REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 30 OF 2013

(An appeal against both conviction and sentence of the Senior Resident

Magistrate's court at Vihiga in Criminal Case No. 1124 of 2009 [B. N. IRERI, SRM] dated 31st January 2013)

DINAH AWINJA …... APPELLANT

VERSUS

REPUBLIC …... RESPONDENT

JUDGMENT

The appellant was charged with another in the subordinate court with child stealing contrary to Section 174 (1) of the Penal Code. The particulars of charge were that on 28th August 2007 with intent to deprive J O a parent who had lawful charge and care of J A, a child under the age of 14 years of possession of the said child. After a full trial, the co-accused one Jane Opanga was acquitted. The appellant was however convicted and sentenced to serve 4 years imprisonment on 31st January 2013.

Being dissatisfied with the decision of the trial court, she filed the present appeal on several grounds. The grounds of appeal are as follows -

1. That he learned Senior Resident Magistrate erred in law and fact by failing to appreciate the contradictions and the inconsistencies in the prosecution case and failing to give the appellant the benefit of doubt as required by the law.
2. That the learned Senior Resident Magistrate erred in law and in fact by failing to appreciate that the prosecution witness No. 1's evidence was not trustworthy and could not be relied upon.
3. That the learned Senior Resident Magistrate erred in law and in fact by appreciating the 2nd accused's defence witness and using the same as the basis within which to render a conviction against the appellant.
4. That the learned Senior Resident Magistrate erred in law and in fact by failing to appreciate the prosecution case was not corroborated to come up with findings as it did.
5. That the senior Resident Magistrate erred in law and fact by failing to appreciate that the sentence thereto was excessive in the circumstance in view of the fact that the appellant was a first offender.
6. That the learned Senior Resident Magistrate erred in law and fact in failing to appreciate that the appellant was not found with the complainant.
7. That the learned senior resident magistrate erred in law and fact by failing to appreciate that the evidence was not consistent with the particulars of the charge sheet.
8. That the leaned senior Resident magistrate erred in law and fact in failing to appreciate the defence of the appellant and .it totality.

9. That the learned Senior Resident Magistrate erred in law and fact in failing to appreciate that the prosecution failed to call all the witnesses to corroborated the case and leaving it to rely on the evidence of the complainant versus that of the appellant.

At the hearing of the appeal, the appellant stated that she was wrongly convicted. That the culprit was Jane (the co-accused) who was released. She asked for mercy.

The learned Prosecuting Counsel Ms Opiyo opposed the appeal. Counsel submitted that the prosecution had called six witnesses. In counsel's view, the evidence of PW1 the complainant, was corroborated by that of PW5. Counsel urged the court to note that the appellant had changed the name of the complainant in the school register. In counsel's view, the sentence was lawful, and not excessive.

The evidence of the prosecution was that the appellant was a resident of Majengo. She was a small time trader. The complainant, PW1, J A also a resident of [particulars withheld] was a girl aged 14 years in 2007. On 28/8/2007, the complainant had cooked lunch for her uncle J O and some smaller children. The appellant then came to their house and asked her to follow her as she wanted to take her to her mother who had gone to Siaya. The complainant followed her. The appellant however, she took her to her daughter in Mumias where she was enrolled in Primary school in Std. 5.

On noticing the disappearance of the complainant, J O, PW2 reported the incident to the police.

The daughter of the appellant then became sick and died in 2008. The complainant was then handed over by the appellant to a relative of the appellant, who was the co-accused. They registered her in another school. The total schools were four. Lastly, they also registered her in [particulars withheld] Primary school in Std.6, where the appellant changed her name to V C.

In 2009, the sub-chief one R E PW4, become aware of the problem from the co-accused who reported in a public meeting about the bad conduct of the complainant. With some pursuation from PW4, the complainant said that she was able to identity her relatives. She was then taken to where she had been picked by the appellant at Majengo. She identified the man she stayed with, PW2. The appellant was subsequently charged, together with the co-accused.

When put on their defences, both gave sworn testimony. The co-accused called a number of defence witnesses. They were DW3. Miriam Musasa, DW4, Mary Odera and DW5, Samuel Mambo Ebukhunza.

Faced with the above evidence, the learned trial magistrate convicted and sentenced the appellant. The co-accused was acquitted.

This being a first appeal, I am duty bound to re-evaluate the evidence on record and come to my own conclusions and inferences. I have to take into account that I neither saw the witnesses testify nor heard their evidence to determine their demeanour. See the case of ***Okeno -vs- Republic [1972] EA 32*** .

The complainant having been of the age of 14 years when she was taken away from home, was in my view of an age that she could understand people and issues. The incident occurred during broad daylight. There is no allegation of mistaken identity. The girl stayed outside her home for about two years. She knew the daughter of the appellant well. She stated that the appellant's daughter died in 2008. The co-accused was a relative of the appellant. Though she was a suspect, in my view, she did not have any reason to implicate her falsely. No suggestion was made that there existed a grudge. She also called many witnesses in her defence. She is the one who raised the issue about the child complained to the Assistant Chief PW4 in a baraza.

Taking the totality of the prosecution and defence case, I find that the trial magistrate was right in finding that the prosecution had proved that the appellant took away the complainant from her home.

However, this appeal will be allowed on a technicality of age. The charge sheet clearly stated that the child was below the age of 14 years. The offence charged also can only be committed when the victim is

below the age of 14 years. The section under which the appellant was charged provides as follows –

> ***"174 (i) Any person who, with intent to deprive any parent, guardian or other person who has the lawful care or charge of a child under the age of fourteen years of possession of the child –***

a. ***Forcibly or fraudulently takes or entices away or detains a child; or***
b. ***Receives or harbours the child, knowing it to have been so taken or enticed away or detained;***
c. ***Receives or harbours the child, knowing it to have been so taken or enticed away or detained,***

Is guilty of a felony and is liable to imprisonment for seven years.

It was therefore imperative that the age of the child be proved to be below 14 years. The age of the complainant was an important ingredient of the offence.

All the evidence on record shows that the child was born in 1993. She was therefore 14 years when the alleged offence occurred in 2007. The offence charged could therefore not be committed on the child, as she was not below 14 years of age. It follows that it was wrong for the magistrate to have found that the prosecution had proved that the offence had been committed, as the child was not below 14 years of age. On this account, the appeal has to be allowed.

I therefore allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 5th day of June, 2014

George Dulu

J U D G E