



REPUBLIC OF KENYA



KENYA LAW
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**Cheye v Republic (Criminal Appeal E049 of 2022)
[2025] KEHC 1773 (KLR) (Crim) (24 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL E049 OF 2022**

**CJ KENDAGOR, J
FEBRUARY 24, 2025**

BETWEEN

KWANDU CHEYE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against conviction and sentence in Chief Magistrates Courts Milimani
Cr. Case No. 1483 of 2018 delivered on 12th February, 2021 by Hon. H. Onkwani (PM.)*

JUDGMENT

1. The Appellant was charged in Count I with the offence of Trafficking in Persons contrary to Section 3 (1)(e) as read with Section 3 (5) of the Counter Trafficking in Persons [Act No. 8 of 2010](#). The particulars of the offence are that the Appellant on the diverse dates between the month of May, 2018 and August, 2018 transported M.M alias J., a disabled child about 7 years from Baliati in Tanzania to Eastleigh Section three in Kenya for the purpose of exploitation in abuse of vulnerability.
2. She faced Count II; with the offence of Trafficking in Person contrary to Section 3 (3) as read with Section 3(5) of the Counter Trafficking in Persons [Act No. 8 of 2010](#), which particulars of the offence are that on the diverse dates between the month of May, 2018 and August, 2018 transported M.M. alias J., a disabled child about 7 years from Baliati in Tanzania to Eastleigh Section three in Kenya for the purpose of child labour.
3. Under Count III, she was charged with the offence of being unlawfully present in Kenya contrary to Section 53 (1) (j) as read with Section 53 (2) of the Kenyan Citizenship and Immigration [Act, no 12 of 2011](#), particulars of which are that on the 9th August, 2018 at Shauri Moyo Police Station in Kamukunji Sub-county within Nairobi area, being a Tanzanian citizen she was found being unlawfully present



in Kenya in that she did not have a valid pass or Visa in contravention of the [Kenya Citizenship and Immigration Act](#).

4. At the close of the prosecution's case, the trial Court ruled that the Appellants had a case to answer, and were thereby put in her defence. The Trial Court recorded compliance with Section 211 of the [Criminal Procedure Code](#), and the Appellant opted to give an unsworn testimony.
5. The Appellant was convicted and sentenced under Count I and Count II to pay a fine of Kshs.30 million and, in default, serve 30 years imprisonment on each Count, to run concurrently.
6. After feeling aggrieved by the conviction and sentence, she lodged the present appeal on the grounds that she is deeply sorry, remorseful, and regretful about everything that occurred. The sentence imposed by the trial was harsh and excessive, given that she is 47 years old and in ill health and is thus deserving of a second chance.
7. The appeal was canvassed by way of written submissions.

Written submissions

8. From the outset, the Appellant contended that she does not contest the conviction but rather the sentence. She argues that the sentence imposed by the trial Court was harsh and excessive, given the circumstances. She criticised the learned magistrate for imposing a disproportionate sentence, contrary to Section 4 (1) of the [Counter-Trafficking in Persons Act](#), which stipulates that a person convicted of trafficking in persons is liable, upon conviction, to a term of not less than fifteen years.
9. She argued that pursuant to Article 50 (2) (p) of [the Constitution](#) Of Kenya, 2010, she is entitled to the least severe of the prescribed punishment. Further that the courts are enjoined to promote reconciliation under Section 176 of the [Criminal Procedure Code](#).
10. The Respondent, at the time of making this determination, had not yet filed its submissions.

Determination

11. It is the duty of the first Appellate Court to carefully examine and analyze afresh the evidence presented from the trial court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. (See *Pandya v Republic* [1957] EA 336).
12. It is not lost to me that the Appellant, in her submissions, concedes that she does not contest her conviction. Nevertheless, this being a first appeal, the Court must reevaluate the evidence and make its own findings, as was stated in *Okenov. R.* [1972] E.A. 32.

