



**Walubengo & another v Republic (Criminal Appeal 89 of 2019)  
[2022] KEHC 10414 (KLR) (Crim) (30 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 10414 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL 89 OF 2019  
JM BWONWONG'A, J  
MARCH 30, 2022**

**BETWEEN**

**ISABELA WAMBANI WALUBENGO ..... 1<sup>ST</sup> APPELLANT**

**MARGARET KERUBO NYAKOE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((Being an Appeal against the judgment (conviction and sentence) of Hon M. Mutuku S.P.M, delivered on 28th February 2019 in the Chief Magistrate's Court at Nairobi in Criminal Case No 1121 of 2017 Republic v 1. Isabella Wambani Walubengu 2. Margaret Kerubo Nyakoe))*

**JUDGMENT**

**Introduction**

1. The appellants were charged with 17 counts of conspiracy to commit a felony, trafficking in persons, child neglect, making false statements and documents in the lower court.
2. They denied the charges.
3. At the conclusion of their trial, they were convicted and sentenced to serve thirty years imprisonment on the trafficking charges; which sentences were ordered to run concurrently with the sentences that were imposed on the other convictions.  
They have appealed against their convictions and sentences.
4. The 2<sup>nd</sup> appellant was acquitted on the following counts namely: - trafficking in persons of baby C (count 6) and trafficking in persons of baby D (count 17).



5. The 1<sup>st</sup> appellant was also acquitted on the charges of making a document without authority (count 15) and being in possession of an identity card bearing false entries (count 16) and in trafficking in persons (count 17).

### **The 1<sup>st</sup> Appellant's Grounds of Appeal.**

6. The 1<sup>st</sup> appellant filed a petition of appeal dated 12<sup>th</sup> April 2019 in which she raised seven grounds of appeal, which are as follows:
  1. That the learned Magistrate erred in entertaining a prosecution based on a charge sheet which was bad and defective because of being vague, and otherwise not disclosing an offence with particularity
  2. The learned Magistrate erred in convicting the appellant based on evidence that did not prove the prosecution's case to the required standard of proof beyond reasonable doubt
  3. The learned Magistrate erred in misinterpreting and misapplying the provisions of section 3 (1) and 3 (5) of the Counter-Trafficking in Persons Act, No 8 of 2010 to the set of facts before her.
  4. The learned Magistrate erred in convicting the appellant in the absence of proof of all the ingredients of the offence of trafficking in persons.
  5. The learned Magistrate erred in convicting the appellant based on speculation and circumstantial evidence.
  6. The trial process did not comply with the appellant's rights under Article 50, especially Article 50 (2) (l) of the Constitution of Kenya
  7. That for the reasons aforesaid, the learned Magistrate erred in sentencing the appellant to 30 years imprisonment.
    - i. That the offence of trafficking in persons was never proved in respect of the 1<sup>st</sup> appellant
    - ii. The sentence of 30 years was excessive considering that the option of a fine was available to the Honourable Magistrate.

### **The submissions of the 1<sup>st</sup> Appellant**

7. Messrs Echesa & Bwire Advocates LLP, for the 1<sup>st</sup> appellant submitted in respect of ground 1 that the charge sheet was defective and vague, in support of which they cited *Nyandenga v Republic* (1989) eKLR, in which the Court of Appeal observed that an omission of any one of the ingredients of the offence charged will render the charge fatally defective. Counsel submitted in relation to counts 1, 2, 3, 4, 5, 8, 9 and 10 that the charge sheet did not contain the ingredients of exploitation and there is no explanation how the exploitation was undertaken. Counsel further submitted that his client's fair trial rights were violated.
8. Counsel further submitted in relation to grounds 2, 3, 4, 5 and 7 that the ingredients of the offence of Counter-Trafficking in Persons Act No 8 of 2010 were not proved in respect of which they cited *Mohamed Asif Republic* (2017) eKLR, in which the court allowed the appeal because there was no evidence adduced as to the purpose for which the appellant was harbouring the trafficked persons. Counsel also cited *Bernard Onyandi v Republic* (2018) eKLR, in which the court allowed the appeal for lack of evidence as to who was the potential employer, the transportation from her home or the nature of the exploitation the appellant was going to subject the complainant to.



