IN THE COURT OFAPPEAL AT NAKURU
Criminal Appeal 66 of 2009
BETWEEN

KENNETH KIPLANGAT RONO …….APPELLANT

AND

REPUBLIC ……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kericho (Angawa, J.) dated 25th March, 2009

in

H.C.Cr.A. No. 4 of 2009)
****
JUDGMENT OF THE COURT

Kenneth Kiplangat Rono alias ***Rasta,*** the appellant, was charged in the Resident Magistrate's Court at Bomet with the first count of defilement of a girl under the age of 15 years contrary to ***section 8(3)*** of the Sexual Offences Act No. 3 of 2006 and the second count of Child Trafficking contrary to ***section 18(1)*** of the same Act. The defilement charge alleged that on the 18th and 19th day of June, 2008 in Bomet District within the Rift Valley Province, he unlawfully had carnal knowledge of ***M.C*** a girl under the age of 15 years, while the Child Trafficking charge alleged that on diverse dates between 18th June, 2008 and 20th June, 2008 at in Bomet District within the Rift Valley Province, he detained M. C, a girl under the age of 15 years for sexual exploitation. The evidence adduced by ***M. C*** (PW1) was that she was a student at [..] Secondary School in Form 1. On the night of 18th/19th June, 2008 there were ball games at the school where she met her brother ***Gt*** with the appellant. The appellant had a motor vehicle. They left in the motor vehicle to go to the town called K and from there to Sachangwan. But when she entered the motor vehicle, a station wagon, the appellant drove it in the opposite direction to his home. Her brother G then drove away the same motor vehicle leaving PW1 in the appellant's home. She slept there for two nights and had sex with the appellant. She said it was her first time to have sex with a man. ***J.K.R*** (PW2), the father of PW1and his brother ***W. C. R*** (PW3) looked for PW1 who went missing after going to school on 17th June, 2008 but failed to return. They arrested the appellant on 20th June, 2008 and he directed them to his home where PW1 was found. The appellant was then charged with the offences as hereinbefore stated. When placed on his defence, he denied the charges framed against him in sworn evidence. The Senior Resident Magistrate (*T. Okelo)* wrote and delivered his judgment on 16th January, 2008 in which he concluded thus:-

> ***"As I have said earlier, if there was any sex between the accused and PW1, that has not been proved and as stated, there was no evidence on the use of condoms which could have prevented spermatozoa. This creates doubt in my mind as to whether the accused defiled the complainant. This doubt benefits the accused who is accordingly acquitted under section 215 of the Criminal Procedure Code in Count 1.***
>
> ***In Count II I am convinced that the accused took the complainant to his home without her consent. I am therefore convinced that the prosecution has proved their case beyond any reasonable doubt in Count II. The accused is thus found guilty as charged and convicted accordingly in Count II."***

Thus the appellant was acquitted on Count I but convicted on Count II of the charges framed against him. After his conviction he was sentenced to 15 years imprisonment or a fine of Kshs.2 million on Count II. He appealed against conviction and sentence in a petition of appeal dated and filed in the superior court on 29th January, 2009. There was no cross appeal by the State against the appellant's acquittal on Count I. However, when the superior court *(Ang'awa, J.)* wrote and delivered her judgment on 25th March, 2009 she appeared to entertain "*some appeal"* on Count I wherein she concluded in part:

> ***"19 The trial Magistrate explained the acquittal on this count on the grounds that the accused may have used condoms and thus there was no trace of sexual intercourse.***
>
> ***20 . I do not find that evidence before court. I note that the minor (sic) evidence was credible. That she was defiled and there was indeed was (sic) penetration on the discharge of the white substance.***
>
> ***21. …***
>
> ***22. …***
>
> ***23. …***
>
> ***24. …***
>
> ***25. …***
>
> ***26. She was subjected to sexual intercourse and she submitted to it. She is a minor and was therefore a person who was incapable of appreciating the nature of an act which causes the offence. On the face value one cannot say that no offence has been committed herein where the minor was constantly defiled for two nights.***
>
> ***27. I would hold herein that the conviction on both counts be and is hereby upheld."***

