



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Criminal Appeal No.274 Of 2012

Between

BEATRICE AKOMO ONGITO APPELLANT

AND

REPUBLIC

...RESPONDENT

(Being an appeal from original conviction and sentence of the SPM's court at Migori in Criminal

Case No.156 of 2009 dated and delivered on 18th December 2012 by Hon Shitubi, CM)

JUDGMENT

Introduction

1. The appellants Babu Thomas Otom and Beatrice Akomo Ongito were charged at the Senior Principal Magistrate's court at Migori with the offence of compelled indecent act contrary to **section 6 (1)** of the **Sexual Offences Act No.3 of 2006**.
2. Particulars were that on the 2nd day of October 2008 at [particulars withheld] in Migori District jointly with others not before court, they intentionally and unlawfully compelled M.A.O aged 23 years to engage in an indecent act with Thomas Babu Atom. In the alternative, the appellant herein was charged alone with the offence of compelling an indecent act contrary to section 6 (b) of the Sexual Offences Act No.3 of 2006.
3. On count II Babu Thomas Otom was charged with being unlawfully present in Kenya contrary to **section 12 (2)** of the **Immigration Act Cap 172 Laws of Kenya**. Particulars of the charge were that on the 3rd day of March 2009 at [particulars withheld] in Migori District being a citizen of Tanzania was found to be unlawfully present in Kenya without a passport or permit from Immigration department.
4. Both the appellant and her co-accused denied the charges. The 1st accused Babu Thomas Otom unfortunately passed on before hearing of the case commenced. Accordingly, the prosecution applied to withdraw the charge against him under **section 87 (a)** of the **Criminal Procedure Code**. The case thus proceeded against the present appellant only.

The Facts and the Evidence

5. The facts and the evidence of the case against the appellant are that the appellant who is the complainant's older sister went to the complainant's house situated within [particulars withheld] on 1st October 2008 at about 6.00 p.m. The appellant informed the complainant one M.A.O who testified as PW1, that the complainant's husband had sent a message through the appellant saying

that some people wanted to kill him, and that he had therefore had to go into hiding. Further, that the complainant's husband had asked the appellant to pick up the complainant so they could together go to where the complainant's husband was hiding. It was upon receiving such information that the complainant packed her bags and took Kshs.30,000/= for the intended trip in search of her husband.

6. According to the complainant's evidence, she woke up early the next morning on 2nd October 2008. The appellant sent a taxi to collect the complainant from her house. The complainant boarded the vehicle together with her children and they were driven to [particulars withheld] in Migori. The complainant could not recollect the registration number of the taxi, but she and her children were taken to the appellant's house.
7. After some pleasantries, the appellant informed the complainant that she was taking her to where the complainant's husband was hiding. The time was about 3.00 p.m. At a place called [particulars withheld], the appellant alighted from the vehicle, leaving the complainant, her children and 2 men and 2 women in the vehicle. According to the complainant, she was to be taken to where her husband was by the 2 men and the 2 women.
8. When the vehicle got to a place called [particulars withheld] the complainant was blind folded by one of the men and when she tried to scream, she was threatened with death. The vehicle still drove on and in the night, the complainant found herself in a strange house. The complainant slept in the house, and while it was still dark on the next morning, she was blind folded again and at about 11.00 a.m. in the morning, she found herself at [particulars withheld]. When she enquired about her husband, the complainant was informed that he had escaped into Tanzania. The complainant then crossed into Tanzania together with the 2 men and the 2 women.
9. Upon arrival in Tanzania, the complainant was taken to a strange house and left there alone with her child. While the other men disappeared, the 1st accused, Babu Otom would go and come back with men unknown to the complainant. The complainant was forced to have sex with these men.
10. On one of those days, the complainant tried to escape after Babu Otom had gone out but before she could reach a telephone booth to make a call, she was forced back into the house by a woman who was nearby. In the night of that day of the attempted escape, the complainant was put on a vehicle that took her to Mwanza in Tanzania where she was made to stay for a month. The complainant also stated that during her stay in Mwanza, she fell sick and sought treatment from a woman herbalist who also offered to assist her escape. The woman also enabled her to get in touch with her husband who was in Kenya. The herbalist gave the complainant Tsh.10,000/= and she was therefore able to travel back to Kenya sometime in January 2009. Her husband joined her at her aunt D home and together they returned home after being away for 2 months. Thereafter she was taken for treatment.
11. After investigations, the appellant, who was a teacher at [particulars withheld] Academy, was arrested together with her co-accused Babu Thomas Otom.
12. During cross examination, the complainant stated that it was the appellant who came up with the theory that the complainant's husband had been hijacked, and that it was not until after 2 months that the complainant's husband knew she was in Tanzania. She also denied that she had quarrels with her husband, J.O.O, who testified as PW2. The complainant also testified that she did not have any medical records to show that she had been treated after coming back from Tanzania.
13. PW2, J.O.O confirmed that the complainant was his wife of 7 years. On 2nd October 2008, he was informed by his sister, M.O, that the complainant had packed her bags and left the matrimonial home. M.O was not called as a witness.
14. PW2 stated that after the complainant disappeared from home, he mounted a search for her, including a visit to her parents' home, the appellant's home and the home of another of the complainant's sisters who lived at Mbita. PW2 told the court that when he checked their matrimonial home, he found that the complainant had taken all her personal belongings, the beddings and some of the couple's personal documents plus Kshs.30,000/= which belonged to PW2.
15. PW2 stated that when he went to check for the complainant at the appellant's house, the appellant was cruel and rude to him and refused to welcome him. The appellant however offered to assist in looking for the complainant. PW2 gave her Kshs.2000/= for the search, but in the evening of the same day, the appellant rang PW2 and informed him that a magician could help trace the complainant. PW2 went to the magician's house but because the magician was not present, PW2