9. In respect of sentence, counsel submitted that the sentence imposed did not take into account the period the appellant had been in pre-trial and post judgement custody following the sentence imposed by the trial court. In the alternative, counsel has submitted that the appellant be sentenced to a monetary fine.

### **The 2<sup>nd</sup> Appellant's Grounds of Appeal.**

10. The 2<sup>nd</sup> appellant also filed a petition of appeal in which she raised eight grounds of appeal, which are as follows.
  1. The learned Magistrate erred in law and facts in failing to appreciate that the prosecution had failed to prove its case to the standard required in law, that is to proof beyond reasonable doubt.
  2. The prosecution failed to prove the essential ingredients of the offence of conspiracy that is an agreement between two persons or more persons to commit an unlawful act namely trafficking in persons.
  3. The prosecution failed to prove an essential ingredient of the offence of trafficking in persons that is, recruiting, transporting, transfer, harbouring, or receiving victims and the purposes of the act within the meaning of section 3 of the [Counter-Trafficking in Persons Act](#) (Cap 61) Laws of Kenya
  4. The learned trial magistrate erred in law and fact in shifting the burden of proof from the prosecution to the appellant contrary to the law.
  5. The learned trial magistrate misdirect herself in law, that is, she convicted the appellant based on charges which were not in existence and or not supported by the evidence, and the said misdirection occasioned a miscarriage of justice.
  6. The learned trial magistrate erred in law and fact in failing to comply with the clear provisions of section 169 of the [Criminal Procedure Code](#).
  7. The learned magistrate erred in law and fact in failing to take into account and or failed to consider and or failed to give reasons why she disregarded the appellant's alibi defence.
  8. The trial magistrate erred in law and fact in convicting the 2<sup>nd</sup> appellant when the appellant's constitutional right to a fair trial enshrined in article 50 (2) of the [Constitution](#) of Kenya were violated.

### **The submissions of the 2<sup>nd</sup> Appellant**

11. In her written submissions, the 2<sup>nd</sup> appellant submitted that the prosecution failed to prove the offences charged in counts 1 – 3 against her beyond reasonable doubt. That as per the provisions of section 393 of the [Penal Code](#) for the offence of conspiracy to be complete, there must be an agreement between two persons to commit an unlawful act which was not the case herein. Furthermore, she submitted that it was not proved beyond reasonable doubt that the 1<sup>st</sup> appellant shared a meeting at any time on the issue of the subject babies being transported from Kapsabet to Mombasa before the communication were made by her.
12. She also submitted that no witness was called from any telephone mobile subscriber to shed light on the issue of the alleged communication made or what messages were sent or received by the appellant. In the absence of such a witness, she contended that the offence of conspiracy remained unproven. It was the 2<sup>nd</sup> appellant's submission that no evidence was called to prove that the 1<sup>st</sup> and 2<sup>nd</sup> appellant



- agreed to work together as persons in common to achieve a financial gain or profit. Furthermore, she submitted that there was no evidence that the 2<sup>nd</sup> appellant paid or received money to facilitate the commission of the offences alleged. She cited the case of *Christopher Wafula Makobka v Republic* [2014] eKLR and submitted that the prosecution must prove the existence of an agreement between the 2<sup>nd</sup> appellant and some other persons to do the act complained of.
13. As regards the offence of trafficking in persons, the 2<sup>nd</sup> appellant submitted that the prosecution failed to prove an essential ingredient of conspiracy. This is because the words recruitment, transportation, transferring, harbouring, or receiving can be proved had there been evidence from the prosecution proving an element of the agreement before the alleged episode from the first action to the last. It was her submission she never transported, transferred, recruited, or received the children thus the offence was not proven. She relied on the case of *Woolmington v D.P.P* [1935] AC 462.
  14. The 2<sup>nd</sup> appellant further submitted that the trial magistrate erred in sentencing her to serve 30 years imprisonment in counts 1, 2, and 3 whereas she was never charged with count 1. Furthermore, she submitted that the trial court sentenced her in respect to counts 4 and 5 and remained silent on counts 6, 7, 8, 9, and 10, and yet the court had returned a guilty verdict. She also submitted that the trial magistrate failed to comply with the provisions of section 169 of the *Criminal Procedure Code*.
  15. It was further her contention that she was denied her constitutional right to a fair trial as enshrined in article 50 (2) of the *Constitution* of Kenya; since her right to disclosure by the prosecution was breached. The 2<sup>nd</sup> appellant relied on the case of *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] eKLR to support her submissions. She therefore urged the court to allow her appeal and proceed to quash and the sentence.
  16. The appellants have appealed to this court against both the conviction and sentence. This being the first appeal, the court is obliged to re-examine and re-evaluate the entire evidence tendered at the trial and make its own findings and conclusions bearing in mind, however, that the court did not have the advantage of seeing and hearing the witnesses when they testified. In this regard, the Court of Appeal in *Okeno v R* [1972] EA 32 laid down what the duty of the first appellate court is and set out the principles that should guide the first appeal court as follows:
  17. The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

