



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL 82 OF 2017**

**MUHAMMAD ASIF.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the judgment and sentence of Hon. L. Kassan SPM in Criminal [Case No. 414 of 2016](#) delivered on 1<sup>st</sup> July 2016 at the Senior Principal Magistrate's Court at Mavoko)**

**JUDGMENT**

The Appellant was charged with and convicted of the offence of trafficking of persons contrary to Section 3 (1)(d), as read with section 5 of the Counter Trafficking in Persons Act No. 8 of 2010. The particulars were that on 30<sup>th</sup> May 2016 at upper Kapiti estate in Athi river sub-county within Machakos County, he was willfully and unlawfully found trafficking a total of eleven adults. He was sentenced to serve five (5) years imprisonment or to pay a fine of Kshs 5,000,000/= for the offence.

The Appellant has now preferred this appeal against his conviction and sentence in a Petition and Grounds of Appeal filed in Court on 5<sup>th</sup> August 2016 on the following grounds:

1. The learned trial magistrate erred in law and fact by convicting the Appellant while relying on prosecution's evidence that raised doubt.
2. The learned trial magistrate erred in matters of law by convicting the Appellant while relying on a section of law that did not warrant his conviction.
3. The learned trial Magistrate erred in matters of facts by failing to observe that the Appellant had only sublet to persons whom he had no business with except receiving the agreed rent, and this could not have been misconstrued as trafficking in persons.
4. The learned trial Magistrate erred in law and facts by failing to consider the fact that the Appellant was a business man legally living in Kenya and that the evidence produced by his tenants did not link him with trafficking in persons.
5. The learned trial magistrate erred in law and facts by failing to put into consideration that the Appellant was not conversant with the Kenyan law and was therefore entitled to representation in court.

A.M. Muia & Associates, the Advocates for the Appellant, filed submissions dated 13th April 2017 and it was contended therein that there was no nexus shown between the Appellant and the alleged trafficked

persons, and that from the evidence tendered in the trial Court the alleged trafficked persons and/or prosecution witnesses expressly indicated that the Appellant was not deliberately engaged in the alleged offence and merely accommodated them on commercial terms. As such the Appellant was as much a victim of deception of persons not before the trial Court as the alleged trafficked persons were.

It was thereby submitted that there was failure by the prosecution to prove its case beyond reasonable doubt as it failed in its mandatory duty of presenting before the Lower Court the real mastermind and sole profiteer of the alleged trafficking scheme, and in its desperate attempt to clinch a conviction conveniently arrested the Appellant without obtaining proper and sufficient evidence.

Lastly, it was contended that the Appellant did not benefit from a fair trial as his representation in the lower Court was fraught with challenges firstly, with his Counsel withdrawing from representation, and secondly, with the Appellant being unable to cross examine the Prosecution witnesses without the aid of an understanding the Kenyan legal system.

The Respondent conceded the appeal in written submissions dated 8th June 2017 filed by Rita Rono, the learned Prosecution counsel. She stated therein that the plea of not guilty was entered irregularly and that the record shows that the proceedings on 31st May 2016 when plea was taken were as follows:

"Before-Hon L.P.Kassan

Prosecutor: Torome sc

Court clerk: Ojijo

Interpretation: English/Kiswahili

Accused:

Accused Present

Not true

Ct. Plea of not guilty entered.

Bond Kshs.2,000,000 with the one Kenyan surety. The accused is not a Kenyan.

Hearing 6/6/2016..... .”

Therefore, that from the proceedings, the charge and offence that the Appellant is pleading to was not been recorded contrary to section 207 of Criminal Procedure Code, and that the language the Appellant understood was not indicated hence the plea was not properly taken.

It was also submitted that the Appellant was charged with trafficking of persons, however from the evidence tendered by PW1 it was stated that they were received by one Kashif who was to organize for their travel to Bangladesh, and the Appellant offered the said persons accommodation at a cost of 10 dollars a day. Further, that this evidence was reiterated by PW2 and PW3, who stated that they paid the Appellant 10 dollars a day as they awaited one Kashif who was to help them go to Brazil. Therefore, that the Appellant had rented the house and from the record he was subletting it for commercial purposes to PW1, PW2 and PW3, and his conviction was not safe as the correct person to be charged was Kashif and not Appellant.