- left the complainant to follow up the search through the magician.
16. PW2 also stated that later that same day the magician contacted him so they could meet over the issue. The search for the complainant intensified after a letter calling the complainant for a teacher training course came but it was not until 14th January 2009 that PW2 received a telephone call from the complainant on a Tanzanian telephone number and gave him details of what had happened to her. On the 6th March 2009, the appellant and her co-accused were arrested in connection with the complainant's abduction.
 17. During cross examination, PW2 stated that after the complainant disappeared, the appellant, who was a frequent visitor at the couples' house stopped visiting. He also stated that though he did not believe in magic, he accompanied the appellant to the magician's home. He also testified that when he made a report to the police, he did not inform the police that the complainant had been raped, although the complainant had told him so before he went to record his statement.
 18. PW3 was Number 69197 Cpl Rodha Chepkemboi of Migori police station; crime branch. She received the 1st accused on 9th March 2009 on allegations that he had abducted both the complainant and her child. PW3 also stated that she was informed it was the appellant who had made the requisite arrangements for the abduction. PW3 stated that the complainant told her how she had been confined in a house in Tanzania and how the appellant's co-accused had raped her. PW3 stated that after taking statements, she charged the appellant and her co-accused with the offence. PW3 also stated that the complainant did not provide any medical evidence of rape as she did not report immediately upon her arrival from Tanzania.
 19. During cross examination, PW3 stated that she was not able to find an independent witness to the complainant's allegations, and that her decision to charge the appellant and her co-accused was premised on the complainant's statement. He also testified that PW2 denied ever communicating with the appellant to the effect that he had been hijacked. He dispelled the notion that the complainant had voluntarily got married to a Tanzanian between August 2008 and March 2009.
 20. Upon re-examination, PW3 stated that the complainant had confirmed to her that she had sought no medical treatment despite the allegation that she had undergone a rape ordeal throughout the time she had been in Tanzania.

The Appellant's case

21. At the close of the prosecution's case, and after hearing submissions on no case to answer, the appellant was put on her defence. She gave an unsworn statement and called no witnesses. Her evidence was that on 3rd October 2009, PW3 went to her place of work seeking to find some of his things from her house after confirming that the complainant had disappeared from the matrimonial home.
22. The appellant also said that PW2 asked her to assist him in the search for the complainant. After fruitless efforts to find the complainant, the family of the complainant resorted to prayers. The family went to a man at Suba but when the complainant did not show up after the prayers, PW2 decided to consult a magician in Mombasa. The appellant denied going to the complainant's house in a taxi. The appellant also stated that she did not know the charge against her.

The Judgment

23. After careful consideration of all the evidence that was adduced by both the prosecution and the appellant, the trial court found that there was no evidence to support the original charge against the appellant, though the court was satisfied that an offence was committed. The trial court found that the evidence pointed to a lesser charge of kidnapping or abducting in order to subject to grievous harm, slavery or unnatural lust of any person contrary to **section 260** of the **Penal Code**. The trial court accordingly invoked the provisions of **section 179 (2)** of the **Criminal Procedure Code, Cap 75** of the **Laws of Kenya** and proceeded to convict the appellant of the offence of kidnapping or abducting in order to subject to the lust of another person contrary to **section 260** of the **Penal Code**. The appellant was sentenced to Five (5) years imprisonment.