### **Re-evaluation of the entire evidence and findings thereon**

18. In the 1<sup>st</sup> appellant’s first ground of appeal and the fifth ground of appeal by the 2<sup>nd</sup> appellant, they challenged the charge sheet used to convict them. Firstly the 1<sup>st</sup> Appellant contends that the charge sheet relied on by the trial court to convict her was defective for being vague and did not disclose an offence with particularity. On the other hand, the 2<sup>nd</sup> appellant contended that her conviction was based on charges which were not in existence and or not supported by the evidence, which occasioned a miscarriage of justice.



19. In determining whether a charge sheet is defective or not, the High Court in *Sigilai & another 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”.

20. Additionally, section 134 of the *Criminal Procedure Code* provides for what the components/ ingredients of the charge sheet should constitute which are as follows: “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 charged”.
21. In the case of *Isaac Omambia v Republic*, [1995] eKLR, the Court of Appeal considered the ingredients necessary in a charge sheet and stated as follows:

In this regard, it is pertinent to draw attention to the following provisions of Section 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.”

22. Looking at the charge sheet in question, it is clear that the appellants were charged with the following charges: Conspiracy to commit a felony contrary to section 393 of the *Penal Code*; Trafficking in Persons contrary to section (1) (e) as read with section 3 (5) of the *Counter-Trafficking in Person Act*; neglect of a child contrary to section 127 (1) (e) of the *children's Act*; Making a false statement to the registrar of births contrary to section 363 of the *Penal Code*; making a false document without authority contrary to section 357 (a) of the *Penal Code*; Being in possession of an identification card bearing false entries contrary to section 14 (1) (h) of the *Registration of Persons Act*; and Trafficking in person for organized crime contrary to section 10 of the *Counter-Trafficking in Person Act*. The charge sheet spells out the statement of the offence that the appellants were charged with. The said offenses are also known in law.
23. The charge sheet also contains the particulars of the offences that were charged. In relation to the conspiracy that was committed, the children who were trafficked and the documents that were forged or falsified are set out therein. All the particulars in the charges were clear to the appellants. It was also clear from the charge sheet what charges they faced. There was no ambiguity. I further find that the prosecution evidence made it clearer as regards what the appellants did in each count. I therefore find that the charges in the present case were not defective. Consequently, I dismiss the submissions of both appellants that the charges were defective.
24. I have considered the authorities cited by counsel for the 1<sup>st</sup> appellant namely *Nyadenga v Republic* (1989) eKLR and *Muhammed Asif v Republic* (2017) eKLR. In *Nyadenga v Republic*, the appellant was convicted of committing a felony contrary to section 308 (1) of the *Penal Code*. His conviction was quashed on appeal because it was not alleged in the charge sheet that he was armed with a panga and a rungu, which were dangerous or offensive weapons. Even in the proceedings in court there was no evidence that the panga and rungu were dangerous or offensive weapons. In the instant appeals the particulars that constitute the offences are specified, unlike in that case. Furthermore, any gaps in the appeals were cured by the evidence on record.



