



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

HCRA. CASE NO. 24 OF 2016.

BENARD ONYANDI alias BOI.....APPELLANT

VERSUS.

REPUBLIC.....RESPONDENT

[An appeal from the Conviction and Sentence in Bungoma CM Criminal Case No. 108/2016 delivered on 18.1.2016 by K.T. Kimutai (SRM)].

JUDGMENT.

The appellant Benard Onyandi was charged with Counter Trafficking of persons contrary to Section 3(3) as read with Sub Section 5 of the Counter Trafficking in persons Act, Cap 61 of the Laws of Kenya.

The particulars of offence were; on the 9th day of January 2016 at about 6.00a.m. at Gara Village in Kamolo Location in Teso North Sub-county with Busia County fraudulently transported A A a girl aged 15 years from [particulars withheld] Village enroute Nairobi for the purpose of working as a house-help.

On 14.1.2016 the Charge was read out to the accused and the proceedings show he replied;

Accused: It is true

Court: Plea of guilty entered.

Prosecutor: The fact are that on 9/10/2016 at around 6 a.m. the victim in this case was going to school [particulars withheld] Primary School whereat she was in class six (6). This is in Kamolo, Teso North. That is when accused approached her and offered to take her to Nairobi as a house-help. The victim boarded the accused's cycle and they rode towards accused home. At some thicket the accused gave her clothes to change into. Then they continued with the journey to accused's home. The parents of the victim started searching for her when she did not go back home on 9th. On 11/11/2016, the father of the victim went to victim's school where the headteacher gave him a letter to take to the police. He did so. On same 11th, the victims father got information that victim was staying at the accused's home. He, the victim's father went to accused's home where he found the victim only. The accused was not at home. On 13/1/2016, the accused was arrested and subsequently charged with this offence. The letter that the victim's father was given by the Headteacher, Gara Primary is before Court and wish to produce it (P.Exh. 1). The victim was age assessed and found to be 15 years old. We produce the receipt also (P.Exh. 2). The suspect who was arrested and charged is the accused.

Accused: I have understood the facts. They are correct and true.

Court: Accused convicted on own plea of guilty.

Having been convicted on his own guilty, on 18.1.2016 the appellant was sentenced to serve 30 years imprisonment. He was dissatisfied with the conviction and sentence and filed this appeal. His grounds of appeal are that he was misled to plead guilty by the father of the complainant that he was withdrawing the case. He prays for an order for re-trial.

The appellant filed written submissions in support of the appeal. He submitted that he pleaded guilty due to ignorance; and that the complainant's father enticed him to plead guilty with the support of the police; and that the plea of guilty was due to coercion.

M/s Njeru for the state opposed the appeal; Counsel for the state submitted that the charge and facts were read to the appellant in a language he understood, he admitted the facts as correct and the conviction therefore was proper. Counsel for state submitted that this appeal is an after thought.

This is a first appeal. This court is therefore enjoined to re-evaluate the evidence and arrive at its own conclusions but always bearing in mind it did not have the advantage of hearing or seeing the witnesses testify. The accused was charged with the offence of trafficking in persons contrary to Section 3(3) of the Counter Trafficking of Persons Act.

An offence of trafficking in persons is defined in Section 3(1) of the Act as *a person commits the offence of trafficking in a 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 a person having control over another person.*

For the prosecution to establish an offence under the act it must show that the accused (1) recruits or (2) transports, or (3) harbours, or receives another persons for the purpose of exploitation and has used threats or force or abduction, or fraud, or deception, or abused vulnerability or obtained consent by payment to the victim or person having control of the victim. The offence of trafficking consists of a process with the ultimate purpose of exploitation of the person trafficked. Every participants in every stage of the process is guilty of the offence, and an accused need not participate in all stages to be guilty. If the prosecution established to the satisfaction of the court that the accused was part of the chain and committed only one act in the chain which was aimed at facilitating the commission of the offence, he would be guilty of the offence of trafficking In Persons.

I have reproduced the facts as narrated by the prosecutor to court above. Briefly the facts the appellant met the complainant; offered to take her to Nairobi to work as a house-help, took her to his home. The parents of the complainant searched for her and located her at the home of appellant did not find the appellant but found the complainant and went away with her

The appellant in this appeal prays for a retrial on the basis that he was misled to pleading guilty. The principles upon which a court can order a retrial or not were clearly stated by the court in *Fatehali Manji -Vs- 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.”

The court can order a re-trial where it notes from the proceedings that the trial was defective or illegal or necessary steps were not taken during the plea or trial process. The court will also have to form the opinion that the evidence adduced if properly admitted a conviction might result. Where however the court forms opinion that the evidence on record might not lead to a conviction, then there will be no need to order a retrial. In *Mwangi -Vs- 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.”

The facts tendered by the Prosecutor when appellant pleaded guilty should show that the appellant in Section 3(1);

- 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.***

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.

I therefore allow the appeal quash the conviction and set aside the sentence of 30 years imprisonment imposed. I direct the appellant to be released forthwith unless otherwise lawfully detained.

Dated and Signed at Bungoma this 5th day of November, 2018.

S.N. RIECHI

JUDGE