The Appeal

24. The appellant was aggrieved by both conviction and sentence.
25. In the present appeal filed on 28th December 2012 by Abisai & Co. Advocates, the appellant sets out the following 7 grounds of appeal:-
1. *The Learned Trial Magistrate erred in law by convicting the Appellant on charge that was neither leveled against her nor read to her.*
 2. *The Learned Trial Magistrate erred in law by failing to frame the charge upon which she convicted the Appellant.*
 3. *The Learned Trial Magistrate erred in law and fact by failing to analyze the evidence presented before her and hence arrived at a wrong verdict.*
 4. *The Learned Trial Magistrate erred in law and fact by relying on the complainant's evidence which was uncorroborated.*
 5. *The Learned Trial Magistrate erred in law and fact by convicting the appellant contrary to the weight of evidence.*
 6. *The Learned Trial Magistrate erred in law and fact by convicting the appellant on insufficient evidence.*
 7. *The Learned Trial Magistrate erred in law and fact by handing down a sentence that was harsh and excessive in the circumstances.*
26. When the appeal came up on 31st July 2013, counsel for the appellant Mr. Abisai sought and obtained leave to proceed with the appeal despite the appellant's absence from the court. That application was not opposed by prosecuting counsel, Mr. Shabola, and the court, considering the circumstances of the case, and also considering the fact that hearing dates were not easily available because of the ongoing election petitions and also upon satisfying itself that no prejudice would accrue to the appellant, the appeal proceeded to hearing notwithstanding the absence of the appellant.
27. Mr. Abisai submitted that initially the appellant was charged with compelling an indecent act contrary to **section 6 (a)** of the **Sexual Offences act 2006** but in her judgment the trial magistrate found that even though an offence was committed it did not directly relate to the charge. He submitted therefore that the appellant was convicted of a charge not framed against her. Furthermore, counsel submitted that even though the trial court applied **section 179 (2)** of the **Criminal Procedure Code**, the court was duty bound to frame the charge which the appellant was to be convicted of. He submitted therefore that even if the trial court was entitled to convict of a lesser charge, that lesser charge ought to have been proved by the evidence adduced. He submitted that no such evidence was not laid before the court as there was no medical examination done on the complainant to corroborate allegations of rape which evidence would have been required for an offence under **section 260** of the **Penal Code**.
28. Secondly, he submitted that the offence was not proved to the required standard as throughout the judgment; the trial court does not mention that the prosecution had proved its case beyond any reasonable doubt. He further submitted that in any event, the evidence adduced by the prosecution was so inconsistent that it did not support the charge of which the appellant was convicted. To demonstrate this, he referred to page 24 of the record of appeal where the complainant alleged to have been called by appellant on her mobile phone to inform her that the complainant's husband had been hijacked. Counsel submitted that the state should have proceeded to establish with the mobile phone company whether the alleged phone call was indeed made.
29. In addition, counsel referred the court to page 26 of the Record of Appeal where the complainant says she was taken away in a taxi whose registration number she could not remember and that in spite of such lacuna, no investigation was done to establish the registration number of the said taxi. He therefore submitted that this was a case where the trial court accepted the complainant's case/word without corroboration.
30. In conclusion, Mr. Abisai submitted that the appellant's conviction was unsafe and ought not to have been made. On sentence he submitted that the said sentence was excessive in the circumstances and urged the court to so find.
31. The appeal was opposed. Counsel for the respondent Mr. Shabola submitted, regarding grounds 1, 2 and 3 touching on the lesser charge that the trial court's decision to convict the appellant of the lesser charge was well founded since the law gave the court the power to do so, and that it was

- not necessary for the trial court to frame the fresh charge.
32. Secondly, turning to grounds 4, 5 and 6 which touched on the weak and uncorroborated evidence, counsel submitted that the complainant's evidence in chief remained unshaken by the appellant's testimony in which she merely denied that she had ever gone to the complainant's home in a taxi. Counsel also submitted that the appellant never responded to the issue of whether or not she had gone to the complainant's home the previous day.
33. Thirdly in reference to ground 7 of the appeal on sentencing counsel submitted that **section 260** of the **Penal Code** provides for imprisonment of up to 10 years and that the 5 year term of imprisonment given to the appellant was neither harsh nor excessive. He therefore urged the court to dismiss the entire appeal.
34. Mr. Abisai in reply submitted that the prosecuting counsel's narration of the evidence as given by the complainant was not sufficient and that this evidence needed to be corroborated in order to form a basis for a conviction.
35. Secondly, counsel submitted that appellant in her defence denied her involvement in the offence by stating that she made efforts with the help of PW2 to find the complainant. Counsel maintained the conviction was unsafe. He therefore prayed that the appeal be allowed.

