sexual exploitation. The appellant called two (2) witnesses in support of his defence.

On 6/7/2015 the learned trial magistrate delivered her judgment in the matter. She convicted the appellant of the offence of Child Sex Tourism and sentenced him to serve ten (10) years imprisonment. Being aggrieved by both this conviction and sentence the appellant filed this appeal.

The appeal was argued before the court on 7th March, 2016. **MR. MONGERI** and **MR. KAHIGA** acted for the appellant whilst **MS NGOVI** learned State Counsel represented the Respondent State.

The Petition of Appeal dated 15th July 2015 raised five grounds of appeal as follows:

> ***"1. The learned magistrate erred in law and in fact by holding that the offence of Child Sex Tourism had been established whereas there was no such evidence.***
>
> ***2. The learned magistrate erred in law and fact by not addressing himself to whether there was mens rea to commit the offence of Child Sex Tourism.***
>
> ***3. The learned magistrate erred in law and in fact by not evaluating the entire evidence but took the prosecution evidence in isolation***
>
> ***4. The learned magistrate erred in law and in fact by not appreciating the defence of the accused person***
>
> ***5.The learned magistrate erred in law and fact by passing a sentence that was harsh and excessive in the circumstances of the case"***

This being a court of first appeal, the court is under an obligation to re evaluate the prosecution evidence and to draw its own conclusions on the same. In the case of **AJODE –VS- REPUBLIC (2004) 2 KLR 81** it was held

> ***"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"***

The appellant faces a charge of Child Sex Tourism. Section 14(a) of the Sexual Offences Act. 2006 provides that any person who

> ***(a) "makes or organizes any travel arrangements for or on behalf of any other person whether that persons 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 or …..***
>
> ***(b) ……..***
>
> ***(c) ……..***
>
> ***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 juristic person to a fine of not less than two million shillings"***

Counsel for the appellant raised the following broad grounds of appeal

i. ***Defective charge sheet***
ii. ***Insufficiency of Evidence***
iii. ***Failure to prove the 'mens rea' of the offence***
iv. ***Failure by the trial court to consider the defence raised by the appellant.***

I will proceed to consider each ground individually

i. **Defective Charge Sheet**

It was submitted for the appellant that the charges as framed were so defective as to hinder the ability of the appellant to defend himself during the trial. Counsel took issue with the manner in which the particulars of the charge were framed, that the appellant

> ***"organized travel of 'S H H a child aged 15 years to Nairobi to 'Sayyid Murtadha Murtadha' to be taken to Lebanon intentionally and unlawfully the said 'Sayyid Murtadha Murtadha' defiled the said 'S H'.***

Counsel for the appellants submit that the manner in which these particulars have been framed are so incoherent as to be incomprehensible and therefore rendered the appellant unable to mount an effective defence. I have considered this ground and I am not myself persuaded by the same. Whilst it may be true that the facts relating to the charge were set out in a rather convoluted manner and could have been framed better, I do not find that the charges were incomprehensible to the accused. The statute under which the appellant had been charged being the Sexual Offences Act was clearly stated in the charge sheet. Likewise the section of that statute under which the charge had been brought being section 14(a) was also clearly stated. The charge was clearly stated to be **'child sex tourism'**. The particulars clearly named the complainant. On the whole I find that the appellant could have been under no illusion whatsoever regarding the nature of the charges which he faced. He participated fully in the trial before the lower court and the record shows that through his advocates the appellant mounted a vigorous defence to the charge. The appellant and his advocates could not have done all this and now claim to have been less than sure of what charges they were defending. I find that the charge was properly framed. The appellant fully comprehended both the nature and gravity of the charges which he faced. The fact that the particulars could have been framed in more clear terms does not in my opinion render the charge defective. To my mind this would amount to a mere technicality and Article 159(d) exhorts Courts of Law to administer justice **"without undue regard to procedural technicalities".**

However, having said that I wish to make the following observations regarding nature of the charges filed against the appellant.