Whether the prosecution established its case against the appellant beyond reasonable doubt?

13. The offence of trafficking of persons is defined under Section 3(1) (e) of the Counter Trafficking in Persons Act which provides as follows:
 - a. “(1) A person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbors or receives another person for the purpose of exploitation by means of—
 - b. ...
 - c. (e) abuse of power or of position of vulnerability”



14. Section 3 (3) of the Act provides that;
 - a. “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.”
15. The penalties for the offence of trafficking of persons are created by Section 3(5) 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.”
16. From the prosecution’s witnesses, PW1; Tabitha Imani, an officer at the Office of the Women’s Representative, dealing with youth and children affairs, testified that she got word of the minor, through the county’s women representative after watching a shared video in a tweet. She followed up the matter and was directed to Eastleigh Section 3, by the person who shared the video. The recovered the boy child, who was missing a limb begging on the streets using a ‘pink cup’ filled with kshs.450/=.
17. The minor guided them to their residence in Shauri Moyo. The incident was reported to the Children’s Office in Gikomba and the Shauri Moyo Police Station. She later discovered the Appellant in the house and directed her to the police.
18. PW2, Corporal Elizabeth Wambui, testified that she visited the Shauri Moyo single-room house and recovered the minor’s clothes. The Appellant alleged that the minor was her child, but she could not provide any documentation to that effect.
19. PW3, Pamela Khaunda, a government analyst, produced the DNA report of the maternity test between the Appellant and the subject minor. The results were negative, meaning the Appellant is not the minor’s biological mother.
20. In her defence, the Appellant conceded that she indeed entered the country and used the minor to look for money in an alleged move to safeguard the livelihoods of her other children in Tanzania.
21. From the foregoing, considering the prosecution’s evidence against the Appellant’s defence, I see no reason to disagree with the trial magistrate’s findings. The prosecution established their case beyond a reasonable doubt.

Whether the sentencing was grossly harsh and excessive?/

22. It is trite that although sentencing is at the discretion of the trial Court, that discretion must be exercised judiciously in accordance with the law taking into account the facts and circumstances of each case.
23. The severity of the offence herein cannot be downplayed. Clearly, this was not noted by the legislature whose hand birthed the offences and their sentences thereof under the Counter Trafficking in Persons Act. In this instance, it is established in evidence the Appellant ferried a physically challenged minor, whom she has no biological relations with, from Baliati in Tanzania to Eastleigh section three in Kenya for the purpose of exploitation, to wit, he was placed in the streets, to beg for money.
24. Although sentences are intended, inter alia, to punish an offender for wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens.



25. I am guided by the strict principles guiding interference on sentences by appellate Courts as recently considered by the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) which noted that minimum sentences unlike mandatory sentences set the floor rather than the ceiling when it comes to sentences. Simply put, the statute prescribes the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In so stating the learned judges held as follows;
- a. “We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.
26. Guided by the above decision, I have weighed the same against the sentence imposed on the Appellant, the mitigation sentiments raised, and the Appellant’s ‘offender management report’ by the Kenya Prison’s Service. In my view, the sentence is inherently sound, commensurate to the offence, and guided by statute under Section 3 (5) of the Counter Trafficking in Persons Act, which provides the minimum sentence for the offence. And, as per the Supreme Court decision above, this court cannot alter or strike down the said statutorily provided sentence arbitrarily, whimsically or out of benevolence but adjudicate based on the provisions of law unless in the special circumstances of a declaration of its unconstitutionality.
27. For the above reasons, I find and hold that the prosecution proved its case against the Appellant beyond reasonable doubt. Accordingly, I uphold the conviction and sentence of the trial Court. Consequently, the appeal is hereby dismissed in its entirety.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 24TH DAY OF FEBRUARY 2025.

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C. KENDAGOR
JUDGE

In the presence of:
Appellant – present
Mr. Omondi for the Respondent

