



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL APPEAL NO. 307 OF 2010

JAMES MUSEMBI MULI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case (S.O.) No. 19 of 2008 by Hon. S. Gacheru, SRM on 4/11/2010)

J U D G M E N T

1. The appellant, **James Musembi Muli** was charged with the offence of **Child Trafficking** contrary to **Section 13(a)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the **24th January, 2008** at [**particulars withheld**] **Secondary School in Makueni District**, he intentionally organized travel arrangements on behalf of **C M** with the intention of facilitating the commission of sexual offence against **C M** a girl **aged 15 years**.
2. Facts of the case were that on the **24th October, 2008** PW1 **C M M**, the complainant herein then a form one student at [**particulars withheld**] Secondary School was given leave by a **Mr. Muendo** the duty master to attend a funeral. On her way out she encountered the appellant who was standing at the school gate. The appellant had been her friend for a period of two (2) years, therefore, was known to her. They boarded a motor vehicle as directed by the appellant and went to Machakos town. They went to the appellant's house at Katoloni. She stayed at the house for two (2) days.
3. In the meantime PW2 **K K** the complainant's mother got information that PW1 was away from school. She suspected she was with the appellant following a previous incident. She notified the Assistant Chief, Mbiuni, PW3, **Antony Muasa Munyao**. They went in search of them and found them at the appellant's house. The appellant somehow managed to get away. The matter was reported to the police. Thereafter he was arrested and charged.
4. In his defence the appellant stated that the complainant was his girlfriend and would visit him at his home. At the time of his arrest the complainant was at his house. However, he denied knowing how she left school. He denied having collected her from school and stated that her parents did not approve of their relationship.
5. The trial magistrate analyzed the evidence adduced and concluded that indeed the appellant had organized travel arrangements for the complainant with the intention of facilitating the commission of a Sexual Offence. He convicted the appellant and sentenced him to **ten (10) years imprisonment**.
6. Being dissatisfied with the conviction and sentence, he appealed on grounds that the learned

magistrate erred:

- i. **By going against the weight of evidence and erroneously convicting him.**
- ii. **By treating the evidence on record superficially, casually and without caution thus arriving at an erroneous finding;**
- iii. **By ignoring the mitigation of the appellant hence giving a manifestly excessive sentence.**

7. The appeal was canvassed by way of written submissions.
8. This being the first appeal, my duty as a court is to re-evaluate the evidence, draw my own inferences and come to a logical conclusion knowing that I did not have an opportunity of seeing or hearing witnesses who testified at the trial court. (*See Okeno versus Republic (1972) E.A. 32*).
9. To prove the case the prosecution had a duty of proving that the appellant made/organized plans for the complainant to travel. Evidence adduced of how the complainant got permission to leave school is exhibited by a student's leave out sheet. The document is in the name of **C M**. In court she gave her names as **C M M M**. The document has a stamp impression of [particulars withheld] Secondary School. There are remarks thereon to the effect:

“Attend a burial at home. Left at 1.00 p.m.”

It bears an endorsement of a Principal. It is dated **24th October, 2008**.

10. According to the evidence of the complainant she was given the leave out sheet by **Esther** a school clerk having been notified to collect it by the teacher on duty, whose name she gave as **Mr. Muendo**. It was important for the school administration to adduce evidence establishing circumstances under which the complainant left school.
11. This is a Sexual Offence case where the court could believe the complainant and base its conviction of evidence adduced solely by her. In her evidence the complainant stated that the accused went and lied that he was related to her and sought the leave out sheet to enable her attend the funeral. And, after she was issued with the leave out form she met the accused outside the school gate whereafter they travelled to his home.
12. In his defence the appellant admitted that the complainant went to his home but he denied having organized to get her out of school. Evidence adduced as to how the accused lied and got the leave out form issued was hearsay. Evidence of the maker of the document was important to establish the fact of having organized how the complainant left school.
13. In his testimony the appellant claimed that the complainant was no stranger to him. She used to visit him at home as they were friends. On the fateful day, he found her at his home, per his allegation. On the **10th March, 2009** the complainant indeed told the court that she was not in school because her mother (PW3) had chased her away from home whereafter she went to work at Kayole in Nairobi area for a **Mr. Kituku**. Thereafter she left going to stay with her grandfather at Katoloni where she was picked and taken to the police station. It was after she was committed to the girls' hostel that she changed her story. The complainant was delinquent. Her testimony required confirmation which was lacking.
14. In her testimony the complainant stated that she did not engage in sexual intercourse with the appellant. The trial magistrate in reaching his decision stated that the appellant must have organized travel arrangements on behalf of the complainant with the intention to commit a sexual offence with her. He took into consideration hearsay evidence which was inadmissible. Although he disbelieved what the appellant stated in his defence he did not specifically state that he believed the complainant.
15. Evidence adduced left many loopholes in the prosecution's case such that it was unsafe for the trial court to base its conviction on it. I, therefore, find the appeal having merit. I quash the conviction and set aside the sentence imposed. The appellant shall be set free forthwith unless otherwise lawfully held.

16. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 12TH day of May, 2015.

L. N. MUTENDE

JUDGE