25. Furthermore, in the case of *Muhammed Asif v Republic, supra*, the conviction of the appellant was quashed because the appellant did not plead guilty to the charge which the court found was a fatal defect. As a result, the court (Nyamweya, J) declined to order a re-trial for lack of evidence to support a charge of trafficking of persons for exploitation purposes. The current appeals are distinguishable from the foregoing case. I find that in these appeals the appellants were not running a children welfare home in Kenya in the USA. In the circumstances, I find that the only inference to be drawn from the entire evidence is that they were trafficking the children for exploitation purposes.
26. Furthermore, it will be shown below in the judgement the mode of participation of the appellants in the commission of the crimes upon which they were convicted.
27. Both appellants challenged their conviction on the charge of conspiracy which they alleged was based on evidence that did not meet the threshold that is required by the law. This is the 1<sup>st</sup> appellant's second ground of appeal and the 2<sup>nd</sup> appellant's 1<sup>st</sup> ground of appeal. In the present case, it was alleged that on diverse dates in 2015, the 1<sup>st</sup> appellant jointly with another not before court conspired to commit a felony namely trafficking in persons in that she harboured Baby A alias Abraham Adam, baby B alias Yisreal Yitzhaq Davis, and Baby C alias Avigail Deborah Davis. The 2<sup>nd</sup> appellant was also charged with counts 2 and 3 which involved babies B and C.
28. During trial, evidence was produced showing the existence of an agreement between the appellants. That the first appellant wanted three children and asked the second appellant to get them for her for adoption. Further, the appellants reached an agreement and the 2<sup>nd</sup> appellant began delivering the children to the 1<sup>st</sup> appellant.
29. The first three counts in respect of which the first appellant was convicted of was that of conspiracy to commit a crime contrary to Section 393 of the [Penal Code](#). That section provides: -
30. 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.”
31. The 2<sup>nd</sup> appellant in her grounds of appeal stated that the prosecution had failed to prove the essential ingredients of the offence of conspiracy against her, that is an agreement between two or more persons to commit an unlawful act namely trafficking in persons. She contended that there was no agreement between her and the 1<sup>st</sup> appellant for the delivery of children to the 1<sup>st</sup> appellant. It was the evidence of David Kiplagat Korir (PW 3) that he was hired to transport the appellants and the babies to Mombasa. The trial magistrate noted that his evidence denotes a conspiracy to commit an unlawful act by the appellants. Further, the acquisition and transportation of the children without a proper legal procedure for adoption that was initiated by the first appellant further points to a conspiracy to commit an unlawful act. The question that arises is whether the prosecution proved the two ingredients of conspiracy.
32. The 2<sup>nd</sup> appellant testified on oath and did not call any witnesses in her defence. She testified that the 1<sup>st</sup> appellant gave her a contact number. As a result, she called one David Kiplagat Korir who took her to Eldoret; where she was given a child at the house of one Edna. The 2<sup>nd</sup> appellant called the 1<sup>st</sup> appellant who sent her (the 2<sup>nd</sup> appellant) Kshs 2,000/- to buy clothes and flasks. The 2<sup>nd</sup> appellant then left for Mombasa where she handed the baby to the 1<sup>st</sup> appellant. On another occasion she also took a child to the 1<sup>st</sup> appellant in Mombasa in respect of which she was given Kshs 10,000/- for that trip



to Mombasa. It was the evidence of the 2<sup>nd</sup> appellant that she was acting on the instructions of the 1<sup>st</sup> appellant on all these occasions. The 2<sup>nd</sup> appellant was cross examined by counsel for the 1<sup>st</sup> appellant. I find as credible the sworn evidence of the 2<sup>nd</sup> appellant although it is evidence of an accomplice.

33. After re-evaluating the entire evidence, I am satisfied that the prosecution proved beyond reasonable doubt that the appellant was guilty of the offence of conspiracy to commit a felony. The offence of conspiracy is set out in section 393 of the [Penal Code](#). The dominant aspect of the offence of conspiracy is that there must be an agreement, a meeting of the mind to commit an unlawful act, or to do a lawful act by unlawful means.
34. I find that there is ample evidence to support the conviction of conspiracy to commit felonies with which the appellants were charged.
35. The question is whether it was proved that there was an agreement between the appellants on the delivery of children for purposes of adoption. An agreement may be deduced from any facts which raise a presumption of a common intention. See *Gokaldas Kanji Karia* (1949) 16 EACA 116. Furthermore, an agreement is an essential ingredient of the offence of conspiracy.
34. Furthermore, in *Gray Mattaka & others v R* (1971) EA 495 the Court of Appeal for Eastern Africa defined conspiracy in the following terms:

Simply defined, conspiracy is the agreement of two or more persons to do an unlawful act or to do a lawful act unlawfully. The gravamen of the conspiracy charge is the unlawful agreement so here the words “every act of conspiring with any person to effect that purpose” must mean the agreement between two or more persons to effect or carry out a treasonable purpose as set out in s. 39. We would refer to the following extract from the judges’ opinion in the case of *Mulcahy* (supra) defining conspiracy.