On sentencing she said:-

> ***"Under Count I***
>
> ***Section 8(3) the term of imprisonment is 20 years. I accordingly impose this sentence."***
>
> ***Under Count II***
>
> ***The term is not less than 15 years imprisonment. The trial Magistrate gave a fine of 2 million and 15 years imprisonment. I would rule that a 2 million fine not to be in default and or imposed and is set aside.***
>
> ***To this extend the sentence of 20 years and 15 years imprisonment are to run concurrently."***

The appellant was dissatisfied with this decision too and he, through ***Messrs. J. K. Mitey & Associates, Advocates***, filed a memorandum of appeal dated 23rd October, 2009 and lodged in this Court's sub-registry at Nakuru on 8th February,

2010. It has four grounds of appeal as follows:

> ***"(1) The learned Judge erred in law and fact in holding that the complainant (PW1) was a minor aged between (12-15 years without evidence either medical or otherwise to support that finding.***
>
> ***(2) That the learned Judge erred in law and fact in finding that the complainant (PW1) was defiled without any scintilla to support that finding.***
>
> ***(3) That the learned Judge erred in law in justifying the conviction of the appellant on count 2 of the charge sheet on the basis of the provision of section 260 of the Penal code Chapter 63 of the Laws of Kenya.***
>
> ***(4) That the sentence imposed on the appellant is harsh and excessive in the circumstances.***

The appeal was heard by this Court on 23rd February, 2010 whereby *Mr. Mitey*, learned counsel for the appellant submitted that although the age of PW1 was put at 15 years, it was not ascertained or verified by medical evidence. He stated that there was no evidence that the appellant had sexual intercourse with PW1 and that there was no basis for the superior court to base its judgment on ***sections 260*** and ***261*** of the Penal Code. According to him, there was no evidence that PW1 was either abducted or locked up in the appellant's house. Furthermore, if PW1 was left alone in the compound of the appellant on 20th June, 2008 then she had an opportunity to escape; hence the charge under ***section 18(1)*** of the Sexual Offences Act No. 3 of 2006 was not proved. ***Mr. Gumo***, learned Assistant Deputy Director of Public Prosecutions did not support the appellant's conviction by the superior court on Count I as there had been no appeal by the State on that count.

On Count II the learned Assistant Deputy Director of Public Prosecution submitted that this count was proved against the appellant because PW1 was taken to the home of the appellant without her consent; that her movement to the appellant's home was facilitated by him and the trafficking was for sexual exploitation.

As stated above, the appeal against conviction by the superior court on Count I was conceded by the State and correctly so. There was no cross appeal against the appellant's acquittal on Count I by the State and therefore the learned Judge misdirected herself and/or had no jurisdiction to reverse the trial Magistrate's finding of not guilty to that of guilty and to sentence the appellant to 20 years imprisonment on that count. There was absolutely no basis for her to do so. Accordingly, the appeal in relation to that Count must be allowed and the conviction thereon quashed.

In respect to Count II where the appellant was charged with child trafficking by detaining PW1 for sexual exploitation, it was incumbent upon the superior court to examine the evidence and to determine whether all the ingredients of the offence in that count had been proved beyond reasonable doubt. ***Section 18(1)*** under which the appellant was charged in Count II provides as follows:

> ***"18(1) Any person who intentionally or knowingly arranges or facilitates travels within or across the borders of Kenya by another person and either:-***
>
> ***(a) intends to do anything to or in respect the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act.***

(b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world which if done will involve the commission of an offence under this Act,

is guilty of an offence of trafficking for sexual exploitation.

(2) A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

The section under which the appellant was charged focuses on the person who arranges or facilities travel of another person within Kenya or outside Kenya. It also focuses on the victim and then any other person who might take advantage of the arrangement and who does something to the victim which would amount to the commission of an offence.

The section creates the offence of "*Trafficking"* but there is no definition of that term or "*Child Trafficking"* in the Sexual Offences Act. We must therefore seek assistance elsewhere. The Collins English Dictionary defines ***"trafficking"*** as:-

"Carrying on trade or business especially of an illicit kind."

