REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

Criminal Appeal 19 of 2009

STEPHEN OUMA ERONI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G E M E N T

The appellant **STEPHEN OUMA ERONI** was charged and convicted of two counts by Busia Resident Magistrate. He was sentenced to ten (10) years imprisonment on each count. In count 1, the appellant was charged with child trafficking contrary to Section 13(b) of the Sexual Offences Act. Count II was of attempted defilement Contrary to Section 9(1) (2) of the same Act. Being dissatisfied with the judgement on both conviction and sentence, the appellant appealed to this court.

Mr. Etyang for the Appellant took the court through the grounds of appeal. He submitted that there was no sufficient evidence to sustain convictions on the two charges. The ingredients of the offences were not proved and the court relied mostly on hearsay evidence to convict the appellant. The intention to commit the offence was not proved in count 1. In count II the overt act which amounts to attempt to commit the offence was not in existence in the evidence of the witnesses.

Mr. Onderi conceded to the appeal and submitted that the offences were not proved to the standards required against the accused. He referred to the evidence of the complainant which he said was contradictory in regard to what the appellant did to her.

The investigating officer did not do thorough investigations before he preferred charges against the appellant.

I have looked at the evidence on record, PW1 said the appellant carried her on his bicycle having found her on the road going to school He passed the school and took her to a place without people next to a river and sugarcane plantation. The appellant said he wanted to drink water. He held PW1's hand and took her to the cane plantation. She screamed and ran towards the road. From this evidence there is no evidence of trafficking a child let alone trafficking with the intention to have sexual intercourse with her. None of the witnesses gave evidence as to the intention of the appellant. Not even PW1 herself. I agree that PW1 contradicted herself when she said the accused "***wanted to kill her"*** and later ***"to do bad things to her".***

In count II, there was no overt act which constitutes an attempt to commit an offence. The appellant did not even attempt to undress the girl or knock her down. One cannot be convicted of an attempt to commit an offence unless he commits some act geared towards the actus reus to the relevant offence.

None of the prosecution witnesses PW2, pw3 and PW5 was any eye witness to the offence. PW3 came to the scene after the incident. He found the appellant under arrest. PW2 was a teacher at N A.C. Primary School. He was called by the police to go and identify the girl much later after incident. PW5 was the investigating officer while PW4 only saw someone running away outside his shop at Busibwao. He tried to stop him and he ran away. From the whole evidence given in court, there was no eye witness. DW1'S evidence was contradictory and lacked the material particulars to prove the ingredients of the offence.

The defence of the appellant was that he gave the complainant a lift on his bicycle. She jumped off on the way and ran.

The judgement of the court was based on hearsay evidence of the witnesses who got the story from others. This kind of evidence is not only unreliable but inadmissible.

I find that the magistrate erred both in fact and in law in convicting the appellant without sufficient evidence. The two charges were not proved by the prosecution beyond reasonable doubt.

The appeal is therefore successful. I hereby quash the convictions and set

aside the sentences on both counts.

F.N. MUCHEMI

J U D G E

Judgment dated and delivered on the 3rd day of March 2010.

In the presence of the appellant and the state counsel.