



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL 236 OF 2019

FRANCIS NJUGUNA KAGUNDA.....1ST APPELLANT

ABDISIAD OSMAN ABDI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. C. M. Njagi, Senior Resident

Magistrate, in the Chief Magistrate's Court JKIA Criminal Case number 33 of 2019

dated 7.11.2019).

JUDGMENT

The two appellants **FRANCIS NJUGUNA KAGUNDA** and **ABDISIAD OSMAN ABDI** were jointly charged before the lower court in the above case with the offence of Trafficking in persons contrary to section 3(1)(d) as read with section 3(5) of the counter-trafficking in Persons Act, 2010. The particulars of the charge read that on 8.3.2019 at Jomo Kenyatta International Airport area within Nairobi County, jointly with others not before the court, they harboured or received 2 Burundian nationals namely 1. **Gretta Nduwimana**, and 2. **Rebecca Nizigiyimana** by means of deception for purposes of exploiting the 2.

The case of the 2 appellants was heard. They were both eventually convicted as charged. On 7.11.2019, each was sentenced to pay a fine of Kshs.30,000,000/= or in default to serve a term of 30 years imprisonment. Both have filed appeals against the conviction and sentence. The 2nd appellant filed criminal appeal No. 233 of 2019 while the 1st appellant filed No. 236 of 2019. The 2 appeals have, however, been heard together in appeal file No. 236 of 2019.

The memorandum of Appeal of the 1st appellant Francis Njuguna Kagunda, lists upto to 9 grounds of appeal as follows:

- 1. THAT** the learned magistrate erred in law in entering Judgement against the appellant in total disregard of the issues of law and fact raised therein.
- 2. THAT** the learned magistrate erred in law and fact by failing to note that the prosecution had not discharged its burden of proof and failed the requirement of ingredients to sustain an offence under section 3(1) as read with section 3(5) of the counter-trafficking in persons Act 2010.
- 3. THAT** the learned magistrate erred in law to rely on the alleged evidence of PW4 to convict the appellant without observing that the same lacked merit.
- 4. THAT** the learned magistrate erred in their findings by upholding the conviction without observing that the prosecution's case was full of discrepancies and inconsistencies in contravention to section 165 of the Evidence Act, Cap 80, Laws of Kenya.
- 5. THAT** the learned magistrate erred in law by convicting without considering that the prosecution case was contradicting and uncollaborative hence section 163(1) of the Evidence Act, Cap 8, was not complied with.
- 6. THAT** the learned magistrate erred both in law and fact by failing to scrutinize and evaluate the evidence on record so as to give a judgment based on fact and law.

7. **THAT** the learned magistrate erred in law and fact as the judgment was against the weight of evidence adduced by the defence which facts were justifiable substantive and overwhelming as provided for it in the law.

8. **THAT** the learned magistrate erred in law and in fact as the conclusions drawn from the facts were perverse in that the findings of fact by the learned magistrate were unreasonable, improper and inadequate in law.

9. **THAT** the learned magistrate erred in law and in fact as the judgment was against the weight of the evidence adduced by the appellant.

The 2nd appellant, on the other hand, raised 4 substantive grounds on the memorandum and grounds of appeal filed. that is:

1. **THAT** the sentence imposed by the trial court is too harsh and excessive.

2. **THAT** the case of the prosecution was not proved to the required standards needed in law.

3. **THAT** the provisions of section 169(1) of the Criminal Procedure Code was not complied with in relation to the sworn defence statements.

4. **THAT** the trial magistrate erred in both law and facts by failing to subject the entire evidence to a thorough and exhaustive examination and as a result arrived at a finding which was manifestly unsafe.

The appellants have urged that their appeals be allowed, convictions quashed and sentences set aside. The state respondent, has on the other hand, opposed this appeal and urged that the same be dismissed.

By agreement of the parties, this appeal was canvassed by way of written submissions which all the parties duly filed.

From the 1st appellant, it was submitted that there was no evidence tendered by the prosecution pointing at the appellant as having harboured or received 2 Burundians, and so the 2 ingredients of the charge were not proved. That since both PW1 and 2 had never seen the appellant before, there is no possibility of receiving them. Further, that it is alleged that the appellant brought Ksh.20,000/= to secure release of the victims but it was not proved that appellant was part and parcel of the human trafficking.

Counsel for the 1st appellant submitted that the prosecution's case was based on circumstantial evidence. He relied on the holding of Sawe Versus Republic (2003)eKLR, that;

“in order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justifies the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the accused.”

And on further clarification of circumstantial evidence, counsel relied on the case of Neema Mwandaro Nduya Versus Republic (2008)KLR in which the Court of Appeal held;

“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in Republic Versus Taylor Weaver Cr. APPRR 20, but circumstantial evidence should be very closely examined before basing a conviction on it.”

