



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL APPEAL NO. 21 OF 2013**  
**BENSON NZOKA MWANIKI .....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

*(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NUMBER 252 OF 2011*

*IN THE PRINCIPAL MAGISTRATE'S COURT AT KYUSO - B. M. MARARO (PM) ON 31<sup>ST</sup> JANUARY, 2013)*

**JUDGEMENT**

The Appellant (Benson Mwaniki Nzoka) was charged and convicted on three counts. In Count 1 he was charged with defilement contrary to Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence stated that on 20<sup>th</sup> November, 2011 at [particulars withheld] Division in Kyuso District within Kitui County the Appellant intentionally caused his penis to penetrate the vagina of M M a girl aged 14 years.

In count 2 he was charged with child trafficking contrary to Section 13(a) of the Sexual Offences Act No. 3 of 2006 namely that on the date and place mentioned in count 1 he booked transport on behalf of M M a child aged 14 years to travel to Korogocho in Nairobi with the intention of facilitating child sex tourism against the said M M

In count 3 the Appellant was charged with infringing a child's right to parental care contrary to Section 6(1) as read with Section 20 of the Children Act No. 8 of 2001. The particulars of the charge stated that on diverse dates between 20<sup>th</sup> November, 2011 and 6<sup>th</sup> December, 2011 at Korogocho in Nairobi area within Nairobi County the Appellant willfully denied M M a child aged 14 years the right to live with and be cared for by her parents by taking her away.

He was sentenced to 20 years imprisonment on count 1, ten years imprisonment on count 2 and a fine of kshs.100,000/= in default twelve months imprisonment on count 3. The trial magistrate did not state whether counts 1 and 2 were to run concurrently or consecutively. Of course count 3 would run consecutively with the other sentences considering that it had an element of fine - see **Section 28(1)(c)(i)** of the Penal Code. The magistrate ought to have clearly stated whether the sentences for counts 1 and 2 were to run consecutively or concurrently.

The Appellant being aggrieved has appealed against both conviction and sentence.

When the appeal came up for hearing on 17<sup>th</sup> October, 2013 Mr. Mulama for the state conceded the

appeal in respect of count 2 but strongly opposed the appeal on count 1. He indicated to the Court that there was no count 3 and the learned magistrate erred by sentencing the Appellant for a third count which he was not charged with.

I have perused the Court proceedings and I find that Mr. Mulama erred in agreeing with the Appellant that there was no third count. I do not blame Mr. Mulama for this error considering that there were several appeals listed for the week of 14<sup>th</sup> -18<sup>th</sup> October, 2013 which was dubbed the Judiciary Service Week and he may not have had sufficient time to go through all the files. According to the trial Court record, the Appellant took plea on 7<sup>th</sup> December, 2011 at which time two counts were read to him and he pleaded not guilty.

On 8<sup>th</sup> December, 2011 the prosecutor indicated to the Court that he wanted to introduce a third count. All the three counts were read to the Appellant and he specifically pleaded not guilty to each of these counts. The Appellant is therefore not honest when he alleges that he was convicted for an offence he had not been charged with.

On 7<sup>th</sup> December, 2011 the charges facing the Appellant were the ones listed as count 1 and count 3 at the introduction of this judgment. It is therefore assumed that Mr. Mulama conceded the appeal on the third count. I agree that this was the proper way to go. I will, later in this judgement, give the reasons as to why I agree with the state counsel.

The main ground of appeal is that the evidence before the trial magistrate was not sufficient to result in a conviction and the trial magistrate therefore erred in convicting the Appellant on such evidence.

I will proceed straight away to consider and evaluate the evidence before the magistrate so as to come to my own conclusion on that evidence.

In her evidence the complainant who testified as PW1 told the Court that on 20<sup>th</sup> November, 2011 she went to church from where she proceeded to the home of the Appellant. When they reached there, the Appellant and his mother told her she was going nowhere. That night they slept with the Appellant and had sex with him. The next day he asked her to let her go home but he refused. On the third day he told her they were travelling to Nairobi for a day. They proceeded to Nairobi where they stayed at Korogocho for three weeks. On 6<sup>th</sup> December, 2011 while with her sister and brother she saw her cousin M K with people she learned were police officers. She was told to take her luggage and they proceeded to Kyuso Police Station. She was taken to hospital. During cross-examination she stated that the Appellant was her boyfriend and she had been suspended (presumably from school) for attending the funeral of the Appellant's father.

PW2 F K M is the mother of the complainant. She told the Court that her daughter went to church on 20<sup>th</sup> November, 2011 but did not come back. She started looking for her. The following day her daughter called and informed her that she was at home but when PW2 went home she did not find her. Later she heard that her daughter had travelled to Nairobi to attend the funeral of the Appellant's father. On 24<sup>th</sup> November, 2011 she received a call from her daughter that she was at Kibera in Nairobi. On 28<sup>th</sup> November, 2011 she went and reported the incident to the police. She also asked one S M to go and look for her daughter in Nairobi and she was found and taken to Kyuso Police Station on 6<sup>th</sup> December, 2011. When cross-examined PW2 stated that her daughter had informed her that she was going for funeral arrangements in Nairobi.