The Duty of this court

36. The appeal before me is a first appeal. In this regard my duty as the first appellate court is to reconsider and evaluate the evidence afresh with a view to reaching my own conclusions in the matter remembering only that I do not have the privilege of seeing and hearing the witnesses who testified in the lower court. See generally **Pandya –vs- R[1957] EA 336; Okeno –vs- Republic [1972] EA 32** and **Selle & another –vs- Associated Motor Boat Co. Ltd. & others [1970] EA 123.**

Issues for Determination

37. I have now carefully reconsidered and evaluated all the evidence afresh. I have also weighed and considered the judgment of the trial court. I have also considered all the submissions. From an analysis of all the above, the following are the issues of determination by this court:-
1. *In what circumstances does the court invoke the provisions of section 179 (2) of the criminal Procedure Code?*
 2. *Did the prosecution prove its case beyond any reasonable doubt against the appellant?*
 3. *Was the sentence meted out against the appellant by the trial court excessively harsh?*

Analysis and Findings

38. Firstly, **section 179 (2)** provides that **“when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”** In **Remiaus Ligaro Muhario –vs- Republic [2006] e KLR** the court of Appeal held that:-

“Section 179(2) of the Criminal Procedure Code, Cap 75 of the Laws of

Kenya allows a trial court to convict an accused person of a minor offence where the facts proved sustain a conviction on a reduced minor offence although the accused was not charged with it in the first place.”

39. It follows therefore that counsel's submission that the trial magistrate convicted the appellant on a minor offence without reading the charge to the appellant is, in my view a wrong interpretation of the above section as the only thing the trial court needed to establish was the fact that in as much as the evidence adduced did not support the charges in the charge sheet, that evidence however disclosed a minor offence that the accused though not charged with it was guilty of. Thus the discretion as to when a trial court can invoke the provisions of **section 179 (2)** of the **Penal Code**

lies in the hands of the trial court.

40. Secondly, was the trial magistrate right in relying on the evidence of one witness to convict the appellant when such testimony was not corroborated? In other words, did the prosecution prove its case against the appellant beyond any reasonable doubt? **Section 143** of the **Evidence Act** states:-

“No particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of any fact.”

Further in **Abdulla bin Wendo & another –vs- R.[1953] 20 EACA 166**, the court said in part at page 168:-

“Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness

41. After considering the above provisions of the law, I will take a walk through the evidence adduced by the complainant before the trial court, where she stated in examination in chief that:-

“On 1/10/2008 at 6 p.m. I was at home at [particulars withheld]. My sister B.A

came to me she said that she had received a call from my husband J.O that some thieves wanted to kill him and that I had to pack my things so that she takes me to where he was hiding.

--- she then said that she was taking us to where my husband was. We left at about 3 p.m. to go and board a vehicle at the road side, a vehicle came from Sirare coming to Migori. It was a car with some occupants.

---- We boarded on reaching [particulars withheld], Accused alighted and said the people – 2 ladies and 2 men were taking me to where my husband was. On reaching Stella they blind-folded me. I tried to scream but they threatened to kill me.”

42. On cross-examination by the Appellant, the complainant stated:

“The taxi man said you had sent him. It was in the morning. I never

doubted you. ... By informing me that my husband had been hijacked you were behind everything.”

She also said the following:

When I came back I took things as normal as it was my sister. It’s when I saw Babu Thomas and he said you had directed him that I got you arrested.”

43. PW2 (PW1’s husband) during examination in chief stated:-

“On 2/10/2008 at 11 a.m. I received a telephone call from my sister M.O. She said that my wife had packed belongings in 2 boxes and had been picked by a taxi.

...The mother came with a brother. We went together to accused’s

home at [particulars withheld] where she was an ECD teacher. Accused decided not to talk to us, until I left her with the mother.

We went back to collect the mother after some house. The mother said that accused had claimed that she did not know the whereabouts of the sister and that she was trying to go up to Mwanza to trace her.”

44.PW3 (the investigating officer) during evidence in chief revealed:

“On 9/3/09 I was at the station when a suspect by name Babu Thomas was brought by APs on allegation that he had abducted M.A together with her child in August 2008 and taken them to Tanzania.

.... I interrogated the suspect. He led us to the request of the 2nd accused Beatrice Ongicho....

He alleged that it's Beatrice who had made arrangement for the complainant to be abducted.”

