



**Republic v Leraran & another (Criminal Case E4188 of 2020)
[2023] KEMC 16 (KLR) (6 September 2023) (Judgment)**

Neutral citation: [2023] KEMC 16 (KLR)

**REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT (MILIMANI LAW COURTS)
CRIMINAL CASE E4188 OF 2020
E KIMILU, SPM
SEPTEMBER 6, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

MAKALLAH FRED LERARAN 1ST ACCUSED

SELLINA AWUOR ADUNDO 2ND ACCUSED

JUDGMENT

1. Vide an Amended Charge Sheet dated 10th August 2021, the 1st and 2nd Accused persons were charged jointly on the following counts:

i. Count 1

Conspiracy to commit a felony namely trafficking in persons contrary to Section 393 of the Penal Code.

Particulars of the Offence: On diverse dates between 1st day of March 2020 and 16th day of November 2020 at Mama Lucy Kibaki Hospital in Embakasi Central within Nairobi County, jointly with others not before court, conspired to commit a felony namely trafficking in persons.

ii. Count 2

Trafficking in persons contrary to Section 3 (1) (e) as read with Section 3 (5) of the Counter-Trafficking in Persons Act, 2010.

Particulars of the offence: On diverse dates between 30th day of April 2020 and 13th day of May 2020 at Mama Lucy Kibaki Hospital in Embakasi Central within Nairobi County, jointly with others not before Court, received and transferred a male child aged three (3) weeks namely J.S for the purpose of abusing the vulnerability of the said child.



iii. Count 3

Trafficking in persons contrary to Section 3 (1) (e) as read with Section 3 (5) of the Counter-Trafficking in Persons Act, 2010

Particulars of the offence: On diverse dates between 30th day of April 2020 and 13th day of May 2020 at Mama Lucy Kibaki Hospital in Embakasi Central within Nairobi County, jointly with others not before Court, received and transferred a female child aged two (2) months namely N.H alias L.K for the purpose of abusing the vulnerability of the said child.

iv. Count 4

Trafficking in persons contrary to Section 3 (1) (e) as read with Section 3 (5) of the Counter-Trafficking in Persons Act, 2010

Particulars of the offence: On diverse dates between 30th day of April 2020 and 13th day of May 2020 at Mama Lucy Kibaki Hospital in Embakasi Central within Nairobi County, jointly with others not before Court, received and transferred a male child aged eight (8) days namely O.M alias A.T for the purpose of abusing the vulnerability of the said child.

v. Count 5

Neglect of a child contrary to section 127 (1) (b) of the Children Act, No. 8 of 2001.

Particulars of the offence: On diverse dates between 1st day of March 2020 and 12th day of May 2020 at Mama Lucy Kibaki Hospital in Embakasi Central within Nairobi County, being employees of Nairobi Metropolitan Services to wit, Medical Social Workers, being custodians of J.S aged three (3) weeks knowingly caused him to be a child in need of care and protection by failing to protect him.

vi. Count 6

Neglect of a child contrary to section 127 (1) (b) of the Children Act, No. 8 of 2001.

Particulars of the offence: On diverse dates between 1st day of March 2020 and 12th day of May 2020 at Mama Lucy Kibaki Hospital in Embakasi Central within Nairobi County, being employees of Nairobi Metropolitan Services to wit, Medical Social Workers, being custodians of N.H alias L.K aged two (2) months knowingly caused her to be a child in need of care and protection by failing to protect her.

vii. Count 7

Neglect of a child contrary to section 127 (1) (b) of the Children Act, No. 8 of 2001

Particulars of the offence: On diverse dates between 1st day of March 2020 and 12th day of May 2020 at Mama Lucy Kibaki Hospital in Embakasi Central within Nairobi County, being employees of Nairobi Metropolitan Services to wit, Medical Social Workers, being custodians of O.M alias A.T aged eight (8) days knowingly caused him to be a child in need of care and protection by failing to protect him.

