REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 18 OF 2012

MOSES KIMINZA MUSYOKA …………………………..…..APPELLANT

VERSUS

REPUBLIC ………………………………………………..RESPONDENT

(*Being an appeal from the original conviction and sentence in Kithimani Principal Magistrate's Court Sexual Offences Case No. 2 of 2011 by Hon. A.W. Mwangi, SRM on 8/2/2012)*

JUDGMENT

1. The appellant, **Moses Kiminza Musyoka** was charged with the offence of benefiting from child prostitution contrary to **Section 156(a)** of the **Sexual Offences Act No. 3** of **2006.** Particulars of the offence being that on the **17th** day of **February, 2011** at **Donyo Sabuk Market** within **Machakos County,** HE knowingly permitted a child namely **S W N** aged **15 years** to remain in his house for purposes of subjecting the said child to sexual abuse.

2. The appellant was tried, convicted and sentenced to serve **ten (10) years** imprisonment.

3. Being dissatisfied by the conviction and sentence he now appeals on grounds that:-

i. The learned trial magistrate erred in convicting him when the case was not proved to the required standard.
ii. There was no evidence to suggest that the complainant had been sexual assaulted or subjected to any form of sexual activity or indecent exhibition to indicate some purposes of child prostitution.
iii. Evidence adduced was contradictory.
iv. The learned trial magistrate erred in both law and fact by descending into the arena by creating her own theory that though the complainant had not engaged in sex the appellant had the intention of having sexual intercourse with her had he not been interrupted.

4. The facts of the case as presented by the prosecution are that PW1, **S W** a girl aged **15 years** old was found in a lodging. The door to the room was opened by the appellant. Both of them were arrested and taken to the police station. The appellant was charged.

5. In his defence the appellant stated that the motor-vehicle he was assigned to had mechanical problems, he took it to the garage and went to a bar nearby. He found some women drinking and dancing. He bought them some drinks. He then excused himself to leave but one of the ladies requested him to assist her look at her radio that was faulty inside the room. Since all the women at the bar were drinking he could not tell their age. All over a sudden the complainant's father arrived and slapped her as she was

drunk. He intervened to separate them. The gentleman blamed him. A police officer arrested them.

6. Further, he stated that they were taken to hospital and examined and it was established that they had not engaged in any sexual activity. The complainant's father asked him to give Kshs. 5000/= but he declined as he was innocent. He was charged.

7. At the hearing of the appeal the appellant relied upon written submissions restating what was raised in the grounds of appeal.

8. In a reply thereto, the State opposed the appeal. **Mr. Mwangi,** learned State Counsel submitted that the age of the girl was proved as **15 years** having been born in **1996.** The complainant was found with the appellant inside a room on the bed although they were not naked. Since she was drunk it was proof that the appellant had an intention to either have sexual intercourse with her or sexually assault her. He urged this court to uphold the conviction and sentence.

9. This being the first appellant court, I do appreciate its duty to re-look at the evidence afresh, subject to it evaluation and come up with its own conclusions, bearing in mind the fact that it neither saw nor heard witnesses tender evidence. (***See Okeno versus Republic [1972] E.A. 32).***

10. The appellant is said to have contravened **Section 15(a)** of the **Sexual offences Act** that provides thus:-

> ***"Any person who knowingly permits any child to remain in any premises, for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or shows commits the offence of benefiting from child prostitution and upon conviction to imprisonment for a term of not less than ten years".***

11. Evidence adduced by the prosecution proved that the complainant was born on the **8th March, 1996.** At the time of the alleged offence she was aged **15 years.**

12. In her testimony she stated that on the fateful date when she left home she carried some clothes' in a bag. She went to **Donyo Sabuk Market** where she met **Mutheu** and **Wanza,** girls, as they stood outside the shop the appellant went and greeted them, then bought them sodas. While there they were arrested. She was declared a hostile witness whereby she was cross-examined on her statement. She maintained that the appellant did not take her bag and while at the police station she was threatened. She denied an allegation that the appellant bought her alcohol.

13. PW2, **L N K,** the father of the complainant led the police to a room in which the complainant was found. It was his evidence that she was drunk lying on the bed with only a brassiere and skirt. Both of them were taken for medical examination. He said a mattress had been placed on the complainant. PW3, **P M M** on the other hand said the girl was covered with a blanket. She was fully dressed save that she was drunk.

14. PW4, No. 48214, Sergeant Jonah Wangila on the other hand stated that they found the complainant covered with a blanket but naked and she appeared drunk. He said that the complainant had carried her clothes to go and live with the appellant. He established that the two (2) had not engaged in sexual intercourse following an examination carried out by the doctor. The alleged doctor was however, not called as a witness and the allegation that the complainant was drunk remains a mere allegation.

15. In her finding the learned trial magistrate stated that the accused bought the complainant alcohol which interfered with her judgment ability. She lay on the bed with her clothes off which was an indication that the appellant intended to have sex with her.

16. In court the complainant denied an allegation that the appellant bought her any alcohol. In her statement to the police she stated that the appellant bought her alcohol and when he took her to his house he left her asleep. She was woken up later on and she found herself at the police station.

17. The complainant did state that she was threatened while at the police station and being a hostile witness her evidence was questionable. In the case of ***Coles versus Coles [1986]L.R. IP & D 70, 71, Sir J.P. Wilde*** said:-

> "***A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court".***

18. Similarly, in the case of ***Alowo versus Republic [1972] E.A. 324,*** the court stated thus.

> ***"The basis of leave to treat a witness as hostile is the conflict between the evidence the witness is giving and some earlier statement shows him or her to be unreliable and this makes his or her evidence negligible".***

19. This means that the evidence of the complainant was unreliable and of very little value. It therefore called for confirmation.

20. Evidence of ownership of the room in which the complainant was found was not adduced by the prosecution. In the particulars of the offence it is stated that the house belonged to the appellant while in the evidence of witness it was stated without proof that it was at a room at a lodging.

21. Medical evidence having not been adduced after the complainant was examined, there is no proof that the complainant was under any influence of alcohol. Evidence that she had her clothes on or not is contradictory. The disparity in evidence adduced by the prosecution witnesses leaves a doubt as to the actual state in which the complainant was found.

22. What informed the learned trial magistrate that the appellant had an intention of having sexual intercourse of with the complainant was per her argument the allegation that she was lying on the bed with some of her clothes off. PW2 stated that the complainant lay on the bed with only a brassiere and a skirt. PW3 said she was resting on the bed fully dressed and so was the appellant. PW4 said she was asleep covered with a blanket, he woke her up. With such contradictory evidence, such intention could not be inferred.

23. No evidence was therefore adduced to prove beyond any reasonable doubt that the appellant knowingly permitted the complainant to remain at the premises with an intention of having her sexually abused.

24. In the result the appeal has merit. I do quash the conviction and set aside the sentence meted out. The appeal is allowed. The appellant shall be released forthwith unless otherwise lawfully held.

25. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **9TH** day of **SEPTEMBER, 2014.**

L.N. MUTENDE

JUDGE