



**Ingahitzu & another v Republic (Criminal Appeal E074 & E075 of 2022
(Consolidated)) [2023] KEHC 21791 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E074 & E075 OF 2022 (CONSOLIDATED)**

REA OUGO, J

JULY 26, 2023

BETWEEN

JUDITH INGAHITZU 1ST APPELLANT

FLORENCE MUSIMBI ABULU ALIAS MAMA AMOS 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in a judgment dated
19th July 2022 in SRM's Court at Webuye by Hon. M. Munyekenya (SPM))*

JUDGMENT

1. The Appellants herein, Judith Ingahitzu and Florence Musimbi Abulu Alias Mama Amos were the 1st and 2nd accused persons before the lower court and for purposes of this appeal I shall refer to them as the 1st and 2nd appellants respectively. They were charged before the subordinate court with two counts:
2. Count I: Conspiracy to commit a felony contrary to section 393 of the Penal Code. It is alleged that on unknown dates in the year 2021 at unknown place within the Republic of Kenya jointly with others not before court conspired to commit a felony namely trafficking in person in that you trafficked Bay IBW a child aged one day old.
3. Count II: Trafficking in person contrary to section 4(1) (b) as read with section 4 (3) of the Counter Trafficking in Person Act No. 8 of 2010 ('the Act'). It is alleged that on 9th September 2021, at Vihiga Health Centre, Vihiga Sub County within Vihiga County jointly, took a minor IBW, aged one day old, from the mother (a suspected minor), for illegal fostering, for purposes of promoting trafficking the said child.
4. At the end of the trial both the appellants were found guilty of the two counts, convicted and sentenced to 5 years each on count 1 and 12 years each for count II both sentences were to run concurrently.



5. The accused persons were aggrieved by the decision of the trial court and preferred an Appeal this court on the following the grounds that:
 1. That the learned magistrate grossly erred in both law and fact by presiding over a trial that failed to meet *the Constitution* threshold of fair hearing stipulated under section 50 (2) (f) of *the Constitution*.
 2. That the learned magistrate grossly erred in both law and fact by failing to note that the evidence was contradictory, uncorroborated, unreliable, untrustworthy and was well planned and orchestrated to secure conviction.
 3. That the learned magistrate grossly erred in both law and fact in basing the conviction and sentence on evidence that did not meet the constitutional threshold of fair hearing as set under Article 50 (2) (j) of *the Constitution* as they were not supplied with witness statements.
 4. That the learned magistrate grossly erred in both law and fact by failing to note that the investigating officer did not perform his duties professionally hence did shoddy, flimsy and inadequate and unfair investigations.
 5. That the learned magistrate erred in both law and fact by rejecting the plausible defence and unreasonable dismissed the defence and mitigation.
 6. That the learned magistrate grossly erred in both law and fact by failing to establish that there was existing grudge between the appellants and the whistleblower.
6. This being a first appeal, this court is required to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno v Republic* [1972] EA 32.
7. Pauline Engefu (Pw1) testified that in 2021 she met the 2nd appellant in her home in Madzuu as the sister of the 2nd appellant, Janet, was in need of a house help. At the time Janet was in Kisii and the 2nd appellant accompanied her to the home of Janet. Pw1 testified that after spending one night in Kisii she left with Janet to Nairobi, as she was to work for her in her Rongai home. While at Janet's house Pw1 realized that she was pregnant and when she told Janet of the pregnancy. The 2nd appellant then called and asked her if she was pregnant and when she confirmed to her the pregnancy she told her that she should tell the father of the child that she had lied to him that she was pregnant. At 8 months pregnant, Janet gave Pw1 fare to go to the home of the 2nd appellant. She stayed at the appellant's home for 2 weeks and on her due date the 2nd appellant took her to hospital. On 8th September 2021 at 9:00 p.m. she delivered a baby boy. On 8th September 2021 the appellants came to discharge her and they left the hospital together. Outside the hospital the 1st appellant asked Pw1 to board a motor cycle and go to the house. The appellants were to follow her to the house. In the evening, the 2nd appellant came home and she did not have the child and when Pw1 asked her where she had taken the child, the 2nd appellant told her that the child was with the 1st appellant. On 10th September 2021 she called her child's biological father, Gift, and told her that she had not been pregnant and in fact had lied about the pregnancy. Pw1 lived with the appellant till 25/9/2021 when she travelled to Nairobi after Janet had sent her fare. Thereafter Janet received a call that Pw1 should go and record a statement with the DCI at Webuye. Pw1 was informed that they had found her child with the 1st appellant whom she had seen at the hospital.



8. Josphat Ayuta (Pw6) testified that he is a boda boda rider at Mugogo stage. He recalled that in September of 2021, the 2nd appellant who was in the company of the 1st appellant asked him to take them to Vihiga Referral Hospital. Pw6 left them at the hospital. Later, he received a call from the 2nd appellant to take a visitor who was a girl to her home. Pw6 left the 2nd appellant at the front gate of the hospital.
9. Anne Andeso Oyule (Pw2) testified that she is from Kivaywa location in Kakamega County and is an assistant chief in Kivaywa sub-location. She testified that the 1st appellant is a resident within her area and that they used to go to the same church together. She recalled that some time in 2021 she met the 1st appellant who appeared to be very tired and told her that she was pregnant. The 1st appellant was big and appeared pregnant. Later on at a funeral they both attended, she met the 1st appellant who was wearing a Kitenge and a white sweater and she told her that she was pregnant. She later received a call from the chief informing her that the 1st appellant had stolen a child. Pw2 asked the 1st appellant's family if she had delivered but they denied her being pregnant.
10. Adagi Claradge (Pw3) testified that she was the 1st appellant's neighbour and friend. In March of 2021 the 1st appellant told her that she was pregnant and Pw3 congratulated her. In September 2021 the 1st appellant told her that she had gone into labour and had gone to Mukumu to deliver. Pw3 kept talking to her up until 9:00 p.m. The appellant told her that she had the baby at 1:00 a.m. On 9th September 2021 the 1st appellant told her that she had been discharged and that she went to her parent's home. Pw3 saw the 1st appellant on 10/9/2021 and she was fine. Pw3 testified that she saw the baby after 8-9 days. On 15th September 2021 the 1st appellant's daughter came to her house informing her that strange people were in their house. When Pw3 went to the house she found the CID and helped pack the baby's clothes, feeding bottle, nan and a flask.
11. Dr. Maalim Abdi Rahaman (Pw4) testified that he is a doctor attached at Webuye District Hospital. The 1st appellant was brought to the hospital in the company of 2 detectives. It had been reported that the 1st appellant had stolen a new born baby. Pw4 was asked to ascertain whether there was recent evidence of pregnancy. The 1st appellant gave her the history that she had had her 4th child through C-section in 2009. She told him that she had 5 children and 3 miscarriages. Pw4 testified that when he examined the 1st appellant he did not see any surgical scar to indicate that she has a child through C-section. He observed that the 1st appellant had a small scar below the navel of 2cms and that cannot be from C-section. He also noted that there was lochia or any discharge that is seen in women who had recently delivered which is usually present within the 6 weeks. The 1st appellant had told him that she was breastfeeding but her breasts were not engorged or swollen with milk. There was no discharge from the nipples. They carried out asrium and antihimuriam hormone test and it revealed that the 1st appellant was in her reproductive age. They carried out an ultra sound which revealed that the 1st appellant was already in pre-pregnancy stage at 5 weeks which is almost impossible. He produced the medical report in respect to the 1st appellant as Pexh 12. Pw4 advised the detectives to do a DNA sampling on the mother and the baby.
12. Polycah Luttah Kweyu (Pw5) testified that he is a government analyst working at the Government Chemist in Kisumu with 10 years' experience. He testified that he had the report that was prepared by his colleague Godwin Khamala Waliama and that he was familiar with his signature having worked with him for 3 years. The 1st appellant was brought together with a child I.B.W for DNA sampling. Samples were taken from them on 15/10/2021 and on 17/10/2021 samples from Pw1 were taken. After DNA analysis it was revealed that the 1st appellant is not the mother to 1BW and Pw1 is the mother to IBW.



13. The investigating officer No. 236991 Everlyne Mboya (Pw7) testified that on 9/10/2021 they received a phone call through their hotline called Fichua kwa DCI. She explained that anyone who calls the number is not required to identify him/herself. The caller informed them that the 1st appellant who was living in Matete area has a child but it is suspected that the child was not hers because she left in the night of 8/9/2021 saying that she was in labour and on 9/9/2021 she had delivered a child. They carried out their investigations and found that the 1st appellant lived in a rental unit that was behind her shop. They went to her place and found her basking in the sun. They introduced themselves and the 1st appellant gave them documents showing that the child was hers including the birth notification card. She also gave them the clinic booklet which revealed that the child had received her first immunization. Pw7 took pictures of the house including the 1st appellant carrying the baby. She also took baby clothes and thermos flask and put them in an inventory. She asked the appellant to dress the child so that they could go to the police station for further interrogation. She noted that the 1st appellant was not able to breastfeed the child. She took the 1st appellant to hospital and Pw4 conducted his examination and to Kisumu Government Chemist for DNA sampling. The 1st appellant then led them to the 2nd appellant's home but the 2nd appellant informed them that Pw1 was in Nairobi working for her sister Janet. Pw7 found Pw1 and brought her to Webuye and upon interrogation discovered that Pw1 did not give consent to have her baby taken. She then went to Vihiga health center and retrieved a certified copy of registration of birth which showed that Pw1 was the mother of the child. Pw7 also found out that Pw1's mother had died and she lived with her step grandparents but did not have a good relationship with her step father. Pw7 produced the following documents:
- i. Pw1's ante-natal clinic card (Pexh1)
 - ii. Maternity booklet from Vihiga (Pexh2)
 - iii. Register for maternity (Pexh3)
 - iv. In patient file (Pexh4)
 - v. Age assessment report showing Pw1 is 17 years (Pexh 5)
 - vi. A baby bottle, Nan milk powder, thermos flask, assorted baby clothes and black bag produced as Pexh 7, 8, 9, 10 and 11.
 - vii. Notification copy given by the 1st appellant, hospital booklet, NHIF and copy of National Identity Card produced as Pexh 13 (a), (b), (c) & (d).
 - viii. Bundle of photographs and certificate produced as Pexh 14 (a) – (m) and Pexh 15 respectively.
 - ix. The consent for DNA sampling for the 1st appellant and Pw1 were produced as Pexh 6a and 16(b).
 - x. The inventory form was produced as Pexh17 and the certified copy of registration of birth from hospital (Pexh18).
14. The appellant's were put on their defence. Judith Ingahitzu (Dw1) testified that the 2nd appellant is her aunt. She testified that Pw1 was pregnant and wanted to abort and she asked the 2nd appellant to ask Pw1 not to abort as she will take care of the child. Pauline then came to the 2nd appellant's home and when Pw1 started having labour pains she sent money so that they could go to the hospital. The following day she went to the hospital and met Pw1 who told her that she did not want to take care of the baby. Pw1 refused that her name be put on the birth notification. They were discharged and



Pw1 refused to go with the baby. She testified that she did not steal the child and that she took care of the baby until her arrest.

15. Florence Musimbi (Dw2) testified that she was informed by her sister that Pw1 was pregnant and wanted to abort. She talked to Pw1 who confirmed that she was pregnant and wanted to abort. Dw1 told her not to abort as she could take care of the child or could find someone else to take care of the child. A neighbour took her to the clinic and in August she told Pw1 that if she wished she could stay with her. Pw1 gave birth on 8/9/2021 at 9:00 p.m. Dw2 told Dw1 that Pw1 had given birth and that she did not want the baby. She went to the hospital with Dw1 and Pw1 did not want to name the baby. The husband of Dw1 named the child and after registration Pw1 was discharged and went home. She took Dw1 to her mother's home and went home. She found Pw1 at home and they lived together for the whole of September. Pw1 later requested if she could go back to Nairobi and Dw2's sister sent the fare for her to go to Nairobi.

Submissions

16. The Appellants in their submissions argues that they was merely trying to help out Pw1 who was an orphan and was out to save the new born. Pw1 testified that she did not ask about the child as she was leaving Nairobi. They maintain that she did not take advantage of Pw1 and urges the court to consider their defence. The 1st appellant is now a senior citizen and the appellants' suspects that the whole case was instigated by the 1st appellant's co-wife. They further submit that they were not present in court during the trial in contravention of Article 50 (2) (f) of *the Constitution*. They also advanced that their advocate only represented them during the bond application but not the rest of the trial. They were therefore not supplied with any documents before trial. The appellants now seek a non custodial sentence urging the court to consider that they are first offenders and are remorseful.
17. The prosecution submits that there was sufficient evidence that the 1st and 2nd appellants hatched a plan to the child away from Pw1. The 2nd appellant pretended to be pregnant prior to Pw1 having a baby. The prosecution further submits that the offence of trafficking in persons is defined by section 3(1) of the Counter Trafficking in Persons Act which sets the various acts that constitute trafficking in person. The prosecution must also prove that the act complained of was for purposes of exploitation. The accused persons were charged under section 4(1) (b) of the Act. There was evidence that baby was taken by the 2nd appellant for purpose of fostering. The prosecution proved all the elements of trafficking in persons as required under section 3(1) of the Act against the 2 appellants. They relied on the case of Mohamed Asif v Republic (2017) eKLR.

Analysis And Determination

18. The main issue before the court is whether the prosecution proved all the elements of the two offences beyond reasonable doubt and whether the sentence meted was legal.
19. The appellants in the appeal however raised the issue that they were not provided with witness statements. In the casethe subordinate court bore the responsibility of ensuring that the appellants had all the reasonable facilities for his defence, while also ensuring that the prosecution provides witness statements prior to the commencement of the trial. In the case of Hussein Khalid & 16 Others vs. Attorney General & 2 Others [2019] eKLR, the Supreme Court of Kenya stated that:

“... Indeed, it is salutary practice for the trial Court to satisfy itself that an accused person has all the reasonable facilities for his defence and the prosecution discloses all documents before commencement of trial. However, an accused person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or



any other prosecution documents) as ordered by the court. This minimum obligation on the accused person triggers the court's duty to ensure the documents are supplied before commencement of the trial."

20. I have carefully examined court record and note that the appellants' advocate on record before the lower court, Mr. Wegesa, requested for the same and on 18/10/2021, the court made an order that the appellant's advocate be supplied with copies of the charge sheet, witness statements and all other documents connected to the case. The appellants during the hearing before the lower court were able to cross-examine the prosecution witness and participated in the trial.

21. The appellants herein were charged with the offence of trafficking in person contrary to section 4(1)(b) as read with section 4(3) of the Counter Trafficking in Persons Act. The sections provide as follows:

"4. Acts that promote child trafficking

(1) A person who for the purpose of trafficking in persons—

(a) adopts a child or offers a child for adoption;

(b) fosters a child or offers a child for fostering; or

(c) offers guardianship to a child or offers a child for guardianship, commits an offence.

...

(3) A person who commits an offence under this section is liable to imprisonment for a term of not less than thirty years or to a fine of not less than twenty million shillings or to both and upon subsequent conviction, to imprisonment for life."

