



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL CASE NO.92 OF 2013

(Being an appeal from the original conviction and sentence in Criminal Case No.380 of 2013 at the Senior Resident Magistrate's Court at Kilgoris by Hon. A.K.Mokoross (RM) DATED 6TH September 2013).

WESLEY KIPKORIR RONO

- APPELLANT

VERSUS

REPUBLIC

- RESPONDENT

J U D G M E N T

1. The Appellant herein, **WESLEY KIPKORIR RONO** was on 6th June 2013, charged with two main counts and one alternative count as follows:

On **Count 1**: he was charged with the offence of **defilement of a girl contrary to Section 8(1)** as read with **8(4) of the Sexual Offences Act**. The particulars were that on the 3rd and 4th June 2013 in Transmara District, the appellant caused his penis to penetrate the vagina of **N.C (name withheld)** a girl aged 16 years old.

In the **Alternative** he was charged with **indecent act with a child contrary to Section II (a) of the Sexual Offences Act No.3 of 2006**. The particulars were that between 3rd and 4th June 2013 in Transmara District of the Narok County, the appellant intentionally and unlawfully caused his penis to come into contact with the vagina of **N.C (name withheld)** a girl aged 16 years old.

On **Count 2** the appellant was charged with the offence of **child trafficking contrary to Section 14 (a) of the Sexual Offences Act No.3 of 2006**. The particulars being that on 4th June 2013 in Transmara District in Narok County, the appellant unlawfully, knowingly and intentionally made and organized travel arrangements of a child namely **N.C (name withheld)** from Chebole to Kuresoi area with intention to have sexual intercourse with her.

2. The appellant was tried, convicted and sentenced to serve 10 years imprisonment for **Count 2**. He was however acquitted under **Section 215 of the Criminal Procedure Code** in respect to **Count 1** and its alternative.
3. He now appeals against the conviction and sentence for count 2 on the grounds set out in his

Petition of Appeal filed on 11th September 2013.

4. In summary, the grounds of appeal are that he was convicted despite the fact that the complainant denied ever being caught together with the appellant, the complainant's mother was not sure if the appellant was the one who was with her and lastly, that the prosecution failed to summon a crucial witnesses to shed light on the case.
5. At the hearing of the appeal, the appellant relied on his written submissions which expanded the grounds of appeal. He submitted that there was a conspiracy between the complainant's mother and the police who concealed the truth and were hell-bent on prosecuting him despite the existence of clear evidence that exonerated him from any wrong doing. The appellant further submitted that the prosecution's case was riddled with contradictions and fabrication of evidence that resulted in a selective judgment.
6. Mr. Majale, appearing for the State, did not oppose the appeal. He submitted that there was no cogent evidence to convict the accused on any of the counts for which he was charged since the complainant herself denied all the allegations leveled against the appellant for holding her as a victim of the child trafficking.
7. Most importantly, Mr. Majale submitted that there were glaring gaps in the prosecution's case that made the appellant's conviction unsafe especially in regard to the age of the complainant which he stated was not proved by way of a birth certificate. There was therefore doubt regarding the complainant's age which doubt ought to have been applied in favour of the appellant. In a nutshell, Mr. Majale submitted that the prosecution's case was not proved beyond reasonable doubt and the appellant was greatly prejudiced by the deficiencies in the prosecution's case. He urged this court to proceed and acquit the appellant.
8. This being a first appeal, the court is till enjoined to consider the entire evidence, evaluate it and arrive at an independent conclusion as to whether the conviction on the second count should be upheld or not bearing in mind that I neither heard nor saw the witnesses testify. (See **Okeno vs Republic [1972] EA 32**).

The prosecution called a total of 6 witnesses as follows:

9. **PW1 N.C** (*name withheld*) who was the complainant denied ever having travelled with the appellant on the alleged date or at all. She denied being the appellant's girlfriend and instead testified that her boyfriend was one Weldon. She also denied ever having stayed with the appellant even for a day.
10. **PW2 H.C** (*name withheld*) was the mother of the complainant. She stated that the complainant had disappeared from home on 3rd June 2013 and did not spend the night at home. She reported the case of a missing child to the chief who initiated investigations and discovered that the complainant had spent the night with the appellant. She added that on making further enquiries, she learnt that the complainant and appellant were heading to a place called Mauche-Kuresoi whereupon she involved the police who intervened and intercepted the complainant and the appellant at a place called Chebole.
11. **PW3 APC Denis Wakoli** and **PW4 APC Joseph Rono** confirmed having received the report about the complainant's disappearance and testified that they collected both the appellant and the complainant at Chebole Police Post after they had been arrested.
12. **PW5 Sgt. Evans Bett** was the Police Officer stationed at Chebole who on 4th June 2013 allegedly intercepted the complainant and the appellant when the two were aboard a motor cycle when en-route to Mauche Kuresoi. He stated that he arrested the duo together with the cyclist who was riding the motorcycle.

