



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NOS. 30 & 31 OF 2020

IDAHA NZISA KIKUBI.....1ST APPELLANT

SHARON MWIKALI MBITHI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence Hon. E.W Waweru (SRM) in Criminal case No. 241 of 2019 in the SRM'S court at Kithimani,

judgement dated 28th May 2020)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

IDAHA NZISA KIKUBI.....1ST ACCUSED

SHARON MWIKALI MBITHI.....2ND ACCUSED

JUDGEMENT

1. The appellants herein, **Idah Nzisa Kikubi** (the 1st Appellant) and **Sharon Mwikali Mbithi** (the 2nd Appellant) were charged before the Senior Resident Magistrate's Court, Kithimani, with the offence of Trafficking of Persons Contrary to Section 3(1)(b) as read with Section 3(6) of the **Counter Trafficking in Persons Act**, Cap 61 Laws of Kenya, the particulars being that on the 4th February, 2019, Mavoloni Location, within Machakos County, they fraudulently and unlawfully transferred **AN**, a girl aged 5 years from [Particulars Withheld] Village to unknown destination. In the second Count they faced the offence of Trafficking of Persons Contrary to Section 3(1)(b) as read with Section 3(6) of the **Counter Trafficking in Persons Act**, Cap 61 Laws of Kenya, the particulars being that on the 4th February, 2019, Mavoloni Location, within Machakos County, they fraudulently and unlawfully transferred **AN**, a girl aged 5 years from [Particulars Withheld] Village to unknown destination.

2. In support of its case the prosecution called seven witnesses.

3. The prosecution's case was that on 4th February, 2019 at 7am, **PW1, CNM**, escorted her 5 year old daughter, **PW4**, the Complainant herein, to [particulars Withheld] Academy Mavoloni and apparently left her with her colleagues on the way and returned back home. However, **PW4** was not in school at 5pm when **PW1** went to pick her at School. It was revealed to **PW1** by the teacher that **PW4** had not reported at school. However, **PW6**, a student at the school informed them that while walking with **PW4** to school, the 1st appellant, a neighbour to **PW1**, person grabbed **PW4**'s bag and said that she would escort **PW4** to school and **PW6** left the 1st Appellant with **PW4**.

4. The 1st appellant was ten arrested based on the said information and upon interrogation, the 1st appellants revealed that she had **PW4** who had been taken by her sister. **PW1** then reported the matter to Yatta Police Station and Kambi Mawe Police Post. According to **PW1**, there

was no grudge between her and the 1st appellant and that it was normal for the 1st appellant to meet PW4 on the road and to escort her to school. The daughter would report to PW1 in the evening.

5. While she knew the 1st appellant as a neighbour, PW1 did not know the 2nd Appellant.

6. PW6, **ENM**, a young boy aged 12 years and a student in class 5 at [Particulars Withheld] Academy was subjected to *voir dire* examination but was found not to appreciate testifying on oath. Accordingly, it was directed that he gives unsworn evidence. According to him, on 4th February, 2019 in the company of his cousin, E, they were on their way to school. Ahead of them was PW4 who, as was normal, was walking with the 1st Appellant. Upon catching up with PW4 and the 1st Appellant, PW6, who used to walk with PW4, picked PW4's bag and carried it on his shoulder together with E's and got hold of PW4's hand and started walking with her. The 1st Appellant however told him to give PW4's bag to PW4 and leave her hand which he did. After that PW6 and E went ahead fast leaving the 1st Appellant and PW6 behind with the 1st Appellant making calls. PW6 did not know the whereabouts of the 1st Appellant and PW6 after that. According to PW6, whereas the 1st Appellant and PW4 were neighbours and he was friendly to the 1st Appellant, the 2nd Appellant was not known to PW6. It was his evidence that the family of the 1st Appellant used to assist his family and that they used to attend the same church. At the time they passed the 1st Appellant and PW4, he stated that the 1st Appellant was not holding PW4's hand. By the time he left the 1st Appellant and PW4, they were standing at Hellen's fence on the road though by the time he took PW4's bag, he was on the road outside Peter Mwikulu's home.