While submitting that one Muiruri, a crucial witness, was never called to testify, the appellant challenged the evidence of PW1, PW2 and PW5. In his submissions, the prosecution failed to call the said Muiruri and one Zainab because their evidence would have been that the appellant was sent with the said 20,000/= because he was a taxi driver but one with nothing to do with the crime.

Also, that no evidence was given as to who the registered owner of number xxxx-xxx-xxx was. And no print out of the appellants' phone was availed.

Finally, it was submitted that the appellant gave a strong defence which the court erroneously ignored. That the appellant was a taxi driver well known at JKIA, that Zainab sent the appellant to PW4 with 20,000/= with the appellant having nothing to do with the case, and lastly that the appellant did not even know the victims. It was argued that the conviction of the 1st appellant be quashed and his sentence be set aside.

For the 2nd appellant, Abisaid Osman Ali, it was submitted that the trial magistrate allowed the prosecution witnesses to testify in a language not understood by the accused contrary to section 198(1) of the Criminal Procedure Code and Article 50(2) of the constitution. He relied on Swahibu Simbanni Simiyu & Another Versus Republic (2006)eKLR in which the Court of Appeal allowed an appeal where case was conducted in Kiswahili language that appellants did not understand.

Secondly, 2nd appellant challenged the evidence of the prosecution regarding the date i.e between 8.3.2019 and 7.3.2019, with the effect being that the charge sheet was defective. That there was no nexus between the evidence relating to events of 8.3.2019 and the charge sheet.

Counsel for the 2nd appellant further submitted that the evidence of the prosecution lacked in any corroboration on the issues of whether the appellant kept the victims in a state of slavery, or forced the victims or forced them to forced labour or sexual exploitation.

Further that necessary and crucial witnesses were never called by the prosecution, leading to gross miscarriage of justice. Examples were given of the Safaricom Liaison officer, one PC Yvonne Mulobi, maker of the certificate (Exh-8) and the immigration officers from Busia Border control or consular from Burundi Embassy.

Counsel also challenged the fact that the interpreter was not properly assessed that he indeed understands the foreign language. In the event, it was submitted that the trial was null and void. Lastly, that the appellant gave a cogent defence which the trial court ought to have considered. The court was urged to quash the conviction and set aside the sentence of the appellant.

From the side of the Respondent, it was submitted that the evidence of the prosecution witnesses PW1 and PW2 gave a well corroborated evidence. He relied on Mohamed Asif Versus Republic (2017)eKLR, on the offence of trafficking. 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 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.”

It was therefore submitted that even if the appellants were not the ones who directly trafficked the victims, they knew the traffickers and were in the process of aiding the process to reach completion.

On the issue of language used during the trial, it was submitted that the court duly complied with section 198 of the Criminal Procedure Code and Article 50 of the constitution and conducted the trial in a language that the 2 appellants understood. That the court even sourced for a Umurundi translator and the appellants even did cross examination, confirming that communication was proper.

Counsel also submitted that the sentence meted out was within the law. Otherwise that there is no provision for *voire dire* in a case not involving a minor.

Counsel also responded on the issue of production of a document. He relied on Republic Versus Rono Khalif Ahmed (2015)eKLR in which it was held;

“in my view, section 77 of the Evidence Act does not deal with the issue as to who can produce such a document. The section allows the court to presume the genuineness of the document. The section also states that the court may call for the maker of that statement to be examined on the same. This means that such a document need not be produced by the maker. It also means the court may or may not require the maker of the document to come to court. That does not mean that its value will be the same if the maker fails to come to court to be examined. When the maker comes to court, the evidential value will be much higher as he/she will be subjected to cross-examination of the same.”

Lastly, on the issue of sentence, counsel relied on the case of Bernard Kimani Gacheru Versus Republic (2002)eKLR, that;

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed the sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”

Counsel reiterated the duties of the 1st appellate court as held in the case of Okeno Versus Republic (1972)EA32, that;

“The appellate court (of 1st instance) must itself weigh conflicting evidence and draw its own conclusion. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusion; it must make its own findings and draw its own conclusions..... in doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

It was urged that this appeal be dismissed.

As already seen above, the decision in Okeno Versus Republic (1972)EA, gives this court guidance on the scope and role of the 1st appellate court. It is therefore imperative that this court reconsiders the evidence that was tendered by the parties before the trial court, and to arrive at its own conclusion of the same.

The case of the prosecution started with the evidence of **PW1 Rebecca Nizigiyimana**, a Burundian national, whose evidence was that she came to Kenya on 28.1.2019 having been told she was on transit to Saudi Arabia. That on reaching Kenya, they were taken to a rented house and locked inside. Then a taxi driver came and took them to the airport. She was however arrested at the airport and placed in the cells. That while in the cells, she saw accused 1. She told the police she had not seen him. That the 2nd accused also came to them and told them that he would organize for them to travel out of the country. And that it was the lady from Heart Kenya, who later took them from the cells to a safe

place.

