



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 117 OF 2018**

**BETWEEN**

**ELI MARUMBU WANYO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence in Criminal Case Number 1048 OF 2018*

*in the Principal Magistrate's Court at Sirisia by Hon. L.N.Kiniale (SRM) on 05.10.18)*

**JUDGMENT**

### **The Trial**

1. On 05<sup>th</sup> October, 2018, the Appellant herein **ELI MARUMBU WANYO** pleaded guilty to a charge of promoting trafficking in persons contrary to section 5(d) of the Counter-Trafficking in Persons Act No. 8 of 2010 (*hereinafter referred to as the Act*) and was sentenced to 20 years' imprisonment.

### **The Appeal**

2. Aggrieved by this decision, the appellant lodged the instant appeal on 03.07.19. From the 5 grounds of appeal Appellant raises one ground that the particulars in the charge sheet did not disclose an offence and also that the sentence is harsh.

3. When the appeal came up for hearing on 07.08.19, Mr. Wekesa for the Appellant chose to wholly rely on the grounds of appeal and written submission filed on 24<sup>th</sup> July, 2019.

4. Mr. Akello, Learned Counsel for the state submitted that the plea was unequivocal and the charge sheet was properly drawn and further that sentence is at the discretion of the trial court.

### **Analysis and determination**

5. This is the first appellate court and as such I am guided by the principles set out in the case **David Njuguna Wairimu V Republic [2010] eKLR** where the Court of Appeal stated:

*“The duty of the first appellate court is to analyse the 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 appellant 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.”*

6. Section 5 of the Act defines trafficking in persons as:

**(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.**

7. Section 5 of the Act defines promotion of trafficking in persons as:

**A person who—**

**(a) knowingly leases, or being the occupier thereof, permits to be used any house, building, or other premises for the purpose of promoting trafficking in persons;**

**(b) publishes, exports or imports, any material for purposes of promoting trafficking in persons; or**

**(c) manages, runs or finances any job recruitment agency for the purposes of promoting trafficking in persons;**

**(d) by any other means promotes trafficking in persons, commits an offence and is liable to imprisonment for a term of not less than twenty years or to a fine of not less than twenty million shillings or to both and upon subsequent conviction, to imprisonment for life.**

8. The Appellant was charged under section 5 (d) of the Act. The particulars of the charge that were read to the Appellant are that:

**On 04.10.18, the Appellant convinced one PWM a child aged 16 years and a pupil at [Particulars Withheld] Primary School to stay away from school and that he would take him to Kiambu to perform casual services.**

9. The key word in the particulars is that the Appellant convinced the victim. There is no evidence that Appellant used threat or force or other forms of coercion, fraud or deception on the victim; abducted the victim, abused his power or of position of the victim; gave payments or benefits to obtain the consent of the victim of; or gave or received payments or benefits to obtain the consent of the victim.

10. From the foregoing, I am persuaded that the prosecution did not meet the threshold of prove beyond any reasonable doubt.

11. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty. It is so ordered.

**DELIVERED AND SIGNED AT BUNGOMA THIS..09<sup>th</sup>...:DAY ON...August...2019**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistant - Brendah**

**Appellant -Present**

**For the Appellant - Mr. Wekesa**

**For the State - Mr. Akello**