The appellant has been charged with the offence of **'child sex tourism'**. The Children Act of Kenya does not provide any definition for this offence. The court has looked at the **Report of the special Rapporteur on the sale of children, Child prostitution and Child pornography, United Nations Economic and Social Council on Human Rights UN-Doc ELCN 14 (1996) United Nations** which defines **'child sex tourism'** as

> ***"tourism organized with the primary purpose of facilitating the effecting of a commercial – sexual relationship with a child".***

The **Tanzanian Anti Trafficking in Persons Act, 2008** defines sex tourism at section 3 thus

a. ***Program organized by travel or tourism related establishment or an individual, which consists of tourism packages or activities utilizing and offering escort and sexual services as enticements for tourists"***

It would appear therefore that in order to be found guilty of the offence of child sex tourism it must be shown that an accused person facilitated the travel of a person or a group of persons to a particular destination with the sole purpose of the travellers engaging in sexual intercourse with children, thereby promoting child sex tourism.

Indeed section14 of the Sexual Offences Act makes it an offence for one to organize travel on behalf of **'any other person'** with the intention of facilitating **"the commission any sexual offence against a child"**. Thus the target of this offence is the person or persons who facilitates travel for the third parties who would be travelling into Kenya (or to any other destination) for the purpose of committing a sexual offence against a child. The offender under section 14 therefore is **NOT** the one who arranges for the travel of the child, but rather the one who arranges travel for the persons (tourists) who would be arriving at a certain destination in order to sexually abuse children. This type of child sex tourism is common in countries like Asia, parts of Europe and unfortunately is also common at the Kenyan coast as well as many parts of Africa. It is section 15(b) that criminalizes the act of procuring a child for purposes of sexual intercourse or any form of sexual abuse (including defilement). which is what the appellant is alleged to have done.

In my view and given the circumstances of this case the accused ought not to have been charged under section 14 with Child Sex Tourism as it has not been alleged that he procured person(s) to come into Kenya in order to defile the complainant. Rather the correct charge the accused should have faced is Child Prostitution under Section 15(b) of the Sexual Offences Act. To this extent and for this reason I find that the charge is indeed defective.

Having so found in view of the serious nature of the alleged offence, the fact that a minor is involved, and due to the public interest, I will not dismiss the charge outright at this stage but I will proceed to consider whether the evidence adduced is sufficient to prove an offence, whether under section 14 or section 15 of the Act.

ii. **Insufficiency of Evidence**

Counsel for the appellant have submitted that the evidence called by the prosecution was not sufficient to prove the charge. The particulars of the charge allege that the appellant **'organized'** for the travel of the complainant child for purposes of child sex tourism. In view of this allegation the first thing which the prosecution must prove is that the appellant organized and/or arranged for the travel of the complainant to some destination. The particulars in the charge sheet indicate that the appellant organized for the travel of the child to Lebanon. This is not entirely supported by the evidence on record. The complainant herself and both her parents testified that the appellant told them that he was arranging for the complainant to travel to Nairobi to link up with a **'Sheikh Murtadha'** who was to organize travel documents to enable her to travel to Lebanon for further studies. Thus according to the evidence of the prosecution witnesses the appellant's role was only to facilitate the travel of the complainant upto Nairobi – her travel to Lebanon was to be organized and facilitated by this **'Sheikh**

Murtadha'. Infact the appellant did not even travel with the child to Nairobi, he remained in Nakuru. The appellant certainly would have had no capacity while still in Nakuru to arrange for her onward travel to Lebanon.

Did the appellant organize and facilitate the travel of the complainant to Nairobi? From the evidence it is clear that he did so. It was the appellant who being a teacher to the complainant broached the subject to this journey to her. He informed her that upon arrival in Nairobi she would be assisted to obtain travel documents to proceed to Lebanon. The complainant told the court in her evidence that the appellant gave her Ksh 500/= as fare to enable her make this journey to Nairobi. He wrote down for her on a piece of paper the name and telephone number of the contact she was to meet in Nairobi.