Prosecution's Case

2. The prosecution presented eighteen (18) witnesses to prove its case.
3. PW1, Brian Kimeu Muia testified that on 4th May, 2020 at about 11.00 pm, while going home from a birthday party, and in the company of one Morris Guyo Muli (PW2), they heard a baby's cry from



some shanties along Outer Ring Road. On approaching the particular area where the crying sound was coming from, they found a child in an open box wrapped in a gunny bag and on checking they discovered that it was a new born baby since it's umbilical cord still had a peg on it. PW1 further testified that they picked the baby and proceeded to report to the village elder who went around the village trying to establish whether there was any woman who had recently given birth within his locality. Since the local elder was unable to find the mother of the baby, he advised that PW1 and PW2 take the child to Savannah Police Station the next day. PW1 took the baby to his home. PW1 told the court that in the company of PW2, they reported the incidence at the Savannah Police Station, where they were advised to deliver the child to Mama Lucy Kibaki Hospital. They were given a letter to that effect. On 6th May, 2020, PW1 and PW2 took the baby to Mama Lucy Kibaki Hospital. When booking the child into the hospital, they were given a card to fill in details that required the name of the child and it was then that they decided to give him the name A.T. Thereafter, they were informed that there were people who had come to take the child. It was at this point that they first encountered the 1st and 2nd accused persons. The 1st and 2nd accused persons introduced themselves as social workers in the hospital and told them that the child would be admitted at the hospital.

4. PW2, Morris Guyo Muli corroborated the events as testified by PW1.
5. PW3, Beatrice Chelanga, informed the court that she was a nurse working at Mama Lucy Kibaki Hospital. She testified that on 11th May, 2020, in the course of duty, the 1st accused person went to her with a release form for preparation of discharge of baby A.T. and a referral form. She did not know who prepared the release form but acknowledged that it was from the Embakasi sub-county children department. She informed the court that when abandoned babies are being released, a social worker is notified; the social worker in the instant case being the 1st accused person. She confirmed that she signed the release form and so did the 1st accused person, and her supervisor, one Monicah Otieno. The baby was, upon discharge, to be referred to Imani Children Home.
6. PW4, Beatrice Njambi Njoroge, informed the court that she was a registered community health nurse. She was in charge of the newborn unit at Mama Lucy Kibaki Hospital. In the instant case, she liaised with the social worker's department in releasing babies to children's homes. She explained to the court the process undertaken in the release of babies. She stated that there are documents that ought to be completed first before babies are released. The release form is one such document requiring the signatures of a social worker, nursing service manager and the nurse in charge of the newborn unit. She further explained that in the process of discharging a baby, a social worker will inform the ward that a child has been placed by the Children's Office to a children home. Thereafter, the social worker will avail a release form and a placement form to the Children's home when he/she is ready to facilitate the placement of the baby. As protocol, the baby cannot be released to any other person other than those whose names appear in the release form.

PW4 testified that in the course of her duties she handled the following babies:

- a. Baby J.K who was admitted at Mama Lucy Kibaki Hospital on 30th April, 2020. The baby was discharged from the new born unit on 12th May, 2020 and she presented a signed discharge summary to that effect. She testified that the baby had been taken to Imani Children's home; which facilitation was done by herself, the 1st Accused and the nursing service manager the previous day. She stated that baby J.K was handed over to the 1st Accused after the release formalities were concluded.
- b. Baby L.K who was admitted at Mama Lucy Kibaki Hospital on 1st March, 2020. She stated that the mother and her baby were to be discharged on 5th May, 2020 but the mother abandoned the baby in the postnatal ward. She testified that Baby L.K was released to Imani Children Home



through the social worker (the 1st Accused) who had handled her after she was abandoned. She presented a release form signed by her, the nursing service manager and the 1st Accused. She further stated that she physically handed the baby to the 1st Accused who as in the previous case, presented had presented the release form to her.

On cross examination, she stated that while the admission form from Imani Children Home stated that a baby named J.S originating from Mama Lucy Hospital was received, the name of the child she handled, as given by the doctors in the ward, was J.K.

Further, she stated that in relation to the two children she handled, she did not interact with the 2nd Accused. She stated that the 2nd Accused was neither present when she signed the documents nor did the 2nd Accused sign any documents herself. She further stated that the 2nd Accused was not present when the babies were being released from the hospital. The children in the case were released to the 1st accused as a medical social worker. He presented the baby Release form already filled and signed. The Nurses signed the release form in the presence of the 1st accused. According PW4, abandoned children are released to medical social worker from the nursing desk as a procedure.

7. PW5, Doris Kisieri Segera testified that she worked at Mama Lucy Hospital and handled socio-economic interventions for patients who were not able to pay fees. She informed the Court that the 2nd accused person was her supervisor. She testified that on 18th November 2020, the 2nd accused person called her directing her to pick a register that was in a drawer in her office. The said register was one for abandoned babies and she produced the same to Court.