PW2, Rubirizi Mutimbuzi, also a Burundian, testified that she had been with PW1. She testified on how they were locked inside a house only to be later arrested at the airport. She gave the same evidence on how accused's 1 and 2 appeared at the cells and how they were eventually rescued by the lady from Heart Kenya.

The 3rd witness was **C.I David Ngare Njoroge** of DCI, JKIA. His evidence was that on 7.3.2019 at about 7:00pm, police intercepted 2 ladies on suspicion of being trafficked and both were placed in the cells. He confirmed that the 2 ladies were PW1 and PW2 whose passports he obtained and later produced in court as exhibits. That the victims said they did not know the 2 accuseds. PW4, **Corporal Moses Mwenda Ntuana**, also of DCI, JKIA, on his part, gave evidence that on 7.3.2019 at about 1800 hours, she had met 2 young girls carrying hand bags and who said they had no identification. That one of them gave him a piece of paper with phone No. xxxx-xxx-xxx which he called using his No. xxxx-xxx-xxx. That one Muiruri picked the call and referred him to one Njuguna, a taxi operator. Njuguna on the other hand told him that one Zainab was with the girls. That Njuguna, on being interrogated stated that he had been sent by Zainab and he had 20,000/= in cash. On being asked questions, the witness confirmed that accused 1 is a taxi driver and that the 2 ladies did not know accused 1.

And **PW5, Dr. Abraham N. Nkiongo**, an Assistant Superintendent of police, gave evidence that on 7.3.2019, Corporal Muenda told him he had seen 2 ladies he suspected to be victims of trafficking. Also that a man was to come with money to facilitate their travel. That the man, Njuguna, gave out Kshs.20,000/=. That the following day, accused 2 went to the witness for assistance over the girls, saying they were friends of the sister, Zainab. According to him, the girls were victims of human trafficking.

Pw 6, Inspector Joseph Kipchumba Kalum, recalled that he analyzed the 3 phones, OPPO, Infinix and Itel. He gave evidence of the communication he retrieved from the phones. Which he produced in court. And **PW7, C.I. Walter Dandas Marunga** produced the inventory of items recovered from accused 2, and the 2 victims. He confirmed that the tickets recovered from the victims of Saudia Airlines were genuine and booked online in South Africa.

This witness was cross-examined at length. Confirmed that the 2 victims denied that the 2 accused facilitated them from Burundi – Kampala – Nairobi. Neither did the 2 communicate nor house them.

When put to his own defence, accused 1 gave a sworn defence that he is a taxi driver and had differences with Corporal Mwenda who threatened to chase him out of JKIA. That corporal Mwenda referred to a lady who gave him Kshs.20,000/= to take to corporal Mwenda to rebook tickets for travelers who had been left by an airline. That on meeting Corporal Mwenda at the JKIA, he was asked to give the money to the man who had been with Corporal Mwenda. He was then taken to the cells for interrogation. That 2 ladies were brought, both of whom said, they did not know him. According to him, he was then forced to sign a statement. He denied knowing the 2 ladies or about how they reached Nairobi, and that even the examination of his phone did not yield any evidence.

The 2nd appellant also gave a sworn defence. His evidence was that he is a prison officer, and that on 8.3.2019 at about 2:00pm, one Asha Osman Sudi informed him that her girl had been arrested at JKIA. He proceeded to the DCIO, to ask why the 2 Burundi girls were arrested, only for him to be arrested. That he saw the 2 ladies for the first time at JKIA police station, and he had no knowledge of them at all. He challenged the evidence retrieved from his phone on the basis that same showed no details or specifics.

The 2nd appellant, however, confirmed that he knows Idi Aisha as a friend and that the 2 would loan each other cash. Further, that he had gone to JKIA to look into why the girls were arrested and disembarked from the flight.

Both the appellants never called any witnesses. I have carefully considered the evidence on record by both sides in totality.

The appellants faced the charges of Trafficking in persons contrary to section 3(1)(d) as read with section 3(5) of the counter Trafficking in persons Act, 2010. Section 3(1) of the Act states;

“A person commits the offences of trafficking in a person 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 form 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 a person having control over another person.

The above provision sets the parameters under which the prosecution must come in proving their case. The prosecution must in the course of proving the various acts that constitute trafficking in persons, i.e (a) to (f), also prove that the act complained of was for the purpose of exploitation. So, did the prosecution prove this vital element of this offence?