It is important and pertinent to note that this trip to Nairobi (and even the intended travel on to Lebanon) was undertaken with the full knowledge, consent and approval of the complainant's parents. The appellant did not kidnap her or spirit her out of Nakuru town to Nairobi. **PW2 H W O** the complainant's father testified at page 9 line 3 thus

> ***"Said A S S's teacher and head at the mosque (Imam) told me he would want S to go to Lebabon for further studies among 3 other students selected. I allowed their request telling him I have no problem with her education…..***

PW2 goes on to state at page 9 line 12

> ***"S told her mother F and she agreed. Ali (appellant) gave her money Shs 500. I knew it because she came home to say goodbye to her mother. That was fare to Nairobi ….***

On her part **PW2 F S** the complainant's mother stated at page 11 line 4

> ***"I was with PW1 that time so I agreed after 2 days Shakila came with 500 and a piece of paper with 2 phone numbers she said one is for the person who will receive her in Nairobi and the other was for accused (A). She said she has a motor bike awaiting outside and the Sh 500 was her fare to Nairobi……"***

It is abundantly clear that the appellant was open and transparent about the plans he was making for his student (the complainant). Not only were her parents fully in the picture but they clearly approved and welcomed the opportunity for their child to travel for studies. In short there was up to this point nothing clandestine under hand or criminal in the activities and/or plans made by the appellant.

Based upon the evidence on record I find that it has been sufficiently proved that the appellant did organize and facilitate for the travel of the complainant to Nairobi.

The complainant who testified as **PW4** told the court that upon her arrival in Nairobi she was met by one **'Sheikh Murtadha'** who took her to his house in Westlands where she was to stay awaiting the processing of the documents which would enable her travel to Lebanon. She states that one night at about 8.00pm this **'Sheikh Murtadha'** came into her bedroom and told her that he **'can't stay in a house with a beautiful girl'**. The Sheikh then proceeded to tear off her clothes and defiled her. Unfortunately due to fear and possibly shame the complainant did not immediately report this incident of defilement to any person, she did not even reveal it to her sister in whose house in Eastleigh she went to stay after leaving the home of **'Sheikh Murtadha'.** The matter only came to light several months later after the complainant had returned to Nakuru. The clothes allegedly torn by the perpetrator were produced as evidence but due to the passage of time no testing for any bodily fluids and/or specimens could be undertaken.

Be that as it may I find no reason to disbelieve the child's account of what happened to her. She had nothing to gain by claiming to have been defiled if no such incident had actually occurred. On the contrary the complainant a Muslim girl stood to lose her dignity and respect if the defilement was revealed. Undoubtedly it was this fear that led her not to disclose the fact to anyone. Indeed when the

incident eventually came to light the complainant attempted to commit suicide by swallowing tablets. This showed her level of distress over the defilement.

PW5 DR. JUSTUS NONDI did examine the complainant approximately 5 months after the alleged defilement. He found that her hymen had old tears indicating that penetration had occurred. **PW5** produced his report as an exhibit **P. Exb 2**. This report corroborated the complainant's testimony. The trial magistrate who saw and heard the child testify stated in her judgment at page 6 line 15

> ***"From the evidence of this girl alone, I am convinced that she was violently raped in the house of the said Murtadha in the style (manner she gave in her evidence)".***

This was the observation of the magistrate who heard and saw the child testify and who observed her demeanour. I have no reason to dispute her observations. From the evidence available I too am satisfied that the complainant was indeed defiled as she has stated by the said **'Sheikh Murtadha'** in his house in westlands.