7. After *voir dire* examination, PW4, the Complainant, **AN**, was found by the Court to appreciate the meaning of oath by telling the truth although not oriented with the place hence court ordered that she give sworn evidence. According to PW4, she was on her way to school after being escorted by her mother, PW1, when she met the 1st Appellant on the road. It was her evidence that she knew the 1st Appellant whose home was far from their home. However, the 1st Appellant left her with the 2nd Appellant, who prior to that day was not known to her. Together with the 2nd Appellant, they boarded a motor cycle to go to Kathine, the 2nd Appellant's home, a place she had not been to before. According to her, the 2nd Appellant informed her that she was taking her to Nairobi. In Nairobi, they stayed with the 2nd Appellant who threw away her uniform and replaced them with other clothing and gave her food. According to her, the 2nd Appellant is called aunty. PW4 stated that she used motor vehicle to get back home after the 2nd Appellant put her alone in the motor vehicle. She confirmed that she was picked up by PW5 on her return. PW4 admitted that she used to go to school with Alba but on 4th February, 2019 she did not go to school with Alba but was with the 1st Appellant.

8. On 4th February, 2019, PW2, **Joseph Mutinda Muathe**, a *bodaboda* rider had dropped his children to school at 7.30 am when he found the 1st Appellant at the school gate. The 1st Appellant boarded his motor cycle and informed him that she was going to meet the 2nd Appellant who was going to Soya Main in Ngoliba. According to PW2, they met the 2nd Appellant, who was known to him and who was wearing a *buibui*, with a child. The 2nd Appellant boarded his motor cycle together with the child while 1st and 2nd Appellants bid each other bye and promised to call each other. Upon arriving at Ngoliba stage the 2nd Appellant informed PW2 that she had no money and promised to send PW2 Kshs.250 which she did via mobile number 0706***** after PW2 gave her his number.

9. When he was arrested, he found the 1st Appellant at Kofi-Mavoloni police post and the 1st Appellant asked him why he was summoned yet he had given him a customer. According to PW2, he did not know both the Appellants before neither did he have any grudge against them. According to him, he did not know if the 1st Appellant had a child. He admitted that he only carried the 2nd Appellant as a customer and he could not know all the customers since he was ferrying many passengers in a day. Because the 2nd Appellant was putting on a *buibui* he stated that he was unable to recognise her.

10. PW3, **MMM**, was on 4th February, 2019 at about 10pm, on his way to Nairobi when he was called by his wife, **NNM**, who informed him that though PW4 had gone to school in the morning, she had not returned and was being searched for. By 4am, he was informed that PW4 had not been found. As a result, he returned back to Mavoloni and was informed that the report of PW4's disappearance had been made at the nearby AP Post where he was informed that PW4 had not been found.

11. According to PW3, his said wife told him that another child, **ZK** who was learning with PW4 and who was in the same school as his daughter and who used to spend time with the said daughter, had not gone to school with her. PW3 was informed that as Z's mother was on her way back from school having taken Z to school when she met with the 1st Appellant. Upon being informed that PW4's father had returned home, he collected them and together with PW1, they went to Yatta Police Station.

12. After the 1st Appellant's arrest, her mother was also taken to the Station and the 1st Appellant disclosed that PW2 had carried them as a result of which PW2 was arrested. They left the 1st Appellant, her mother and PW2 locked in the cell.

13. According to PW3, though both the Appellants were his neighbours, he only knew the 1st Appellant who was also known to his children but there was no grudge between them.

14. In answer to questions put to him in cross-examination, PW3 stated that the 1st Appellant, while at Kambi Mawe Station, he spoke to the 1st Appellant through the window and the 1st Appellant informed him that she had taken the child to her sister but she did not know where her sister lived. However, as he was planning to go to Nairobi, the 1st Appellant's sister called him and handed over the child. He however admitted that when the 2nd Appellant was taken to Villa police station where she found him, the 2nd Appellant did not have the child then. It was however his evidence that the 2nd Appellant had called him in the morning and told him that she had the child in Mombasa and that PW3 should wait for the child in Syokimau as the child had been put in a motor vehicle at country bus heading home after which PW3 gave the driver, who had called him on his phone, PW5's mobile number to pick the child at Ngoliba and the child was received at Ngoliba. It was his evidence that it was the 2nd Appellant who told him that she had given the driver PW3 mobile number to call. He disclosed that the 2nd

Appellant was brought by her brother and police officers from Villa under arrest. It was PW3's evidence that the 2nd Appellant must have lied on phone that she was in Mombasa since on the same day she was taken to Villa police station.

