



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL APPEAL NO. 18 OF 2018.

MADUKU MBASHANI.....1ST APPELLANT

KWELA MANYWELE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the Conviction and Sentence in Original Webuye Cr. 65/2018 delivered on 28/1/2018 by Hon. N.N. Barasa – SRM]

JUDGMENT

The appellants Maduku Mbashani (1st appellant) and Kwela Manywele (2nd appellant) were all 2 respectively in the Magistrates Court where they were charged with 2 Counts. **In Count 1;** TRAFFICKING IN PERSONS CONTRARY TO SECTION 3(3)(5) OF COUNTER TRAFFICKING IN PERSON ACT.

In Count 2; BEING UNLAWFULLY PRESENT IN KENYA CONTRARY TO SECTION 53(1) (J) AS READ WITH SECTION 53(2) OF KENYA CITIZENSHIP AND IMMIGRATION NO. 12 OF 2011.

On 29.1.2018 the charges were read to them whether they committed as true; the facts were narrated and they confirmed the facts to be correct, where convicted on own plea of guilty, court was informed they were first offenders and after offering their mitigation the trial court convicted them and sentenced them to serve 40 years imprisonment on Count 1 and 2 years imprisonment on Count 2. The imprisonment term was to run consecutively.

Dissatisfied with the conviction and sentence the appellant filed this appeal on 12 grounds which can be condensed into the following grounds;

1. **THAT** the charge was premised on Provisions of a non existence provision of the act and therefore defective.
2. **THAT** the language of the court was not indicated.
3. **THAT** the plea was equivocal.
4. **THAT** the sentence meted out was excessive.

By consent appeal was to be canvassed by way of written submissions in support of the grounds of appeal. Mr. Anwar for the appellants submitted that the plea was not considered as per the principles laid down in *Adan Vs. Rep 1973 EA 445*, Counsel further submitted *the accused persons were charged in Count 1 with the offence of Trafficking in Persons Contrary to Section 3 (3) (5) of Counter Trafficking in Persons Act. It is our humble submission that Section 3 (3) (5) of the Counter Trafficking in Persons Act does not exist and thus, the accused persons were charged and convicted of a non-existing offence.*

Counsel further submitted that the facts tendered by the prosecution did not support the two counts as there was no proof that the victims were minors, or disabled, or that the appellants were properly identified as the person who committed the offence. Finally Counsel submitted that the court in sentencing the appellant considered extraneous factors in particular that the offence was committed for monetary gain and that consequently the sentence meted out was excessive and harsh in the circumstances and the minimum sentence provided for was not considered.

Mr. Akello for the state opposed the appeal. He submitted that the plea was properly taken, facts read, and admitted and the plea of guilty was therefore unequivocal. He submitted that the charge sheet was not defective as Kenya is signatory to Poland Protocol which under

Article 2(6) is applicable to Kenya.

The first issue in this appeal is whether the appellants were charged with a non-existent provisions of the law. The accused were charged with

1; TRAFFICKING IN PERSONS CONTRARY TO SECTION 3 (3) (5) OF COUNTER TRAFFICKING IN PERSON ACT.

2; BEING UNLAWFULLY PRESENT IN KENYA CONTRARY TO SECTION 53(1) (J) AS READ WITH SECTION 53(2) OF KENYA CITIZENSHIP AND IMMIGRATION NO. 12 OF 2011.

Section 3 (3) and (5) of the Act Provides;

Section 3 (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.*

Section 3 (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.*

I hereby reproduce section 3 of the Act and section 1 define the offence, Section 3 (3) defines other acts which will constitute trafficking and section 3(5) prescribes the penalty. The contention by the appellant is that the mention of sec 3(3)(5) in the charge sheet does not disclose an offence under the Act. I do not see this to be true. Even if I were to find that there was an error in drafting of charge sheet, the error does not charge the substance of charge. I would in addition point out **Section 382** of the **Criminal Procedure Code** which provides:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

To my view if the offences were explained to the accused persons then any defect on the charge sheet is curable under section under Section 382 of the of the CPC.

On interpretation it is clear that the charges were read and explained in English and Kiswahili to the accused persons and participated actively in the court proceeding and responded in the mitigation where accused one mitigated for forgiveness and accused stated they only have those 2 children then they fully understood charges against them.

On the sentence section 3(5) of Counter-Trafficking in Persons provides that;

(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.

Also under the Criminal Procedure Code where an accused person has pleaded guilty he can only appeal against the sentence. The section reads as follows:

“348 No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

The appellants by virtue of the above section are barred from challenging the conviction except that they can challenge the extent and legality of the sentence meted on them by the trial court.

Guided by the said Provision (348 CPC) and the above decision, I note that the appellants were sentenced to 40 years imprisonment and I also note that they are first offenders consequently I reduce the sentence of 40 years imposed to the minimum sentence provided of 30 years imprisonment.

Dated and Delivered at **Bungoma** this **28th** day of **February** 2019.

S.N.RIECHI

JUDGE