I have considered the arguments by the Appellant and Prosecution, and find that the issue for determination by the court is whether the conviction and sentence of the Appellant for the offence of trafficking of persons was lawful and based on sufficient evidence. The offence of trafficking of persons is defined in section 3(1) of the Counter Trafficking in Persons Act which provides as follows:

**“(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.”**

The penalties for the offence of trafficking of persons are created by section 3(5) and (6) of the Counter Trafficking in Persons Act which provide 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.**

**(6) A person who finances, controls, aids or abets the commission of an offence under subsection (1) shall be 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.”**

Section 5 of the Counter Trafficking in Persons, Act No. 8 of 2010 in addition provides for the offence of promotion of trafficking of persons as follows:

**“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.”**

I have perused the record of the trial Court and indeed note that on the day the plea was taken on 31<sup>st</sup> May 2016, the record does not indicate that any charge was read to the Appellant, and what the Appellant was responding to at the time of taking plea. To this extent, there was a defect in the procedure of taking plea before the trial Court which cannot sustain his conviction. I am of the view that this ground is sufficient to dispose of the appeal.

The only issue that remains to be considered is whether the appeal should be allowed in its entirety or a retrial ordered. The principles governing whether or not a retrial should be ordered were enunciated in **Fatehali Manji v Republic [1966] EA 343** by the East Africa Court of Appeal as follows:

**“In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”**

In **Mwangi v Republic [1983] KLR 522** the Court of Appeal also held thus:

**“We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.”**

I am convinced that this is not a proper case for retrial. I have in this regard particularly noted the concession by the Prosecution that no evidence was brought of the offence of trafficking in persons as against the Appellant. In this regard, for a person to be charged under section 3(1)(d) and 5 of the Counter Trafficking in Persons Act no. 8 of 2010, the evidence should indicate that the accused person has:

- (a) recruited, transported, transferred, received, held, concealed, or harboured the victim, or exercised control, direction or influence over the movements of the victim; and
- (b) by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person; and
- (c) done this for the purpose of exploiting the victim or facilitating their exploitation.

Section 2 of the Act defines “exploitation” to ” include but is not limited to—

- (a) keeping a person in a state of slavery;
- (b) subjecting a person to practices similar to slavery;
- (c) involuntary servitude;
- (d) forcible or fraudulent use of any human being for removal of organs or body parts;
- (e) forcible or fraudulent use of any human being to take part in armed conflict;
- (f) forced labour;
- (g) child labour;
- (h) sexual exploitation;
- (i) child marriage;
- (j) forced marriage

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 the 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.

In the present appeal the evidence of PW1, PW2, PW3, PW4 and PW6 was that the Appellant kept eight persons in a rented house, for which each person paid him ten dollars a day for accommodation and food. This evidence points to the act of harbouring persons which is one of the elements of the offence of trafficking in persons. However, there was no evidence adduced as to any other purpose for which the Appellant was harbouring the persons, and the witnesses PW1, PW2 and PW3 clearly indicated that the person who was to transport them to Brazil was one Kashif, and the purpose for which they were going to Brazil was also not shown. There is thus no evidence that demonstrates that the Appellant personally intended to exploit any victims, or that he knowingly facilitated exploitation by another person.

A retrial is therefore inappropriate in the circumstances as it may serve the purpose of addressing the gaps in the prosecution case. I therefore allow the Appellant’s appeal and quash his conviction for the offence of trafficking of persons contrary to Section 3 (1)(d) as read with section 5 of the Counter Trafficking in Persons Act No. 8 of 2010. I also set aside the sentence of five (5) years imprisonment or payment of a fine of Kshs 5,000,000/= imposed upon the Appellant for this conviction, and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

**DATED AND SIGNED AT MACHAKOS THIS 26<sup>TH</sup> DAY OF JULY 2017.**

**P. NYAMWEYA**

**JUDGE**