This definition is fairly limited. The subject of ***"human trafficking"*** and particularly ***"Child trafficking"*** is an enormous and emerging criminal phenomenon which has captured world attention. That is why there are numerous international instruments and other provisions in domestic legislations to address it. The United Nations in ***Article 3(a)*** of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons,* defines trafficking in persons as:

"The recruitment, transportation transfer, harbouring or receipt of persons by means of threat, use of force, or other forms of coercion of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation."

There are thus three constituent elements: ***the act*** *(recruitment, transportation, transfer, harbouring or receipt of persons)*; ***the means*** *(threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments of benefits to a person in control of the victim)* and ***the purpose*** (*exploitation – including the prostitution of others, sexual exploitation, forced labour, slavery or similar practices).* That definition informs the recent domestic legislation in Kenya (*The Sexual Offences Act)* focusing on sexual exploitation.

When the appellant was convicted on Count II, the trial magistrate simply made the following remarks:

"In Count II, I am convinced that the accused took the complainant to his home without her consent. I am therefore convinced that the prosecution has proved their (sic) case beyond reasonable doubt in Count II. The accused is thus found guilty as charged and convicted accordingly in Count II."

In our view, these remarks did not focus on the ingredients of the offence envisaged in ***section 18(1)*** of the Sexual Offences Act. When PW1 testified she said as follows:

"… on the night of 18th/19th June, 2008, we had ball games in school. In school I found my

> ***brother Gilbert at the field. We went to Primary and came back. We left for town at Kapkwen. I met him with the accused whom I did not know. They said that we go to Sachangwan. The accused was driving a station wagon. We got to the vehicle to the opposite direction. He then took us to his home instead. My brother Gilbert then left me in the house of the accused. It was about 4.00 p.m. We remained with the accused. Gilbert then called the accused that he had gone with the vehicle …".***

There were two men in the motor vehicle; the appellant and one G who was the complainant's brother. There is no evidence to show which of them arranged or facilitated this travel. But according to the Act it is the person who arranges or facilitates and has the necessary mens rea who should be charged with the offence envisaged under ***section 18(1)*** of the Act. The brother of PW1, G, was not called to testify in the case to explain his role in the process and particularly when he drove the appellant's motor vehicle away thus leaving PW1 stranded at the appellant's home. And although it was 4.00 p.m., PW1 did not express her wish to leave the appellant's home by, say, running away and/or that she was prevented by the appellant or anybody else in the home from doing so. Then when she was found on 20th June, 2008 she was outside the house of the appellant's parents, which really meant she was not under detention by the appellant or anyone else.

The alleged purpose of taking PW1 to the appellant's house according to the charge sheet was for ***"sexual exploitation."*** But the appellant was acquitted of the defilement charge in Count I, and consequently there was really nothing left for him to be found guilty of in Count II. It is true, and we agree with *Mr. Mitey*, that the age of PW1 was not ascertained medically or through any documentation to be 15 years. Under Article 3 of the United Nations Protocol, which is cited above, it is provided that:

> ***"In a case where the age of the victim is uncertain and there are reasons to believe that the victim is a child, a State party may, to the extent possible, under its domestic law, treat the victim as a child in accordance with the*** *"convention on the rights of the child"* ***until his/her age is verified."***

In the circumstances of this case, we think it was possible for the State to verify the age of PW1 medically or by other means as it was an element of the offence charged. The State never did this, and therefore the age remains doubtful and the benefit of that doubt must accrue in favour of the appellant. In view of what we have stated elsewhere in this judgment, it is our view that the ingredients forming the offence under ***section 18(1)*** of the Sexual Offences Act were not proved against the appellant beyond reasonable doubt and his conviction in Count II was unsafe. Ultimately we allow the appellant's appeal in its entirety, quash his conviction and set aside the sentences imposed upon him. Unless he is otherwise lawfully held he shall be set at liberty forthwith.

Dated and delivered at NAKURU this 28th day of May, 2010

E. O. O'KUBASU

……
JUDGE OF APPEAL

P. N. WAKI

……
JUDGE OF APPEAL

D. K. S. AGANYANYA

……
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR