



**Kipng'eno & another v Director of Public Prosecution (Criminal Appeal E148 of 2022) [2023] KEHC 22940 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22940 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E148 OF 2022  
TW CHERERE, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**KOSGEI HILLARY KIPNG'ENO ..... 1<sup>ST</sup> APPELLANT**

**ABDUBA GUYO TURICHA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

*(From the conviction and sentence in Isiolo Chief Magistrate's Court Criminal No. 168 of 2020 by Hon. E.Ngigi (PM) on 09th September, 2022)*

**JUDGMENT**

1. Appellants were charged with the offence of human smuggling contrary to section 53(1)(p) as read with section 53 (2) of the [Kenya Citizenship and Immigration Act](#) 12 of 2011
2. Appellants denied the offence and the matter proceeded to full trial

**Prosecution Case**

3. PC Regina Lenarua and PC Erick Odinga stated that on March 20, 2020 at about 01.30 am, they received information of vehicles transporting aliens towards Archer's Post. That they proceeded to Archer's Post where they found M/V KBL 898F Toyota Fielder and M/V KCU 447 U Toyota Wish parked beside the road. That from a distance, they saw people running away from M/V KCU 447 U Toyota Wish out of which they managed to arrest four who happened to be Ethiopians and they had no permit to be present in Kenya. That they also arrested the 1<sup>st</sup> appellant the driver of M/V KCU 447 U Toyota Wish and 2<sup>nd</sup> appellant the driver of M/V KBL 898F Toyota Fielder and both were subsequently charged.



4. Joseph Mwangi Kingetho identified M/V KBL 898F toyota fielder as his and stated that he had given it to 2<sup>nd</sup> appellant on March 20, 2020 after he asked to use it to pick a customer. Patrick Kipkurui Langat stated that on March 17, 2020, he gave his vehicle KCU 447 U Toyota Wish to 1<sup>st</sup> appellant who is his nephew to travel to Marsabit where he worked as a police officer and learnt about his arrest on March 18, 2020.
5. Daniel Khamis a liaison officer with Safaricom produced telephone records which showed that telephone number 07xxxx6 registered in the name of appellant was on March 19, 2020 in Moyale at midday, Karare at 20.29 hrs and Archer's Post at 23.01 hrs. The data contained similar information for 2<sup>nd</sup> appellant's phone number 07xxxx8 whereas another of 2<sup>nd</sup> appellant's telephone number 07xxxx8 was captured on March 19, 2020 in Moyale at midday and on March 20, 2020 in Archer's Post at 01.00 hrs.
6. PC Titus Langat stated that upon analysis the call data from Safaricom, he came to the conclusion that the two appellants who were in constant communication and exchanged money via Mpesa knew each other well. M/V KCU 447 U Toyota Wish and M/V KBL 898F Toyota Fielder were photographed by scenes of crime officers and appellants were subsequently charged.

### **Defence Case**

7. 1<sup>st</sup> appellant denied the offence. He stated that he was a police officer in Marsabit and that he also used to buy and sell groceries and meat and that the 2<sup>nd</sup> appellant was his business partner. He conceded receiving huge sums of money some of which he sent to the 2<sup>nd</sup> appellant all of which he was from his customers. He conceded that he was driving M/V KCU 447 U Toyota Wish at the time of his arrest but denied that he had any Ethiopian nationals in the vehicle.
8. 2<sup>nd</sup> appellant stated he was a taxi driver in Marsabit town and that 1<sup>st</sup> appellant was well known to him. he conceded receiving money from the 1<sup>st</sup> appellant which he said was money owed as transport charges for 1<sup>st</sup> appellant's goods.
9. At the conclusion of the trial, both appellants were found guilty as charged, convicted and sentenced to serve pay a fine of Kshs 50,000/- and in default serve 6 months imprisonment.
10. Appellants were dissatisfied by the decision of the learned trial magistrate, and they preferred the instant appeal on the grounds which I have condensed into two grounds that:
  1. The charge was defective
  2. The prosecution case was not proved

### **Findings and Determination**

11. It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision. (See *Collins Akoyo Okemba & 2 others v Republic* [2014] eKLR).
12. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellants and the respondent. I have also considered that appellants were served with notice of enhancement of sentence and I shall address the grounds as hereunder.
13. Appellants contend that the charge sheet on which they were tried and convicted was defective.



14. It was submitted for appellants that the particulars of the charge did not disclose smuggling which means procurement of illegal entry and exit for direct or indirect financial or other material benefit.
15. In determining whether a charge sheet is defective or not, the Court of Appeal in *Sigilani v Republic* (2004) 2 KLR, 480 held as follows:-

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.
16. Section 134 of the *Criminal Procedure Code* which provides what constitutes components/ingredients of a charge was considered in the case of *Isaac Omambia v Republic*, [1995] eKLR and the Court of Appeal stated as follows:

“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.”
17. Looking at the charge sheet in question, it is clear that the appellant was charged with:

Human smuggling contrary to section 53(1)(p) as read with section 53 (2) of the *Kenya Citizenship and Immigration Act* 12 of 2011.

The particulars of the charge are that

On March 20, 2020 along Isiolo-Marsabit Road at Archer’s Post trading centre within Samburu county jointly with others not before eth court using M/V KCU 447 U Toyota Wish and M/V KBL 898F Toyota Fielder accused were found transporting four Ethiopian Nationals Fikire Yohanis, Abdikadir Mohamed, Zehinu Mundinu and Shamiso Solita who did not have valid pass or permit to allow them in Kenya in contravention of the Act.
18. In support of the prosecution case, evidence was adduced in the form of a charge sheet in Isiolo Criminal Case No 169 of 2020 which reveals that Ethiopian nationals Fikire Yohanis, Abdikadir Mohamed, Zehinu Mundinu and Shamiso Solita that appellants were convicted of smuggling were charged with being that on March 20, 2020 being Ethiopians National were found unlawfully in Kenya without a valid pass or permit.
19. The prosecution evidence that Fikire Yohanis, Abdikadir Mohamed, Zehinu Mundinu and Shamiso Solita were arrested from M/V KCU 447 U Toyota Wish that 1<sup>st</sup> appellant was driving was well corroborated. What the prosecution needed to further prove was not only that the four were found in 1<sup>st</sup> appellant’s motor vehicle and that he was in company of the 2<sup>nd</sup> appellant but also that they were foreigners and they had entered Kenya illegally.
20. Section 2 (1) of the Act defines “human smuggling” to mean the procurement, in order to obtain, directly or indirectly a financial or other material benefit, of the illegal entry (and exit) of a foreign national into and outside Kenya.
21. In support of its case, prosecution only availed the charge sheet in which the alleged four foreigners were charged. Proceedings in which the four are alleged to have pleaded guilty to being Ethiopians National



- who were found unlawfully in Kenya without a valid pass or permit was however not presented before the trial court.
22. Having said that, I find that the prosecution failed to prove that Fikire Yohanis, Abdikadir Mohamed, Zehinu Mundinu and Shamiso Solita were not only Ethiopians but that they had illegally been facilitated to enter into Kenya by appellants.
  23. In the absence of such evidence, I find that the conviction of appellants on the charge of human smuggling was in the circumstances unsafe.
  24. Concerning enhancement of sentence raised by the prosecution, section 362 of the [Criminal Procedure Code](#), provides that if the sentence imposed by the trial court was illegal or improper, then the High Court has the jurisdiction to re-examine it; and the High Court, by virtue of the provision in section 364(a) of the same statute, may enhance the sentence if need be.
  25. Sentence is essentially a discretionary matter for the trial court but in exercising that discretion, the trial court must consider all the relevant factors. An appeal court, is only entitled to interfere with the exercise of discretion where it is shown that the court whose exercise of discretion is impugned, has either not considered a relevant factor, or considered an irrelevant factor or that short of these the exercise of the discretion is plainly wrong. (See [Gedion Kenga Maita v Republic](#) 1997] eKLR).
  26. Section 53(2) of the Act under which appellants were charged provides that  

“ Any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both”.
  27. This section gives the trial magistrate discretion to impose a fine of not more than Kshs 500,000/- and to an imprisonment term of not exceeding 3 years or to both. Had the appeal not succeeded, this court would in the absence of any aggravating circumstances have had no reason to interfere with the discretion of the trial magistrate concerning the sentences imposed in this matter.
  28. From the foregoing analysis, I find that the prosecution failed to prove its case beyond any reasonable doubt and the conviction and sentences cannot be allowed to stand. The appeal on both convictions and sentences is allowed. The convictions are quashed and the sentences set aside. Appellants shall be set at liberty unless otherwise lawfully held. Fines paid by the appellants, if any shall be refunded to them.

**DATED AT MERU THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

Court Assistant - Mr. Kinoti

1<sup>st</sup> Appellant - Present / Absent

2<sup>nd</sup> Appellant - Present / Absent

For Appellants - Mr. Ngentu for Mugiira & Associates Advocates

For DPP - Ms. Rita (PC-1)

