



REPUBLIC OF KENYA



KENYA LAW
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**Omanyala v Republic (Criminal Appeal E001 of 2022)
[2024] KEHC 1353 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E001 OF 2022
WM MUSYOKA, J
FEBRUARY 16, 2024**

BETWEEN

FRANCIS OMANYALA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. Mrs. Lucy Ambasi, Chief Magistrate, CM, in Busia CMCCRC No. E065 of 2021, of 29th December 2021)

JUDGMENT

1. The appellant, Francis Omanyala, had been charged before the primary court, of the offence of trafficking in a person, contrary to section 3(1) of the *Counter-Trafficking in Persons Act*, Cap 61, Laws of Kenya. The particulars of the charge were that on 29th December 2020, at [particulars withheld] in Teso North Sub-County, within Busia County, he transported DE, from Moding to Chemasir, by means of deception, for the purpose of exploiting the said DE. He denied the charges on 11th January 2021, and a trial was conducted, where 4 witnesses testified.
2. PW1, AAO, was the mother of the victim. She stated that the victim was mentally challenged. She was stated that the appellant was in a group of pastors who had visited the area, for the purpose of performing burial rites, and that the appellant thereafter took the victim with him. She said that she travelled to Chemasir, where she met the appellant, and he admitted he was with the victim, and that he had put him on a bicycle taxi to take him home, and although he had promised to show her the particular bicycle taxi used, he never did. PW2, Alice Wafula, was among the persons who were present at the funeral, and she said she saw the appellant take the victim, and left with him. PW3, JE, was an uncle of the victim, and was at the funeral. He saw the appellant come to his house with the victim, and asked victim to kneel so that he could pray for him, after which he left with him. PW4, No. [particulars withheld] Police Corporal Alloyce Obuba, investigated the case.



3. The appellant was put on his defence, vide a ruling that was delivered on 16th November 2021. He made an unsworn statement, on 17th November 2021. He denied the charges.
4. In its judgment, delivered on 29th December 2021, the trial court found the appellant guilty, on the basis that all the elements of the offence had been positively proved. He was sentenced, the same day, to a fine of Kshs. 30,000,000.00, or 30 years in prison in default.
5. The appellant was aggrieved, and brought the instant appeal, arguing that the proceedings were shoddy; the mental status of the victim was not considered; his alibi defence was ignored; and the prosecution did not call all the necessary witnesses.
6. Directions were given on 10th November 2023, for canvassing of the appeal by way of written submissions. Both sides have filed written submissions, which I have read through, and taken note of the arguments made.
7. The elements or ingredients of the offence charged were discussed in the following terms, in *Muhammad Asif v Republic* [2017] eKLR (Nyamweya, J):

“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.”

8. The elements of recruitment, transportation, transferring, harbouring or receiving of the victim, must be shown to be for the purpose of exploitation. In *Muhammad Asif v Republic* [2017] eKLR (Nyamweya, J), the court found that although there was proof of harbouring, there was no proof of exploitation. It was found and held as follows:

“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.”

9. In *Alibhai v Republic* [2022] KEHC 15411 (KLR)(Ong’ino, J), the court found and held that there was recruitment and transportation, but there was no proof of exploitation. It was held:

“From evidence provided the Appellant did recruit the 12 Nepalese ladies who connected with him directly or through a friend and facilitated their transportation to Kenya by paying their air fare. However, elements of exploitation as provided under section 2 of the *Counter Trafficking in Persons* Act No. 8 of 2010 were not proved to the required standard as the 12 Nepalese girls were neither forced into labor; sexually exploited, forced into marriage;



subjected to slavery or kept in a state of slavery or involuntary servitude or exploited in others ways as listed in the provision.”

10. The other element of the offence is deception, so that the recruitment, transportation, transferring, harbouring or receiving of the victim must be founded or based on deception. It was held in *Alibhai v Republic* [2022] KEHC 15411 (KLR)(Ong’ino, J), that :

“ 124. I also find that the Nepalese ladies were not deceived. According to “<https://www.law.cornell.edu/wex/deception>” deception is defined as “knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.”

125. From the evidence on record there is no indication that the 12 Nepalese ladies were deceived into coming to Kenya. They all knew the kind of work they would be engaging in and upon arrival that is the exact nature of work they engaged in. The element of exploitation alluded to by the trial Court at paragraph 102 of the judgment to the effect that the Appellant used means of deception by sending one month’s salary in advance to facilitate travels and taking advantage of financial vulnerability for purposes of exploitation is not in evidence and the Appellant was not charged with the offence under section 3(1)(e). The Prosecution failed to prove the element of deception to the required standard.”

11. Where the relevant elements or the ingredients of the offence are not proved, then the charge cannot hold. In *Benard Onyandi v Republic* [2018] eKLR (Riechi, J), the court said:

“ The above ingredients of the offence were not covered in the facts tendered before the trial court. The facts only lead to the fact that appellant asked the complainant to accompany him to his home on pretext that he will take her to Nairobi to work as a house-help. No evidence adduced as to who was the potential employer, the transportation from her home or the nature of exploitation the appellant was going to subject the complainant to. This is crucial to sustain a charge of trafficking. Perusing the facts, I am not satisfied that they contain all the ingredients of the offence for appellant to be convicted. There being insufficient evidence to support the charge, I am inclined and do find that the facts are narrated by the prosecutor did not support the charge of trafficking in person, the offence appellant was charged with.”

12. The charge herein alleged transportation of the victim, through deception, for the purpose of exploitation. From the material presented there is little evidence that the appellant ever transported the victim. They were allegedly seen together at Moding. The allegation was that they travelled to Chemasir, however, PW1, who alleged to have had travelled to Chemasir did not see the appellant and the victim together there. It cannot, therefore, be said that the appellant had transported the victim to Chemasir, for none of the witnesses saw them travel together to Chemasir, neither did they talk of seeing the 2 together there. On deception, no evidence was led showing that the appellant deceived the victim in anyway. No evidence was adduced on the form or nature of the deception deployed by the appellant. No one testified to having been privy to any communication or conversation between the appellant and the victim, from which it could be deduced that there was deception. On the exploitation, no evidence was led that the appellant personally exploited the victim in anyway, nor



that he facilitated any form of exploitation of the victim by others. No evidence was led as to where the victim ended up, and what he was doing at the destination, to warrant a conclusion that he was under exploitation, and that he had been transported to that destination for that purpose. So, overall, the offence of trafficking in a person was not established, and the appellant ought not have been convicted.

13. In view of the above, it is my finding and holding that the appeal herein has merit. I allow it, with the consequence that the conviction of the appellant is hereby quashed. The sentence imposed on him is hereby set aside. He shall be set free, from prison custody, unless he is otherwise lawfully held. It is so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 16TH DAY OF FEBRUARY 2024

W MUSYOKA

JUDGE

—
Mr. Arthur Etyang, Court Assistant.

Mr. Francis Omanyala, the appellant, in person.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