The father of the complainant R M M testified as PW3 and gave evidence similar to that of PW2. On cross-examination he told the Court that the complainant had been cleared by the school teacher to travel to Nairobi for funeral arrangements.

PW5 Kennedy Kioko a clinical officer told the Court that he examined the complainant and found her sexual organ to be normal except for a sexually transmitted infection. On cross-examination he informed the Court that the hymen was broken.

PW6 Police Constable Florence Nambwayo of Kyuso Police Station testified that on 28<sup>th</sup> November, 2011 she received a report from the complainant's mother to the effect that the complainant had gone missing. On 6<sup>th</sup> December, 2011 she received the Appellant from police officers who informed her that they arrested him for detaining the complainant.

PW4 Samwel Kilonzo, a police officer testified that the complainant's mother is his aunt. He stated that he received a call from her informing him that his cousin (the complainant) had disappeared from home. She gave him a telephone number and informed him that the complainant had used the number to call her. He later traced the complainant to the Appellant's house at Korogocho in Nairobi. He arrested the Appellant and escorted him together with the complainant to Kyuso Police Station.

The Appellant testified as DW1 and told the Court that on 12<sup>th</sup> November, 2011 they were involved in an accident and his father died as a result of the accident. Funeral arrangements were being made both at Nairobi and in their rural home. After the funeral he travelled home but he was told one of the visitors had remained in Nairobi. He was asked to contact her parents. They later arrested him claiming that he had secretly taken the girl away from her home.

The Appellant called DW2 F M as his witness. She told the Court that the complainant travelled to Nairobi and remained there. When they were alerted of her presence they called her parents. She testified that the complainant did not return to Kyuso with the delegation that had travelled to Nairobi to collect the body.

The entire evidence in this matter does not seem to flow well. What I seem to get is that the Appellant took the complainant to Nairobi with a view to making her his wife. He stayed with her from 20<sup>th</sup> November, 2011 until 6<sup>th</sup> December, 2011. Although the impression created by the prosecution witnesses is that the complainant's journey to Nairobi was not voluntary, the truth of the matter is that she went to Nairobi of her free will. She is even the one who took herself to the Appellant's home. This, however, will not come to the aid of the Appellant for defilement can simply be defined to mean carnal knowledge with a person under the age of 18 years. A certificate of birth was produced as an exhibit and it shows that the complainant was born on 3<sup>rd</sup> November, 1997. She was therefore fourteen years old on 20<sup>th</sup> November, 2011. Consent does not count in defilement for Parliament decreed that a child cannot give consent for sexual liaison.

The question that needed to be answered by the trial magistrate was whether the Appellant had carnal knowledge of the complainant.

In sexual offences, where **“the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”** – see the proviso to **Section 124 of the Evidence Act, Cap 80.**

In my view, the only evidence available to connect the Appellant with defilement was that of the complainant. Nobody saw the Appellant sleep with the complainant. The medical evidence does not, in my view, disclose a sexual act that can be directly linked to the Appellant. It only shows that the complainant had previous carnal knowledge. The complainant is said to have had a sexually transmitted disease but the Appellant was not examined and it is not known whether such examination could have exonerated him.

One can say that the fact that the Appellant lived in the same house with the complaint meant that they had sexual intercourse. Apart from the evidence of the complainant there is no other evidence to show that the Appellant lived with the complainant as man and wife. As can be seen from the Court record, the complainant was not a truthful person and the proviso to Section 124 of the Evidence Act cannot come to the aid of the prosecution in this case. In fact the evidence adduced when given close scrutiny may lead to the conclusion that the Appellant and complainant were not together. The complainant told the Court that when PW4 arrived she was with her brother and sister. There is no elaboration as to where and why she

(complainant) was with her brother and sister.

The Appellant and his mother testified that the complainant went to Nairobi with the people who had gone to collect the body of the Appellant's deceased father but she never came back. There appears to be no evidence to contradict this testimony. On the evidence that was placed before the Court, I would be hesitant to conclude that the complainant was indeed defiled by the Appellant. I will therefore allow the appeal and set aside the conviction and sentence on count 1.

For the same reason I agree with the state counsel's conceding the appeal in respect of the 3<sup>rd</sup> count. That leaves me with the 2<sup>nd</sup> count. I have looked at the Sexual Offences Act, 2006 and find that Section 13 was repealed in 2010. I therefore do not understand what the prosecution intended to charge the Appellant with. Section 15 creates a raft of offences arising from what is called child prostitution. Most of these offences have a sexual element. In the case before me I have found that there was no sexual contact between the Appellant and the complainant. The appeal on count 2 therefore succeeds and the same is allowed.

Having reached the conclusion that the Appellant was wrongly convicted in respect of all the three counts I set aside the conviction and sentence for all the counts. The Appellant is therefore set free unless otherwise lawfully held.

Orders will issue accordingly.

Prepared, Dated and signed this 27<sup>th</sup> November 2013

**W. KORIR,**

**JUDGE OF THE HIGH COURT**

Dated and delivered on 2nd day of December, 2013

**S.N.MUTUKU**

**JUDGE OF THE HIGH COURT**