15. According to PW5, **BNM**, on 7th February, 2019, his cousin, PW3 called him and informed him that the woman who went with the child had said that she had put the child in a motor vehicle. He then proceeded to Ngoliba where he waited for one hour and a conductor of motor vehicle registration number KCR of Mutethya Sacco alighted and asked him if he was the one who had been sent to pick the child. He then took the child home to her mother. According to him, PW3 is a cousin to the child's father. He however knew both the Appellants who were from his village and were neighbours.

16. According to PW7, **Sergeant Grace Mureithi**, on 5th February, 2019 at around 1.30 pm a report of a missing child was made at Yatta Police station where she was attached to the Crime Office branch and that some suspects had been arrested. PW7 was then sent by the OCS to collect 3 suspects namely the 1st and 2nd Appellants and PW2 whom she escorted to Yatta Police station and thereafter commenced investigations. The investigations revealed that mobile number 0706***** through which PW2 was paid bore the name of **Sharon Mwikali**. With the help of PW2 and DCI Yatta they managed to track the mobile number of **Sharon Mwikali** whereby the data showed that the 2nd Appellant was at Imara Daima in Nairobi. On 7th February, 2019 they proceeded to Nairobi in the company of **Pastor Wambua** who was 2nd Appellant's brother who took them to where 2nd Appellant had rented a house and she was arrested and taken back to Villa Police post. While at the post they received a phone call from PW5 informing them that he had received the child. As a result, both the Appellants were charged with the offence of trafficking of the child. PW7 was however, unable to establish the reason why they were trafficking even after taking their mobile phones to DCI.

17. According to her, the number used by 2nd Appellant to send money to PW2 via Mpesa had been used to call Michael PW3 and it was the 2nd Appellant who gave PW3's mobile number to the conductor.

18. At the close of the prosecution's case, the Appellants were placed on their defence and they opted to give sworn testimony.

19. DW1, **Idah Nzisa Kikubi**, testified that on 4th February, 2019 she was from the river in Kambi Mawe when at Francis Wambua shop, the complainant's family members got hold of her and asked her the whereabouts of the complainant. **Florence Mwinzi**, her neighbour took her mobile phone, airtime and Kshs.500 and the phone was given to the police officers at Kambi ya Mawe. At the chief's office, Mama Faith who is PW3's wife asked her about the 2nd Appellant, her sister who lived in Nairobi, and she told them that she had seen the child on 25th. While at the police station she told the complainant's family members that she was not aware whether the 2nd Appellant had gone to the place the 1st Appellant was married as that could only be explained by the 1st Appellant's mother since the 1st Appellant had slept at her mother's home. Upon the arrest of the 1st Appellant's mother, she said that the 2nd Appellant had gone home on Sunday and the 2nd Appellant was arrested and taken at the police station on 6th February, 2019.

20. It was her evidence that the 2nd Appellant was in Nairobi when the child got lost and she did not see her. Though she had heard about the loss of the child, she denied that she was involved in it. According to her, she was forced to record her statement and was assaulted and that the said statement which was recorded by the police was recorded in the absence of any of her family members. According to her, she was going to her place of work at a hotel in Kambi Mawe when she saw PW6 holding the hand of another small child, aged about 5 years, while running and told PW6 to stop. She could not tell if the child was a boy or girl. According to her, she was assisting the child when she told PW6 to stop running with a small child and PW6 left.

21. At that moment her sister **Rose** who was in Nairobi called to ask if she could assist her to raise her two children since her sister had separated with the husband. According to her, she left the child behind while talking on phone. According to the 1st Appellant, the 2nd Appellant, who is her sister is **Caroline Mumbua Mbithi** and not **Sharon Mwikali**. The latter were the names given to her by her mother but the 2nd Appellant applied for national identity card using the names **Caroline Mumbua Mbithi**. The 1st Appellant denied having spoken to or seen the 2nd Appellant that day. She insisted that other information was added to her statement. In his evidence though her phone was investigated there was no connection found between her and the 2nd Appellant and she did not know if the 2nd Appellant was at home.

22. She however admitted that she knew PW2 and had seen him at Kambi ya Mawe that morning. According to her, the 2nd Appellant sent her child to her son **Boniface Matu** to take her to go get a birth certificate for another of the 2nd Appellant's child called Michelle and the 1st Appellant sent PW2 to go carry the 2nd Appellant as a customer who was opposite the church at Kanani village. She however did not know what transpired but thereafter she was with the 2nd Appellant in Kanani village.