22. In order to properly interpret section 4(1)(b) of the Act, it is essential to grasp the significance attributed to the trafficking of persons as the section provides that a person 'a person who for the purpose of trafficking in persons fosters a child or offers a child for fostering commits an offence'. The Act also defines trafficking in persons under section 3(1) as follows:

(1) A person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbours or receives another person for the purpose of exploitation by means of—

(a) threat or use of force or other forms of coercion;

(b) abduction;

(c) fraud;

(d) deception;

(e) abuse of power or of position of vulnerability;

(f) giving payments or benefits to obtain the consent of the victim of trafficking in persons; or

(g) giving or receiving payments or benefits to obtain the consent of a person having control over another person.

(2) The consent of a victim of trafficking in persons to the intended exploitation shall not be relevant where any of the means set out in subsection (1) have been used.



- (3) The recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set out in subsection (1) of this Act.
 - (4) An act of trafficking in persons may be committed internally within the borders of Kenya or internationally across the borders of Kenya.
 - (5) A person who traffics another person, for the purpose of exploitation, commits an offence and is liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both and upon conviction, to imprisonment for life.
23. According to the evidence of Pw1 the appellants deceived her that they were going to come home with the child and the 2nd appellant called Pw6 to take her home. Pw1 believed that they would soon follow with the child but to her surprise, the 2nd appellant came home without the child. I also note that according to the age assessment report, Pw1 was only 17 years of age at the time she had the baby and is a vulnerable person in need of protection. The appellants through deceit and also relying on the vulnerability of Pw1 told her they would bring the child home knowing too well that the 1st appellant was going to leave with the child to Matete. Pw7 testified that the 1st appellant had procured a birth notification in respect to baby I.B.W.
24. The prosecution was also expected to prove that there was some element of exploitation. Section 2 of the Act defines exploitation as follows:
- “exploitation” includes but is not limited to— ‘Emphasis mine’
- (a) keeping a person in a state of slavery;
 - (b) subjecting a person to practices similar to slavery;
 - (c) involuntary servitude;
 - (d) forcible or fraudulent use of any human being for removal of organs or body parts;
 - (e) forcible or fraudulent use of any human being to take part in armed conflict;
 - (f) forced labour;
 - (g) child labour;
25. Therefore, the meaning of exploitation is wide beyond the scope outlined in section 2(a) – (g) of the Act. In my view, the act of taking baby IBW by the appellants without the consent of Pw1 was carried out with the objective of exploiting the child, as the appellant’s intention was to abruptly separate the child from its mother, at a time when the child still required her nurturing and safeguarding. Such a course of action could be profoundly distressing for the child and was not in the child’s best interest. The evidence from Pw4 was that it was not possible for the 1st appellant to have been pregnant prior to her arrest. Pw5 gave more conclusive evidence that the 1st appellant was not the biological mother to baby I.B.W. The DNA report, Pexh 5, revealed that Pw1 was the child’s biological mother. The document of Pw1’s antenatal clinic visit, maternity booklet from Vihiga, the register for maternity, in patient file and the certified copy of registration of birth also reveal Pw1’s pregnancy and her journey to delivery of baby I.B.W. The child who was one day clearly required the nurturing of Pw1 and ought not to have been separated from its mother.



26. I also agree with the decision cited by the prosecution in Muhammad Asif v Republic [2017] eKLR where the court held that:

“The offence of trafficking in persons captures the entire trafficking continuum, and engagement in just one of these trafficking “stages” is sufficient. Therefore different persons or groups of people may be responsible for different aspects of the trafficking crime. The offence is thus formulated in such a way as to capture the different actors along the trafficking continuum, including those who do not directly exploit the victim’s labour or services, so long as they knew their action was for the purpose of exploiting or facilitating the exploitation of a person.”