“A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such design rests in intention only, it is not indictable. When two agree carry to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object of for the use of criminal means.”

35. I find that there is ample evidence in support of conspiracy to commit a felony.
36. It is clear that the appellants had agreed on how the babies would be illegally procured and transported for trafficking purposes. The 1<sup>st</sup> appellant's conviction on counts 1, 2, 3 and the 2<sup>nd</sup> appellant's conviction in counts 2, and 3 cannot be faulted.
37. The second category of offences is the offence of Trafficking in persons which the appellants have raised in their grounds of appeal. In grounds 3 and 4 of her appeal, the 1<sup>st</sup> appellant has faulted the trial magistrate for misinterpreting and misapplying the provisions of section 3(1) and 3(5) of the [Counter-Trafficking in Persons Act](#) and her conviction in the absence of proof of all the ingredients of the offence of trafficking in persons. For the prosecution to establish an offence under the act it must show that the 1<sup>st</sup> appellant (1) recruits or (2) transports, or (3) harbours, or receives another person for exploitation and has used threats or force or abduction, or fraud, or deception, or abused vulnerability or obtained consent by payment to the victim or person having control of the victim.
38. The offence of trafficking consists of a process with the ultimate purpose of exploitation of the person trafficked. Every participant in every stage of the process is guilty of the offence, and an accused need



not participate in all stages to be guilty. If the prosecution established to the satisfaction of the court that the accused was part of the chain and committed only one act in that chain which was aimed at facilitating the commission of the offence, he would be guilty of the offence of trafficking in persons.

39. In the present appeal, I find as credible the evidence of David Kiplagat Korir (PW 3) was that he was paid to transport babies A, B, and C to Mombasa. Furthermore, I find as credible the evidence of Emma Mutwole (PW 8) and Edith Mwasi (PW 9) that the 1<sup>st</sup> appellant kept the three children in a house in Mombasa where she paid for their accommodation. This evidence points to the act of harbouring persons which is one of the elements of the offence of trafficking in persons.
40. Furthermore, the 1<sup>st</sup> appellant had acquired passports for the travel of the children. I find as credible the evidence of the Principal Government Chemist at Mombasa namely George Lawrence Uguda (PW 14), that the three children were not the biological children of the 1<sup>st</sup> appellant and that she had not legally adopted them. PW 14 arrived at this conclusion after conducting a DNA profiling tests.
41. The victims herein were transported to Mombasa where they were under the custody of the 1<sup>st</sup> appellant's awaiting their shipment to the intended destination which was the United States of America. The 2<sup>nd</sup> appellant facilitated the process of removing them from their homes while the 1<sup>st</sup> appellant was to facilitate their exit outside Kenya, which was thwarted by their arrest.
42. I find as incredible the sworn evidence of the 1<sup>st</sup> appellant. In her sworn evidence she materially contradicted herself as how she acquired the three children. The 1<sup>st</sup> appellant initially testified that the 2<sup>nd</sup> appellant took to her two children and that the third child was dumped in her home by a girlfriend of her son. Later she contradicted herself in testifying that she obtained the same three children from Mt. Elgon hospital. Her evidence that these three children had no documents is incredible since she has testified that they were obtained from Mt. Elgon hospital.
43. Furthermore, I find as incredible the evidence of the 1<sup>st</sup> appellant that she only wanted to adopt the three children and that she enquired about the adoption procedure. She then asked the 2<sup>nd</sup> appellant for assistance in respect of the issue of adoption. She had testified that the 2<sup>nd</sup> appellant was her house help in Eldoret for three months. I find that the 1<sup>st</sup> appellant had not adopted the three children and therefore her evidence that she was their legal mother is not credible.
44. I also find as incredible the evidence of the 1<sup>st</sup> appellant that she had obtained passports for the three children to enable her to take them to the USA; because of her love and compassion for them. It cannot be disputed that she herself and her husband are USA citizens. I find as credible the sworn evidence of the 2<sup>nd</sup> appellant who testified as follows. The 1<sup>st</sup> appellant gave her a contact number. As a result, she called one David Kiplagat Korir who took her to Eldoret; where she was given a child at the house of one Edna. The 2<sup>nd</sup> appellant called the 1<sup>st</sup> appellant who sent her (the 2<sup>nd</sup> appellant) Kshs 2,000/- to buy clothes and flasks. The 2<sup>nd</sup> appellant then left for Mombasa where she handed the baby to the 1<sup>st</sup> appellant. On another occasion she also took a child to the 1<sup>st</sup> appellant in Mombasa in respect of which she was given Kshs 10,000/- for that trip to Mombasa. It was the evidence of the 2<sup>nd</sup> appellant that she was acting on the instructions of the 1<sup>st</sup> appellant on all these occasions. The 2<sup>nd</sup> appellant was cross examined by counsel for the 1<sup>st</sup> appellant. I find as credible the sworn evidence of the 2<sup>nd</sup> appellant although it is evidence of an accomplice.
45. Furthermore, I find as incredible that the 1<sup>st</sup> appellant's evidence that the charges filed against her were false as she is the legal mother of the children who are the subject of this appeal; since she had not obtained adoption orders from the court. I also find as inadmissible hearsay the evidence of the 1<sup>st</sup> appellant that she was told by the 2<sup>nd</sup> appellant that most of the children were from victims of rape and incest and the victims were unable to take care of the said children.