23. The 2nd Appellant, **Caroline Mumbua Mbithi**, testified that was arrested on 7th February, 2019 after coming from work at 4.30 pm as a waiter at Lukenya Kitchen hotel in South B while at her home. According to her, the police officers were accompanied by her brother who informed her that she was required at Villa police station. According to her, she was beaten and taken to the Villa police station and later taken to Kithimani police station whereby she was told that she had stolen and charged in court. According to her, she did not commit the offence.

24. It was her evidence that on 28th December, 2018 she went to see her child since she cannot take care of her in Nairobi and that she was not at home when PW4 was stolen. She denied that she was Sharon and asserted that the charges had been fabricated against her. She exhibited her National Identity card as part of her evidence.

25. In her judgement, the learned trial magistrate found that the ingredients of the offence in question had been proved. She proceeded to convict both the appellants and sentenced them to serve 10 years imprisonment.

26. In this appeal, it is submitted by the Appellants that the charge sheet is incurably defective for not disclosing and specifying the *actus*

reus and *mens rea*. Further, the particulars of the charge sheet did not accord with the evidence adduced at the trial hence the trial court erred in convicting and sentencing the Appellants based on such a charge sheet. According to the Appellants, it is the duty of the trial court to ensure that the charge is drafted correctly in all aspects as held in the case of **Jackson Mwangi Kariuki vs. Republic [2016] eKLR**.

27. According to the Appellants, the offence of trafficking of person has two *actus reus* elements namely the act of constituting the offence and the means by which it was actuated with an accompanying *mens rea* component of intention to subject the victim to exploitation. It is submitted that whereas it was stated that the act of transfer was actuated by means of fraud, no evidence was tendered in court to establish fraud. The magistrate instead reverted to the conduct of abduction when the accused had been charged with the conduct of fraud hence the learned magistrate did not have any option under Section 214 of the **Criminal Procedure Code** but was bound by the charge sheet. Reliance is placed on the case of **Prosper Alois John vs. Republic [2016] eKLR** which cited **State of Uganda vs. Wagara [1964] EA** on the proposition that in the absence of any amendment the prosecution is bound by the particulars in the charge. Further reliance is placed on the case of **Jason Akumu Yongo vs. Republic [19983] eKLR** that the charge sheet was defective within the meaning of Section 214.

28. It was submitted, based on the case of **Duncan Mwai Gichuhi vs Republic [2015] eKLR**, that it is also incumbent upon the Prosecution to prove the mental element referred to as *mens rea*. According to the Appellants, the charge sheet did not state what statutory form of exploitation the victim was intended to be subjected to hence *mens rea* was not established in the offence of trafficking.

29. Further, no evidence was led to prove that the child was treated in any manner to amount to exploitation. According to the Appellants, exploitation is the most important element of a charge of trafficking in person that must be proved beyond reasonable doubt. It was submitted that the learned magistrate reverted to constructive/implied slavery but no evidence was adduced to prove slavery. Based on the definitions in the **Black's Law Dictionary** and **Learners Oxford Advanced Dictionary**, it was submitted that *slave* denotes *ownership, lowering of human dignity to the status of property, a mere chattel that can be purchased or sold away*. According to the Appellants, no evidence was adduced to show the victim had been sold away as a chattel or that she had been treated in a manner comparable to slavery and the case of **Doris Kemunto vs. Republic [2019] eKLR** where the child never came back was distinguished. It was contended that there was no evidence that the perpetrator intended to permanently deprive the child her parental care. It was argued that the holding in **Doris** case was *per incuriam* because it puts the cart before the horse hence not binding to this court. In this case, it was argued, the act of exploitation as defined under Section 2 of the Act was not proved against the accused persons hence the charge sheet is fatally defective since exploitation is the mischief in the Act. The question of whether there were threats, abduction, fraud, deception becomes irrelevant.

30. According to the Appellants, no service provider data was produced in court as required under Section 65(8) of the **Evidence Act** to prove the critical communication with the missing child parents to facilitate the return of the child. According to the Appellant the failure to produce the data impugns against positive identification of the Appellants particularly as PW2 could not identify the woman who was wearing Buibui or the missing child and reliance was placed on the case of **Alex Ngoko vs. Republic [2015] eKLR**. Appellants also cited the case of **Bernard Onyandi vs. Republic [2018] eKLR** in regard to elements of trafficking in persons. According to the Appellants the charge sheet did not disclose what conduct constituted the *actus reus* of the offence charged.