Both PW1 and PW2, Burundian citizen gave evidence on how they were transported from Burundi, through Kampala and to Nairobi. It was

further their evidence that they enroute to Saudi Arabia where they would work as domestic workers. It was further their evidence that they undertook this process voluntarily and without any form of coercion. And that while being housed in Nairobi awaiting processing of their travel documents, they were housed in a good and friendly environment with food, water and other social amenities. Their tickets to Saudi Arabia via Saudia Airlines had been bought on-line by a firm based in South Africa. And whereas the actual persons, who bought them the tickets, or secured the jobs, or transported them all the way to Nairobi, or housed them while in Nairobi, remains unknown, it is on record that these 2 witnesses (PW1 and 2) only saw the 2 appellants while they were at the cells at the JKIA.

1st appellant, a taxi driver at JKIA was apparently arrested and charged after an engagement with PW4 Corporal Moses Mwenda over some Kshs.20,000/=. It is not clear from either the prosecution side or the defence sides what this Kshs.20,000/= was exactly meant for. There is no evidence that 1st appellant was involved in this matter in any other way. Even a forensic audit of his phone did not yield any material evidence of communication with either the 2 witnesses (PW1 and 2) or indeed any of those who had arranged or facilitated their travel to Nairobi.

For the 2nd appellant, he was arrested after he appeared before the DCI, JKIA to inquire on the arrest and detention of PW1 and 2. There is no evidence on record to show that he was ever in communication with the persons responsible for arranging for the jobs in Saudi Arabia or transporting PW1 and 2 to Nairobi, or indeed the persons who housed them in Nairobi. In the evidence of PW1 and PW2, they did not know 2nd appellant, whom they only saw for the 1st time while they were in the police cells. The forensic examination of the phone of the 2nd appellant, revealed communication with one Asha Osman Sudi. However, those pieces of communication never specifically referred to this case.

One more important evidence that shed light in this matter is the evidence of both PW1 and 2, that the only time they felt threatened and in danger was when they were arrested and placed in the cells at the JKIA police station. This in effect removes any element of coercion in their being brought to Nairobi enroute to Saudi Arabia.

The arrest of PW1 and 2 is also a pointer. They were arrested within the precincts of the Airport. While alone without the company of any alleged trafficker. Had this been a case of trafficking, one would expect the 2 witnesses to be accompanied. They would not have been left loose to roam around on their own at the airport.

The sum total is that the prosecution failed to prove any of the elements of trafficking in a person as required under section 3(1) of the act, i.e threat or use of force or form of coercion, fraud, deception, abuse of power or of position of vulnerability, false payments or benefits to obtain content and control over a person, as against the 2 appellants. The element of exploitation of PW1 and PW2 was also not proved.

PW1 and PW2 were honest enough in their evidence that they were on their way to Saudi Arabia for domestic jobs. Without proof of the above elements of trafficking, this court is convinced that the 2 witnesses were on a lawful endeavor to reach Saudi Arabia for employment.

The 2 appellants denied the charges in their respective defences. The trial court ought to have considered the said defences and found in favour of the appellant in view of the evidence of the prosecution which clearly fell short in proving the charges.

The trial court, is relying on Miller versus Minister of pensions (1947)2 AHER 372, (Lord Denning), was otherwise spot on, on the issue of standard of prove required in criminal case, that;

“That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of Justice.

If the evidence is so strong against a man as to leave a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”

In our instant case, as already stated above, I find that the prosecution failed to prove the charge against the 2 appellants to the required standard. The trial court ought in the circumstances to have given the appellants the benefits of doubt as required by the law.

I accordingly therefore find merit in the appeals of the 2 appellants. I allow the appeals No. 236 (consolidating No. 233) of 2019, quash the conviction and set aside the sentences of the appellants. The 2 appellants are ordered to be set free forthwith unless lawfully held. It is so ordered.

D. O. OGEMBO

JUDGE

4.4.2022.

Court:

Judgment read out in court (on-line) in presence of Ms. Kamau for Kariuki Njiri for 1st appellant, Mr. Nyaberi for 2nd appellant, the appellants and Ms. Ntabo for the respondent.

D. O. OGEMBO

JUDGE

4.4.2022.

'O'

FROM: HIGH COURT APPELLATE SIDE

TO: @ G.K. PRISON KAMITI

INFO: PHQ.

4TH APRIL 2022

HCCR APPEAL. NO. 236 OF 2019

HIGH COURT CRIMINAL APPEAL NO. 236 AND 233 OF 2019 ORIGINATING FROM THE CHIEF MAGISTRATE'S COURT AT JKIA CRIMINAL CASE NO. 33 OF 2019. APPELLANT **FRANCIS NJUGUNA KAGUNDA AND ABDISIAD OSMAN ABDI KAM/1863/019/LS** THE TWO APPELLANT ARE ORDERED TO BE SET FREE FORTHWITH UNLESS LAWFULLY HELD. IT IS SO ORDERED.

DEPUTY REGISTRAR