The complainant told the court that at the time of this incident of defilement she was 15 years old having been born on 29th October, 1997. The issue of the complainant's age did arise during the trial. The question of her age was a pertinent issue since defilement is defined as sexual intercourse with a child below the age of 18 years. Therefore if the complainant was at the material time 18 years or older then the incident would amount to rape and not defilement. The learned trial magistrate did deal with this question of age in her judgment at page 5. The complainant's immunization card produced in court as P. Exh 3 showed gave her date of birth as 29/10/1997. **PW5 DR. JUSTUS NONDI** a medical practitioner attached to the Nakuru PGH produced an age assessment report in respect of the complainant. The doctor assessed her age to be **"16+ or – 1 year'**. Therefore given the evidence on record I do concur with the finding of the learned trial magistrate that at the time of this incident of defilement in the year 2012 the complainant was aged 15 years and was therefore a minor. The sexual assault upon the complainant amounted to defilement.

It is important to note that at no time has any witness claimed or even alleged that it was the appellant who sexually assaulted and/or defiled the complainant. The complainant herself is quite categorical that it was **NOT** the appellant but the man to whom the appellant directed her to seek help in travelling to Lebanon. **'Sheikh Murtadha'** who defiled her. The said **'Sheikh Murtadha'** was never traced by the police as he is said to have absconded and left the country when his vile deeds were revealed. The question then would be-if the appellant is not the one who defiled the complainant why is he now charged in court. This brings in the critical question of motive or **'mens rea'.**

iii. **Is there proof of mens rea on the part of the Appellant**

There is a general rule in criminal law expressed in the **maxim 'actus non facit nisi mens sit rea"**. This means that an offence can only be said to have been committed where a criminal act (actus reus) is accompanied by a criminal intention (mens rea). Without evidence of mens reas, then the unlawful act cannot be deemed to amount to an offence in law.

In the present case it was alleged by the prosecution that the appellant organized the travel of the complainant to Nairobi, into the hands of **'Sheikh Murtadha'** for the purpose of availing her for sexual tourism. As I have said earlier my own view is that given the circumstances the correct charge ought to have been Child Prostitution. Thus it must be shown that the underlying motive or intention of the appellant in dispatching the complainant to Nairobi was in order to provide a victim for Sheikh Murtadha to defile or in the alternative it must be shown that in dispatching the complainant to Nairobi the appellant knew or had reason to believe that she would be defiled.

As discussed earlier the appellant informed the complainant and her parents that he was sending her to **'Sheikh Murtadha'** in Nairobi so that her documents could be processed to enable her travel to Lebanon. Again as stated earlier the appellant was very open to the complaint's parents regarding his plans and intentions. The appellant was not arranging for the complainant to travel to some unknown

and/or mysterious destination. He made it clear to both the complainant and her parents where she was going to and who she would meet and stay with in Nairobi. He gave the complainant his own and her hosts phone numbers for reference.

The complainant in her evidence told the court that sometime after she had been defiled the appellant called Sheikh Murtadha who gave the complainant the phone. The complainant alleges that

> ***"A(appellant) told me I stop being rude because he had taken me to "Kamliwaza" huyo Murtadha"***

It is not clear from her evidence whether the complainant at this point informed the appellant that she had been defiled. However it is alleged that even after becoming aware that the complainant had been defiled the appellant took no action – he did not seek to remove the complainant from that house, he made no report of the incident to the police or to the parents of the girl. It is this failure of the appellant to take any action after being made aware of the defilement that led the court to impute the existence of mens rea by concluding that the appellant's failure to act was an indication that he knew that the child would be defiled in the hands of **'Sheikh Murtadha'.**

The reasoning of the learned trial magistrate is revealed in her judgment at page 9 line 1 where she states

> ***"The clear intent of the accused person in relation to this child is demonstrated by his words to the complainant that he had taken her to Said Murtadha to console "kumliwasa" him. Further his action/omission when the child reported to him that she had been defiled can't be said to be consistent with those of an innocent person. The child told him Murtadha had defiled her then he tells her "whats done is done", if he had nothing to hide, as a head in that institution he would have reported the matter to police so that investigations could be done to ascertain truthfulness or lack of it of the complainants allegations"***

Thus the trial court relied on two main issues to impute mens rea on the part of the appellant. Firstly the appellant's statement that he had taken the complainant to **'Sheikh Murtadha'** to **"kumliwasa"** him. Secondly the failure of the appellant to take any action after being informed of the defilement was deemed to amount to mens rea.