13. **PW6 Julius Munyendo** was the Clinical Officer who examined the complainant after the alleged defilement.

14. When put on his defence, the appellant chose to give an unsworn statement in which he denied involvement in any wrongdoing. He stated that on the material day, he was busy with his employment as a boda boda rider when the police arrested him for no apparent reason.

15. In view of the fact that the appellant was acquitted of Count 1 and its alternative charge, this judgment will focus only on the second count of **child trafficking contrary to Section 14(a) of the Sexual Offences Act No.3 of 2006**.

16. I find that the trial magistrate erred in his Judgment when he stated, the correct section for the 2nd count ought to have been **Section 13(a)** and not **14(a)** as the wordings of the charge corresponds with **Section 13(a)**. **Section 13(a)** of the **Sexual Offences Act No.3 of 2006** had been repealed by the **Counter Trafficking in Persons Act No.8 of 2010** which at **Section 3 (1), (3) and (6)** states as follows:

“(1) A person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbours or receives another person for the purpose of exploitation by means of:-

- a. **Threat or use of force or other forms of coercion;**
- b. **Abduction;**
- c. **Fraud;**
- d. **Deception;**
- e. **Abuse of power or of position of vulnerability;**
- f. **Giving payments or benefits to obtain the consent of the victim of trafficking in persons; or**
- g. **Giving or receiving payments or benefits to obtain the consent of a person having control over another person.**

(3) The recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set out in subsection (1) of this Act.

(6) A person who finances, controls, aids or abets the commission of an offence under subsection (1) shall be liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life.”

I find and hold that at this stage on appeal, the court can still do necessary amendment the charge so as to align it with **Section 3** of the **Counter Trafficking in Persons Act** in line with the provisions of **Section 382 of Criminal Procedure Code** since in any event, the appellant was not in any way prejudiced by the amendment as the charge reflected child trafficking which the appellant fully understood.

17. The prosecution needed to prove, beyond reasonable doubt, that the appellant recruited, transferred, transported, harboured or received the complainant for the purposes of exploitation.

18. In the instant case, I am not satisfied that the prosecution proved any of the above ingredients of the charge for the following reasons:

Firstly, PW1 the complainant categorically denied that she was with the appellant or that she had had a sexual relationship with him or intended to have sex with him. PW1 was clear and consistent and her testimony which was crucial in the determination of the case could not be wished away. All the other witnesses' evidence ought to have built up or corroborated her statement on all the critical ingredients of the charge. Instead, what I see are direct and glaring contradictions that I hold, could not salvage or redeem the prosecution's case.

19. I find that in the event the prosecution felt that PW1 was not being cooperative in her own case, then they ought to have declared her a hostile witness so that the rest of the prosecution's witnesses could proceed to prove the case.

20. The magistrate stated the following in respect to the complainant's credibility:

“Once again the complainant denied that she had been traveling with the accused person but in this I am unable to believe her, the evidence given by the prosecution in this respect is credible consistent and to my observation overwhelming.”

From the above statement, it would appear as if the magistrate was treating the complainant testimony as if her testimony was not part and parcel of the prosecution's evidence.

21. **Secondly**, I agree with the appellant that failure by the prosecution to call crucial witnesses, who were available, without any justifiable cause was an indication that those witnesses would have given evidence that would exonerate the appellant. For instance, PW5 stated that while at Chebole, they spotted the appellant and the complainant aboard a motor cycle and they arrested:

“the motor cyclist, the man and the girl.”

22. In this case, “the man” referred to the appellant and “the girl” the complainant. Nothing would have stopped the police and by extension the prosecution from availing the cyclist who was already placed under arrest, in court as a witness to confirm the circumstances under which he was ferrying the two passengers if indeed the prosecution was to prove that the appellant organized the travel arrangements with the intention of facilitating the commission of a sexual offence against the complainant. The question that remains unanswered is why the motorcyclist was not summoned to testify. This court is in the above circumstances entitled to infer that the evidence of the motorcyclist would have been unfavourable to the prosecution.

23. In the case of **Juma Ngodia vs Republic [1982-88] IKLR 9**, the Court of Appeal held *inter alia*:

“The prosecutor has in general, a discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation, he runs the risk of the court presuming that his evidence which could be and is not produced, would, if produced, have been unfavourable to the prosecution.”

24. For the above reasons, I find that the prosecution's case was not proved to the required standards and the State was justified in not opposing this appeal.

25. In the end, I allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless he is otherwise lawfully held.

Dated, signed and delivered in open court this 3rd day of November, 2015

HON. W. OKWANY

JUDGE

In the presence of:

Muhindi for the State

Appellant: present in person

Mr. Ogega: court clerk