46. Furthermore, I find that the 1<sup>st</sup> appellant's evidence that no one has claimed custody of the three children is not a defence to the offences she was convicted upon; since the complainant in all the offences is the Republic. Individual members of the public may lodge complaints with the police but the Republic always remains the complainant.
47. I further find that as credible the evidence of David Kiplagat Korir (PW 3) which corroborates the evidence of the 2<sup>nd</sup> appellant that he (PW 3) transported her with a child to Eldoret. The said child was calm but weak. PW 3 confirmed that the 2<sup>nd</sup> appellant took the three children to Mombasa.
48. Furthermore, I find as incredible the evidence of the 1<sup>st</sup> appellant testified that she had three letters that were not legible from the chief; which letters were dated 2002, 2011 and 2012. These letters were calling for people who could assist the children, since their parents were ready to surrender them. She further testified that the chief was not willing to testify. If she thought that the chief was an important witness, the first appellant should have sought the assistance of the court to summon the chief to court and testify on her behalf.
49. I also find that the obtainment of the birth certificates and USA passports for the three children to travel to that country supports the prosecution case that she was trafficking these three children who were aged below two years.
50. Furthermore, I find that the victims in this case are children of tender years. They were living with the appellants who were not their parents or relatives. They were deprived of their motherly love and have been exploited due to their vulnerability. The prosecution proved their case of trafficking in person against the 1<sup>st</sup> and 2<sup>nd</sup> appellants beyond reasonable doubt. There was ample evidence adduced in this regard by the prosecution.
51. Furthermore, in ground 6 the 1<sup>st</sup> appellant has stated that the trial process did not comply with her rights under Article 50, especially Article 50 (2) (1) of the Constitution of Kenya, which reads as follows:
- (2) Every accused person has the right to a fair trial, which includes the right-
- (1) to refuse to give self-incriminating evidence;
52. Similarly, the right to remain silent under Article 50 (2) (1) relates to testimony during proceedings in court and extra judicial statements be they confessions or non-confessions. If they are statements under enquiry or under charge and caution they must be taken in accordance with the full consent of the accused in accordance with section 25A (1) (2) of the Evidence Act (Cap 80) Laws of Kenya. It is clear from the record of the proceedings of 17<sup>th</sup> August 2018 that the trial court after finding that the appellants had a case to answer proceeded to explained them their rights under section 211 of the Criminal Procedure Code. In response the 1st appellant elected to give evidence on oath. She also elected not to call any witnesses in her defence. She testified and was cross examined by counsel for the defence on 3<sup>rd</sup> September 2018.
53. I find that there were no extra judicial statements taken from the 1<sup>st</sup> appellant. I further that there is no evidence that the 1<sup>st</sup> appellant was forced to testify against herself during the proceedings in the lower court. I therefore find that her rights under sub-article 2 (1) of article 50 of the Constitution of Kenya were not infringed.
54. In ground 4 of her petition, the 2<sup>nd</sup> appellant also argued that the trial magistrate erred in law and fact in failing to comply with the clear provisions of section 169 of the Criminal Procedure Code. Furthermore, in ground 5 the 2<sup>nd</sup> appellant has faulted the trial court for failing to take into account and or consider and give reasons why she disregarded the 2<sup>nd</sup> appellant's alibi defence.