31. It was further submitted that vital prosecution witnesses being the driver and conductor were not called to testify and the appellants relied on the case of **Juma Ngodia vs. Republic (1982-88) KAR**.

32. On the severity of the sentence it was submitted that 10 years imprisonment sentence is harsh and inappropriate on the face of their mitigating statements.

33. On behalf of the Respondent, it was submitted by **Mr Ngetich**, Learned Prosecution Counsel, that the charge sheet complied with Section 137 of the **Criminal Procedure Code** hence not open to objection in respect of its form or contents. While Section 134 of the same Act spells out what constitute a good charge, it was submitted that a charge may be deemed as defective if it has not stated and explained to an accused clearly and unambiguously and the Respondents relied on the case of **BND vs Republic [2017] eKLR**. It was submitted that the facts of the charge were very clear that the Appellants unlawfully transferred the child from Utithini to an unknown destination. In the Respondent's submissions, the offence of trafficking was committed by the Appellants through abduction which is an unlawful act. According to the Respondent, the Appellants understood the charges they were facing.

34. In the Respondent's view, the charge sheet disclosed the offence of trafficking of persons contrary to Section 3(1) (b) as read with Section 3 (6) of the **Control of Trafficking in Persons Act** Cap 61 since the meaning of exploitation under Section 2 of the Act is not limited to the meaning listed under the Act and may have other meanings as long as they fit the definition of exploitation and reliance was placed on the case of **Doris Kemunto vs Republic [2019] eKLR**. According to the Respondent, the charge sheet was not defective where the charges were read from the charge sheet and the Appellants pleaded not guilty to the same.

35. As regards the Appellants contention that there was a failure to produce service provider data hence the Appellants were not positively identified, it was the Respondent's position that PW6 and PW2 positively identified the Appellants. The 1st Appellant was known by the complainant as well as complainant's parents and PW6. The 2nd Appellant stayed with the complainant in Nairobi so was well known by the complainant. According to the Respondent, though desirable, the mobile phone data would have added little value to the identification of the Appellants.

36. As regards the failure to call the driver and conductor the Respondent cited Section 143 of the **Evidence Act** where it is provided that no particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any facts. Further reliance was placed on the case of **Bukenya & Others vs Uganda [1972] EA** and it was submitted that it is not necessary to call all people who know something about the case. In this case, it was submitted, the evidence that was to be adduced by the driver and conductor was adduced by PW5 who communicated with the 2nd Appellant which evidence was corroborated by PW7. Based on the cases of **Mwangi vs Republic [1984] KLR** and **Keter vs Republic [2007] 1 EA** it was submitted that the failure to call a witness will only be fatal when the evidence presented by the prosecution is insufficient to sustain a conviction and contain gaps that could have been filled up by the unavailable witness. In this case it was the Respondent's view that the prosecution's evidence from the complainant, uncle and investigation officer before the trial court was sufficient to fill the gaps.

37. On the severity of the sentence, it was submitted that sentencing is at the discretion of the trial court but the same must be exercised judiciously and not capriciously. The appellate court would only interfere with the sentence imposed by the trial court if not legal or harsh and excessive to amount to miscarriage of justice and the reliance for this proposition was placed on the case of **Shadrack Kipchoge Kogo vs Republic**. According to the Respondent since Section 3(6) of the Act provides for a sentence of not less than thirty years imprisonment, the 10 years imprisonment was lenient and that the trial court took note of the principles of sentencing and the seriousness of the offence.

38. It was submitted that the 2nd Appellant only produced a national identification card to show that her name is **Caroline Mumbua Mbithi** and not **Sharon Mwikali**. However, it was noted that the 1st Appellant testified that their mother gave the 2nd Appellant the name **Sharon Mwikali** but the 2nd Appellant gave other names when applying to the national identification card. According to the Respondent the 2nd Appellant should have raised the issue with the trial court to be allowed to avail the birth certificate based on the case of **Wellington Nzioka Kioko vs AG (2018) eKLR**.

39. It was submitted that in carrying out *voire dire* examination on PW4 and PW6, the learned magistrate satisfied the requirement under Section 19 of the ***Oath and Statutory Declarations Act*** Cap 15, Laws of Kenya and this submission was based on the case of **Republic vs. Kilbourne [1973] 2 WLR**. It was submitted that PW4 understood the meaning of oath hence her evidence did not require corroboration and as regards PW6 who gave unsworn evidence, his evidence was corroborated by PW2 who testified that he ferried the 1st Appellant to the 2nd Appellant where he found the 2nd Appellant with the complainant.