I do understand the term *ku-liwaza* to be a Kiswahili term used colloquially to mean **"to comfort"** or **"to console".** The term **'liwaza'** means **'to console'** as in the case of bereavement. I cannot see how these words used by the appellant revealed an explicit intention or knowledge or mens rea. The term used is quite ambiguous. The complainant told court that **'Sheikh Murtadha'** lived in a home with his wife. The appellant must have been aware of this fact. Would the appellant send a girl to the family home of Murtadha believing or intending that the girl be defiled. I hardly think so. The appellants antecedents his behavior before the incident belie any knowledge and/or belief that the complainant would face any danger. If the appellant's intention was to send the child to Nairobi for purposes of defilement, then he would have taken steps to cover his tracks – he would have acted in a more under-hand or clandestine manner. The fact that the appellant acted openly and informed the child's parents even where she was to stay belies the fact that he had any ill-motive in respect of the child. Additionally there is nothing to show that appellant had reason to believe that **'Sheikh Murtadha'** would defile the complainant. There is no evidence that he had a habit of defiling girls sent to his house.

Indeed after the incident came out into the open the appellant actively participated in taking the child's parents to Nairobi in order to search for the said **'Sheikh Murtadha'** who had by then absconded allegedly to the Middle East. The fact that the appellant himself made no attempt to run away or abscond again belies the existence of any mens rea on his part.

The trial court also took issue with the fact that the appellant failed to take any action once he became aware of the defilement. Without a doubt this amounts to a moral failing on the part of the appellant.

As an Imam and as a religious teacher the appellant ought to have immediately removed the complainant from that home and reported the matter to the relevant authorities. His failure to do so speaks volumes about his lack of moral character. However can this moral failing be deemed to be tantamount to criminal intent. I do not think so. The failure to act after the fact does not amount to proof that the appellant knew what criminal intentions **'Sheikh Murtadha'** had towards the child.

The law requires that a criminal charge be proved **"beyond reasonable doubt".** The prosecution is required to prove each element of the offence beyond reasonable doubt. I am satisfied that the actus reus of this offence consisting of organizing the travel of the complainant to the home of Sheikh Murtadha in Nairobi has indeed been proved beyond reasonable doubt. However genuine doubts remain regarding the aspect of mens rea or criminal intent. The appellant's intention was to enable the complainant to travel to Lebanon. I am not persuaded that his intention was to provide a girl for the said **'Sheikh Murtadha'** to defile nor is it shown that his intention was to lure the child into the house in Nairobi with the specific intention and/or knowledge that she would be defiled whilst there. The culprit here is the said **'Sheikh Murtadha'** who has absconded and can no longer be traced. The appellant could have exercised more care in establishing the true character of the person whom he was relying on to provide travel documents to the complainant but these moral lapses do not in my view amount to mens rea for the offence of child sex tourism or for the offence of child prostitution.

In the absence of proof of mens rea no offence can be deemed to have been established.

iv. **Failure to consider appellants defence**

The last ground of Appeal advanced that the trial court failed to give due consideration to the appellants defence. This I find to be an inaccurate assertion. In her judgment at page 6 the learned trial magistrate did clearly consider the appellants defence that one **'Issah Mbogo'** a Human Rights activist masterminded these changes in order to fix the appellant. The trial court (rightfully in my view) dismissed that defence. The decision on whether or not to lay charges lies exclusively with the Director of Public Prosecutions, and no other person.

Finally based on the foregoing and for the reasons I have adduced above I find that this appeal has merit. The prosecution failed to prove the charge beyond a reasonable doubt. The defilement of the complainant though a very regrettable incident cannot in any way be attributed to the appellant. The true culprit **'Sheikh Murtadha'** absconded. I therefore allow the appeal and quash the appellant's conviction. His ten (10) year sentence is also set aside. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 1st day of July, 2016.

Maureen Odero

Judge

Ms Gitau for Appellant

Mr. Chirchir for DPP