55. Section 169 of the *Criminal Procedure Code* (Chapter 75) of the Laws of Kenya provides as follows:

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- (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.
- (2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the *Penal Code* or other law under which, the accused person is convicted, and the punishment to which he is sentenced.
- (3) In the case of an acquittal, the judgment shall state the offence which the accused person is acquitted, and shall direct that he be set at liberty.

56. The foregoing section requires the trial court to give reasons for its decision. The court is therefore under a duty to comply with the provisions of that section. In her judgment, the trial court complied with section 169 of the *Criminal Procedure Code*. The court specified the counts on which the appellants were found guilty and convicted having faced cumulatively the seventeen counts. Furthermore, where she acquitted the appellants on other charges the judgment stated the counts which they were acquitted. On the totality of the evidence adduced, the trial court also gave reasons why the said evidence was admitted and its probative value. Upon my own assessment of the entire evidence I find that there is no merit in the two grounds of which I hereby dismiss.

57. I further find that in view of the ample evidence of the prosecution, I find that the defence evidence was incredible and was rightly rejected by the trial court.

#### **On sentence**

##### Count 1

1<sup>st</sup> appellant was sentenced to 3 years imprisonment on a charge of conspiracy to commit a felony.

##### Count 2

Both appellants were each sentenced to 3 years imprisonment on a charge of conspiracy to commit a felony.

##### Count 3

Both appellants were each sentenced to 3 years imprisonment on a charge of conspiracy to commit a felony.

##### Count 4

The 2<sup>nd</sup> appellant was sentenced to 30 years imprisonment for the offence of trafficking

##### Count 5

The 2<sup>nd</sup> appellant was sentenced to 30 years imprisonment for the offence of trafficking.

##### Count 8

The 1<sup>st</sup> appellant was sentenced to 30 years imprisonment for the offence of trafficking.



Count 9

The 1<sup>st</sup> appellant was sentenced to 30 years imprisonment for the offence of trafficking.

Count 10

The 1<sup>st</sup> appellant was sentenced to 30 years imprisonment for the offence of trafficking.

Count 11

1<sup>st</sup> appellant was sentenced to 2 years imprisonment for neglecting a child under the Children's Act

Count 12

1<sup>st</sup> appellant was to 2 years imprisonment for making a false document.

Count 13

1<sup>st</sup> appellant was to 2 years imprisonment for making a false statement.

Count 14

1<sup>st</sup> appellant was to 2 years imprisonment for making a false statement.

Count 15

1<sup>st</sup> appellant was sentenced 2 years imprisonment for making a document without authority.

58. The sentences were ordered to run concurrently.

59. In respect of sentence, the 1<sup>st</sup> appellants challenged the sentences meted as being excessive and should have imposed a sentence of a fine.

60. The sentence provided for in section 3 (5) of *Counter-Trafficking in Persons Act* is as follows:

(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 subsequent conviction, to imprisonment for life.

61. The trial court opted to impose a sentence of 30 years imprisonment which is the prescribed mandatory minimum under the law. In sentencing the appellants, the court considered the gravity of the offence. The trial court also considered the mitigating factors, the pre-sentence report, the seriousness of the offence and that the sentence of 30 years imprisonment is the prescribed statutory minimum sentence. The minimum sentence was proper since the offences were serious.

62. On the counts the appellants were convicted on, the court sentenced them to serve 30 years imprisonment on the offences of trafficking in person. I find that the appellants inflicted untold anguish and pain upon the parents and relatives of their victims.

63. I find that that the trial exercised its discretion properly and I find no basis to interfere with the sentencing discretion of the trial court.

64. In the premises, I find that both appeals fail and I hereby dismiss them in their entirety.

**JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT THROUGH VIDEO CONFERENCE THIS 30<sup>TH</sup> DAY OF MARCH 2022.**

**J M BWOWNWONG'A**

**JUDGE**



In the presence of: -

Kinyua court assistant

Mr Mukuha for the 1<sup>st</sup> appellant

The 2<sup>nd</sup> appellant in person