40. It was urged by the Respondent that the appeal lacks merit hence the conviction should be upheld and sentence confirmed.

Determination

41. I have considered the material placed before the Court. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174**.

42. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

43. However, it must be stated that there is no set format to a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, thus:

“The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:

‘I would accept Mr. Byenkya’s submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).’”

44. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR)**, Odoki, JSC (as he then was) said:

“While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance.”

45. In this case, I have summarised the evidence of the prosecution and the defence. It is contended that the charge sheet was defective for failing to contain all the ingredients of the offence in question. Section 3(1)(b) of the ***Control of Trafficking in Persons Act*** Cap 61, Laws of Kenya (hereinafter referred to as “the Act”) provides as follows;

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;

(b) abduction

46. In this case, the 1st appellant was charged with the offence of Trafficking of Persons Contrary to Section 3(1)(b) as read with Section 3(6) of the ***Counter Trafficking in Persons Act***, Cap 61 Laws of Kenya, the particulars being that on the 4th February, 2019, Mavoloni Location, within Machakos County, he fraudulently and unlawfully transferred AN, a girl aged 5 years from [Particulars Withheld] Village to unknown destination.

47. In the second Count the 2nd Appellant also faced the offence of Trafficking of Persons Contrary to Section 3(1)(b) as read with Section 3(6) of the ***Counter Trafficking in Persons Act***, Cap 61 Laws of Kenya, the particulars being that on the 4th February, 2019, Mavoloni

Location, within Machakos County, she fraudulently and unlawfully transported AN, a girl aged 5 years from [Particulars Withheld] Village to Nairobi.

48. It is clear that in both Counts the purpose of the transfer or transportation was not indicated. Similarly, the manner of the said transfer or transportation was not indicated.

49. Section 134 of the *Criminal Procedure Code* which requires in mandatory terms that every charge should be precise and abundantly clear provides that:

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

50. Interpreting this provision, it was held in Isaac Omambia vs. R, [1995] eKLR that:

“the particulars of a charge [form] an integral part of the charge.”

51. However, the test in such cases was set out in Cherere s/o Gakuli vs. R [1955] EACA 622 in which it was held that:

“The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity.”

52. It was therefore held in Paul Katana Njuguna vs. Republic [2016] eKLR that:

“In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective. In this appeal, the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice. We must, therefore, reject the appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect if any, was in any event, curable under Section 382 of the Criminal Procedure Code.”

53. Dealing with the framing of a criminal charge in the case of Willie (William) Slaney vs. State of Madhya Pradesh, [A.I.R. 1956 Madras Weekly Notes 391], the Supreme Court of India held that:

“We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent...We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms that it must all be “explained to him”, so that he really understands...but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality. ... The essence of the matter is not a technical formula of words, but the reality. Was he told" Was it explained to him" Did he understand" Was it done in a fair way... Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities.”

54. Other jurisdictions have also dealt with similar issues of defective charges. In The State vs. Matlhogonolo Masole, 1982 (1) BLR 202 (HC) the High Court of Botswana, citing with approval (R vs. Greenfield, (1973) 57 Cr. App. Rep. 849) while handling a similar situation, the court opined thus:

“...there is, however, one over-riding matter to be considered and that is whether or not the accused was prejudiced by the duplicity in the charge, as duplicity in a count is a matter of form, not a matter of evidence (R v Greenfield, (1973) 57 Cr. App.Rep. 849).”

55. Dealing with a submission similar to the one made by the 1st appellant herein the Supreme Court of New South Wales in the case of R vs. Fenwick, [1953] 54 S.R [N.S.W. 147], in a case where two men were charged in one count with raping the same woman, held that:

“It mattered not whether they acted in pursuit of a common purpose or each raped the woman independently of the other.”

56. Similarly, in Isaac Nyoro Kimita & Another vs. Republic [2014] eKLR, it was appreciated that:

“In this case, we have no doubt in our minds that the appellant knew that it was practically impossible for him and others to have “jointly” defiled the complainant. He therefore understood the charge against him to have been that on the material date, while together, with others, engaged in an illegal enterprise, they successively defiled the complainant. This is confirmed by the fact that in the trial, the appellant extensively cross-examined prosecution witnesses and defended himself. In the circumstances, we find that the defects in the charge were minor and did not prejudice the appellant. They did not occasion any miscarriage of justice or violate the appellants’ constitutional right to a fair trial.”