45.The 1st accused and appellant's charge sheet read as follows:-

“Statement of offence

Compelled Indecent Act contrary to section 6 (a) of the Sexual Offences Act No.3 of 2006

Particulars of Offence

- 1. Babu Thomas Olum 2) Beatrice Akumu Ongito: On the 2nd day of October 2008 at [particulars withheld] in Migori District within Nyanza Province, jointly with others not before court intentionally and unlawfully compelled M.A.O aged 23 years to engage in an indecent act.**

In the alternative count Beatrice Akoth Ongito was charged alone with the offence of compelling an indecent act contrary to **Section 6 (b) of the Sexual Offences Act No.3 of 2006.”**

- 46.In my humble view, the charges against the 1st accused could not be maintained as he passed on and the prosecution correctly applied for a withdrawal of those charges. In addition, the charges against the appellant could not be sustained as the complainant did not seek medical attention immediately after she arrived from Tanzania where she had been kept after her abduction and during which time she was raped for over two (2) months. I am persuaded that the trial magistrate correctly concluded that the appellant could not be convicted of the offences in the charge sheet. The issue that must now be determined is whether the learned trial magistrate was right in invoking **section 179 (2) of the Criminal Procedure Code** and in making the finding that she did.
- 47.From the evidence adduced before the trial court, there is no doubt in my mind that the complainant left her house after being informed by the appellant that her husband (PW2) had been abducted and he needed her to join him at his new abode. From the complainant's testimony, it was the appellant (her own sister) who gave her the information about the complainant's missing husband, and it would appear that it never crossed the complainant's mind that the appellant was lying to her. Counsel's submission that the complainant's failure to remember the registration number of the taxi that took her from her home suggests that no such event took place, is baseless for the reason that the complainant's state of mind at this point may only have been on how fast she could get to where her husband was by whatever means. The complainant had been informed

- by her own sister that the husband was missing, so she cannot be faulted for not taking note of the motor vehicle's registration number.
48. PW2 also told the court that when he went to the appellant's house to find out if the complainant had left some of his items in her house as she went away, the appellant was cruel to him and did not welcome him. Why would the appellant behave in such a manner? In my humble view the conduct of the appellant towards PW2, at a time when as a sister she would have been concerned about her sister's whereabouts, was not consistent with innocence of what had actually befallen the complainant.
49. I have also carefully considered PW3's testimony as to how both the appellant and her co-accused were arrested. The said evidence lends credit to the complainant's testimony. There is no suggestion that PW3 had any grudge against the appellant. The whole prosecution evidence thus places the appellant at the centre of the abduction and kidnap scheme.
50. The import of what I have stated above is that there was sufficient evidence to support a conviction of the appellant of the offence under **section 260** of the **Penal Code**. I accordingly find that the learned trial magistrate properly applied the law in invoking **section 179 (2)** of the **Criminal Procedure Code**.
51. I am aware that the direct evidence upon which the appellant was convicted was that of the complainant, but considering the provisions of **section 143** of the **Evidence Act, Cap 80 Laws of Kenya**, the complainant's evidence, sufficiently proved the allegations of abduction and kidnapping against the appellant. There was also the additional evidence by both PW2 and PW3 and especially the evidence of PW3 who was the investigating officer.
52. Regarding the section under which the appellant was convicted, it appears to me, namely **section 260** of the **Penal Code** clearly, the evidence on record tends towards supporting a charge under **section 259** of the **Penal Code** which section provides:-

“Any person who kidnaps or abducts, any person with intent to cause

that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years.”

53. The appellant's defence which comprised of mere denials did not shake the prosecution's case against her and I am persuaded that the prosecution proved beyond reasonable doubt that the complainant was indeed kidnapped/abducted by the appellant.
54. On the sentence imposed by the trial court, though the appellant was convicted under **section 260** of the **Criminal Procedure Code** which stipulates 10 years, the trial magistrate gave her 5 years imprisonment. **Section 259** imposes a prison term of 7 years. In view of the foregoing I would be minded to reduce the sentence to three (3) years, effective from 19th December 2012.

Conclusion

55. In conclusion, I find and hold that the appeal on conviction has no basis and the same is dismissed. I allow the appeal on sentence by setting aside the sentence of 5 years imprisonment and substituting the same with three (3) years imprisonment effective 19th December 2012. R/A within 14 days.
56. It is so ordered.

Dated and delivered at Kisii this 8th day of October, 2013

RUTH NEKOYE SITATI

JUDGE

In the presence of:

Mr. S.M. Sagwe for Abisai for Appellant

Mr. Majale for Respondent

Mr. Bibu - Court Clerk