27. The offense of trafficking in persons does not necessitate the actual occurrence of exploitation; rather, it hinges on the demonstration of an intention to exploit. (See Geoffrey Mutemi Manzi v Republic [2021] eKLR). Therefore there was sufficient evidence of trafficking in persons.

28. Section 4(1) (b) of the Act provides that ‘a person who for the purpose of trafficking in persons fosters a child or offers a child for fostering commits an offence’. Therefore the prosecution was also to prove that the child was trafficked for purposes of fostering. Pw1 testified that the 2nd appellant told her that the child was with the 1st appellant. It is clear that the 2nd appellant was aware that the child would be fostered by the 1st appellant. The prosecution evidence further reveals that Pw7 found the 1st appellant with the child as Pexh 14 (a)-(m) are photographs of the 1st appellant with the child in her house. The 1st appellant was also found with feeding bottles, milk powder, thermos and assorted baby clothes revealing that the child was being fostered by the 1st appellant. Pw3 also testified that the 1st appellant held out the child as her own and that Pw1 went to see the baby and gave the 1st appellant a gift. The prosecution therefore beyond reasonable doubt proved the offence established under section 4(1) (b) of the Act.

29. The Appellants herein on count I, were also charged with conspiracy to commit a felony contrary to section 393 of the Penal Code Cap 63 Laws of Kenya. The said section provides as follows;

“ Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.”

30. The prosecution was therefore required to prove that there was meeting of the mind between the two appellants. In the case Christopher Wafula Makohga -v- Republic (2014) eKLR the court stated:

“

“ 11. In Archibold: Writing on Criminal Pleadings, Evidence and Practice (Supra), the learned writers observe at pages 2589 and 2590 that: -

“The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons..... so long as a design rests in intention only, it is not indictable; there must be agreement..... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”



31. Pw1 testified that in August 2021 the 2nd appellant asked her if she was pregnant and instructed her not to tell her boyfriend of the pregnancy. Pw2 and Pw3 testified that the 1st appellant had told them that she was pregnant. On 8/9/2021 the 1st appellant further informed Pw3 that she had gone in labour. The evidence of Pw1 is clear that on 9/9/2021 the two appellants came to the hospital and got her discharged. As they left, she left them with the baby knowing that they were to get the child home. However, when the 2nd appellant came home later, she informed Pw1 that the baby was with the 1st appellant. It is therefore clear that the appellant's had a meeting of minds that after Pw1 delivers the baby, the 1st appellant would take the child. The 1st appellant had planned with the 2nd appellant to take Pw1's baby and the 1st appellant had further informed Pw2 and Pw3 about her non-existent pregnancy in order to prepare the two of the baby that she was to get from Pw1 through the 2nd appellant.
32. The appellants in this case were sentenced to 5 years and 12 years in respect of Count I and Count II and the sentences were to run concurrently. On count I, section 393 of the Penal Code provides sentence of 7 years on conviction and they were sentenced to 5 years imprisonment. However for count II, the section 4 (3) of the Act provides that upon conviction, the appellants are liable to imprisonment for a term of not less than thirty years. In this case, they were sentenced to 12 years in respect of count 2 despite the minimum sentence being 30 years imprisonment. The respondent did not cross appeal on the sentence and nor were the appellants informed that their sentence could be enhanced from 12 years to 30 years.
33. In conclusion , the sentence meted by the trial magistrate after considered the mitigation of the appellants is not excessive. Consequently, I find that the appeal is without any merit and the same is hereby dismissed.

DATED, SIGNED AND DELIVERED AT BUNGOMA VIA MICROSOFT TEAMS THIS 26TH DAY OF JULY 2023

R.E. OUGO

JUDGE

In the presence of:

Judith Ingahitzu/ 1st Appellant- Present

Florence Musimbi Abulu/ 2nd Appellant- Present

M/s Omondi-For the Respondent

Wilkister/ Okwaro -C/A