57. In Fappyton Mutuku Ngui vs. Republic [2012] eKLR the Court expressed itself as hereunder:

“I have said elsewhere that the answer to this question must begin with section 382 of the Criminal Procedure Code. In material part, it provides that:

... 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 injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

The proviso to Section 382 provides that in determining whether the 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. Next, then, we must ask ourselves when it is appropriate to find that a charge sheet is fatally defective. Our case law has given pointers. Two cases are pertinent: the case of Yosefa v. Uganda [1969] E.A. 236 – a decision of the Court of Appeals – and Sigilani v. Republic [2004] 2 KLR 480 – a High Court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. Sigilani held:

‘The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.’

As I have previously held, the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him" In this case, the Appellant was charged under section 8(1)(2) of the Sexual Offences Act. No such section exists in the Act. Did this prejudice the Appellant and occasion a miscarriage of justice" I have previously said that the answer to that question is provided by seeking to see if the accused person can be said to have understood the charges facing him well enough to understand the ingredients of the crime charged so that he can fashion his defence. This can be tested, for example, by how much or vigorously he participated in the trial process and whether the record shows that he was able to follow the proceedings and ask questions in line with his theory of defence. At the end of the day, therefore, the test is not at all a formalistic one but a substantive one. On my part, I have adopted a test that looks at the trial process in its totality rather than the retail defects separately. The aim is to establish if the trial process could have been said to be fair to the accused person. If the charge sheet has a technical defect but all the other procedures are meticulously followed and the other substantive rights of the accused person are evidently respected in the trial process, it will be easier for a Court to fairly immunize the technical defect in the charge sheet – especially if it is clear that the accused person understood what was facing him and his participation in the trial process vindicates that position. On the other hand, if a defect in the charge is followed by a series of other procedural or substantive mishaps or miscues in the trial process which all affect the rights of the accused person, in my view, the Court should be reluctant to utilize section 382 to cure the charge sheet even if each of the defects in the trial process could, standing on its own, be cured or treated as harmless error. An accumulation of singular streams of procedural defects which would otherwise be harmless errors spew into a river of substantive defect which would entitle an accused person to an acquittal upon appeal. Applying this approach to the facts of the present case, I can confidently say that no miscarriage of justice was occasioned by the technical defect in the charge sheet and I will proceed to “cure” it under section 382. If one needed evidence of that, one would begin with the very fact that the Appellant never raised the objection – including on appeal. That must be because he knew the charges he was facing. Second, a perusal of the Court record shows that the Appellant participated vigorously in the trial process and was well aware of the charges he was facing. All in all, I am certain that the trial process was fair and the Appellant had sufficient notice of the charges facing him.”

58. In this case while I agree that the charge sheet ought to have specifically mentioned the manner in which the trafficking was alleged to have taken place and the objective of the said trafficking, no miscarriage of justice was occasioned by that technical defect in the charge sheet which in any case is, in my view, curable under section 382 of the *Criminal Procedure Code*.

59. I however agree with the decision in Benard Onyandi vs. Republic [2018] eKLR that the offence of trafficking consists of a process with the ultimate purpose of exploitation of the person trafficked. In my view it is this ultimate purpose that differentiates the offence or trafficking from the offences in sections 256 and 259 of the *Penal Code* which provides that:

256. Any person who by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person.

259. Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years.

60. In this case, PW7, the investigating officer, testified that she was unable to establish the reason why the appellants were trafficking even after taking their mobile phones to DCI. In other words, there was no evidence that the abduction of PW4 was for the purpose of exploitation. However, Section 2 of the Act defines “exploitation” to include -

- (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.*

61. In this case the learned trial magistrate relied on **Doris Kemunto vs. Republic eKLR 2019**, where the learned judge expressed herself as follows;

“This child in my view has been subjected to slavery for wherever she is she has been deprived of her parental care and love. She is living with persons who are not her parents nor relations. Wherever she is she has deprived of motherly love which in my view amounts to slavery. Further section 3 (3) provides that, 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.”

62. In my view, if deprivation of parental care and love amounts to slavery for the purposes of the offence under the Act, it would necessarily mean that the facts constituting the offence of abduction under sections 256 and 259 of the *Penal Code* may also amount to an offence of trafficking under section 3(1)(b) of the *Control of Trafficking in Persons Act*.

63. In this case however, there was evidence that on 4th February, 2019, PW4 who was on her way to school met the 1st appellant who for some reason removed her from the grasp of PW6. She then handed her over to the 2nd appellant and both the 2nd appellant and the complainant were ferried by PW2 to Ngoliba. PW2 was paid for his services by Mpesa and the payment was reflected as having been received from a person who the 1st appellant admitted was her sister, the 2nd appellant. The same number was the one which was used to inform PW3 where the Complainant was to be delivered. Though there was no data from the service provider, the circumstantial evidence adduced left no doubt that it was the 2nd Appellant who went with the Complainant to Nairobi, a fact which was confirmed by the Complainant herself.

64. As for the alleged failure to call vital witnesses, section 143 of the *Evidence Act* provides that:

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

65. I am guided by the case of **Mwangi vs. R [1984] KLR 595** where this Court stated:

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

66. The prosecution is not duty bound to call all persons involved in the transaction and his failure to call them is not necessarily fatal unless the evidence adduced by him is barely sufficient to sustain the charge. In **Keter vs. Republic [2007] 1EA135** the court was categorical that:-

“The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

67. The Court of Appeal sitting in Mombasa in **Sahali Omar vs. Republic [2017] eKLR** held that:

“The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto

adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. Keter v Republic [2007] 1 EA 135). In this case, the testimony and evidence adduced by the five prosecution witnesses was sufficient to prove that the complainants had been defiled by the appellant. As such, the situation hardly called for the drawing of an adverse inference with regard to the ‘missing’ witnesses.”

68. I reiterate what the Court of Appeal stated in Benjamin Mbugua Gitau vs. Republic [2011] eKLR that:

“It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys.”

69. In this case, while the driver and the conductor of the bus could have testified as to who delivered the Complainant to them to ferry her back home, there was sufficient evidence from the Complainant and PW3 that the 2nd Appellant was the one in whose custody the Complainant was. It cannot therefore be said that by not calling the driver and the conductor, the evidence adduced by the prosecution is barely sufficient to sustain the charge.

70. In the circumstances of this case, I am however, unable to find that the prosecution proved beyond reasonable doubt that the purpose for which the appellants took PW4 was for exploitation. I am however satisfied that the prosecution proved beyond reasonable doubt that the 1st appellant abducted PW4 and handed her over to the 2nd appellant. Both the appellants were therefore guilty of the offence under section 256 as read with 259 of the *Penal Code*. Though that was not the offence with which the appellant was charged, it is my view that it is a cognate offence to the offence of trafficking. Section 179 of the *Criminal Procedure Code* provides that:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

71. As regards the power of the Court to convict the appellant of the cognate offence without affording the appellant an opportunity to address the issue, the Court of Appeal in Robert Mutungi Muumbi vs. Republic [2015] eKLR expressed itself as hereunder:

“The third issue in this appeal relates to appellant’s alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda’s response was that the appellant could be properly convicted under section 179 of the Criminal Procedure Code without having to plead to the offence, so long as it was a minor and cognate offence to that charged...As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171 and WACHIRA S/O NJENGA V. REGINA (1954) EA 398). Spry, J. explained the essence of the first consideration as follows in ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

“Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.”

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial. [Underlining mine].

72. The Court proceeded:

“The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person

was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See *REPUBLIC V. CHEYA & ANOTHER [1973] EA 500*). In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied.”

73. In this case while I agree that considering the particulars of the offence as drawn as well as the evidence adduced, the appellants ought not have been convicted of the charge of trafficking, certainly the particulars of the charge as well as the evidence adduced proved that the appellants were guilty of the offence of abduction of the Complainant and this court has the power to substitute the conviction since no miscarriage of justice was occasioned by the technical defect in the charge sheet which in any case is, in my view, curable under section 382 of the *Criminal Procedure Code*.

74. Accordingly, I hereby set aside the appellants’ conviction of the offence of trafficking of persons contrary to section 3(1)(b) as read with section 3(6) of the *Counter Trafficking in Persons Act* with that of abduction under section 256 as read with section 259 of the *Penal Code*. I accordingly, substitute the sentences imposed on the appellants of 10 years with five years. Pursuant to section 333(2) of the *Criminal Procedure Code*, the sentences will run from 5th February, 2019 when they were arrested according to the charge sheet.

75. Judgement accordingly.

**JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS
21ST SEPTEMBER, 2021.**

G. V. ODUNGA

JUDGE

In the presence of:

Appellants in person

Mr Ngetich for the Respondent

CA Martha