On cross examination she denied having any involvement with the abandoned babies. She stated that her interactions with the 2nd accused person were only limited to waivers for those who could not pay hospital fees.

8. PW6, Josephine Obutu Okello was the deputy in charge of the health records and information department at Mama Lucy Kibaki Hospital.

She testified that the 2nd accused went to the records department in search of three files for abandoned babies [Baby L.K, Baby A.T (alias O.M) and Baby J.S] stating that they had a problem. The stated files were handed over to her. She stated that the three files were never returned to the records department.

In recall, she confirmed that 2nd accused called for the three files in respect of the minors who had been admitted in the hospital as abandoned children on the 17th November, 2020 and never returned them back. It was noted that in cases of abandoned children, the hospital might not be able to capture the age since no records are available but gender is captured.

9. PW7, Silvia Munene Mokaya testified that she previously worked at Mama Lucy Kibaki Hospital. She explained to the court the processes involved in the release of an abandoned child. She stated that a social worker would first notify the children department of an abandoned baby in need of placement to a Children Home. The Children Department would then identify a home for the child and subsequently write a letter indicating the home for placement of the child. Once a child is ready for discharge, the hospital writes to the Children Home and a letter is written back to the hospital. A child, once discharged, would be picked by representatives from the identified children home they were to be placed in. The representatives from the children home would go to the hospital bearing a letter from the Children Department. Once the release form is filled, the unit nurse in charge hands over the baby to the social worker. The social worker would then proceed with the children home representative to the vehicle. The social worker would then hand over to them the discharge summary, waiver and release form for the baby. When exiting the hospital premises, security officers at the gate



would note the motor vehicle registration number if the motor vehicle happens to have the logo of the receiving children home/institution.

10. PW8, Dr Musa Mohamed Ramadhan, was the medical superintendent at Mama Lucy Kibaki Hospital in the year 2020. He testified that when babies are treated and ready for discharge, the social worker in liaison with the Children Department work to get placement for the child in one of the children's homes. Once placement is done, the child is discharged to the social worker. A release form is signed by the social worker, the unit nurse in charge and the nursing service manager.
11. PW9; Noah Sagany, the Director Children Services, testified that he coordinates the 47 Counties in Kenya dealing with children matters. Each sub county had a children office. His officer appoints Children Protection Volunteers in all sub counties in the county. He stated he knows one children protection officer by the name of Wycliff Anami of Embakasi Sub County Nairobi. Wycliff was properly vetted and appointed as per letter of appointment dated 18/02/2020 (Exhibit 8). He outlined duties and responsibilities of a Volunteer Children officer. He did not know any of the accused persons.
12. PW10, Susan Atieno Auma testified that she worked at the sub-county children office at Embakasi. She stated that with regard to abandoned children, she would be informed by a letter from the Chief or by the hospital administration. Thereafter, she would inform the court and process committal orders. She informed the Court that referrals for abandoned children were done either to the hospital, the Chief or to the relevant office. She informed the court that since she was the only one in the Embakasi Children Office, she personally filled and signed all referral forms originating from the Embakasi Children Office. When referred to the referral forms for the three subject babies, she denied having prepared them. She stressed that in regard to the instant case, she was never notified of the abandoned babies and thus did not make the referrals for the three subject babies.

On cross examination, she stated that they had at some point during the material times lost their office key which they reported and, in that period, only three referrals were fraudulently done. She reiterated that she never signed the referrals in question. She acknowledged that there was a Voluntary Children Protection officer by the name of Wycliffe Anami.

13. PW11, Monicah Akinyi Otieno was the nursing service manager at Mama Lucy Kibaki Hospital. She testified that once an abandoned child is brought to the hospital they are examined by the doctor and admitted in the ward if they need treatment. The receiving nurse must notify the social worker's department. Such notification would enable the social workers to work on placement of the child prior to their discharge. She stated that at discharge, the social worker avails a release form to the nurse on duty to fill and sign. Once the nurse on duty signs, the social worker also signs and the baby is released to them.
14. PW12, Peter Murimi Bagaka, was a documentary producer/director with the British Broadcasting Corporation (BBC). He produced a certificate of electronic evidence in line with the provisions of Section 65 (a) of the Evidence Act, Cap 80. He testified that while researching on a story of child trafficking, the BBC team got information from whistleblowers that there might be an issue of child trafficking at Mama Lucy Kibaki Hospital. The whistleblowers specifically mentioned the 1st accused who then became the person of interest and the BBC team decided to secretly film him. The documentary was played for court review and in support of his testimony and produced the same in CD. In his testimony, he talked of three meetings where the deal to sell the child took place:

The first meeting took place on 4th April 2020, when the 1st accused was informed by one of the whistleblowers (who was working in conjunction with the BBC team) that there was a barren lady who wanted to purchase a baby and was requesting a meeting with the 1st accused. The 1st accused was hesitant to meet with the lady and was concerned about whether she could be trusted. He further



mentioned that a previous case scared him. The 1st accused agreed to meet the lady after assurances from the whistleblower that she could be trusted. The 1st Accused mentioned to the whistleblower that he did not want to meet the lady at Mama Lucy Kibaki Hospital since he did not want her to know that he worked there. He further stressed that no one else should be included in the deal. When the whistleblower asked about the availability of a baby, the 1st accused mentioned to him that there was a baby boy who was abandoned at the Hospital about two weeks earlier.

The second meeting took place on 10th May, 2020 at Embakasi Children's Office. In attendance were the 1st accused, a lady hired by the BBC team to play the part of 'the barren lady' (referred to as 'Rose') and PW6. The 1st accused asked Rose about the whereabouts of her husband and her reasons for wanting a baby. Rose explained that their efforts towards getting a child had failed and that pressure was building from the family for her husband to find another lady. The 1st accused asked whether she had tried the adoption process but she told him that she considered it too complicated. The 1st accused went on to enquire on which gender of child Rose preferred but Rose stated that that did not matter; she was only concerned about the baby's health. After assuring Rose that the baby was healthy, he asked her whether the price was mentioned to her. She confirmed that it was mentioned to her that it would be three hundred thousand shillings (KShs. 300,000/-). The 1st Accused shot down her attempt at negotiating the price. The 1st Accused stressed upon them that the deal could ruin their lives and that its success would be based on trust. That it was a risky deal that worried him a lot. The meeting ended with the 1st Accused stating that he would inform them whether the deal could be completed the following day.

On 12th May, 2020 the baby discussed was picked from the hospital premises. The 1st Accused informed them that three babies were to be discharged from the hospital that day; two would be going to a children home and one would go into their custody. At the hospital, the whistleblower asked Rose to follow the 1st Accused into the hospital to pick the baby but the 1st accused told her not to, stating that it would raise suspicions. The babies were brought out by who PW6 described as nurses and were handed over to the whistleblower and Rose. The 1st accused stated that he had to go back to his office because there was a client waiting. The whistleblower told the 1st Accused that he had concerns over what would happen if the nurses decided to follow them but the 1st accused told him that they could not follow them because they had work to do.

The 1st accused further told him that if they kept on with the discussion, someone would get suspicious.

The BBC team took the children to the Children's Home and thereafter met with the 1st accused for the third and final meeting. The said meeting was held at Embakasi Children's Office wherein the exchange of the money discussed in the second meeting took place. Three people were in attendance; the 1st accused, Rose and the whistleblower. Rose stated that she had the money discussed. The 1st accused asked her to place it all on the table. The 1st accused reminded her to keep an eye on the child's vaccination mark and told her that he would refer her to a nurse who would assist her with vaccination. He also advised her to get a nutritionist for the baby. Before Rose left, the 1st Accused warned everyone to be very careful, and after Rose left, the 1st Accused took the money and placed it in an envelope. He gave the whistleblower thirty-five thousand shillings (KSHs. 35,000) which the whistleblower returned to BBC – Nairobi Office.

On cross examination, PW6 stated that the 2nd Accused was not involved in any of their discussions with the 1st Accused and/or over the purchase of a child.

15. PW13, No. 231371, Mr. John Muinde, was tasked with ascertaining whether the handwriting and signatures in the subject release forms of the abandoned babies from Mama Lucy Kibaki Hospital



were of the 1st Accused. He concluded that there were enough individualizing similarities between the handwriting and signatures in the subject release forms and the samples provided and thus in his professional opinion, they were made by the same person. PW13 produced the handwriting report and specimen used in his report.

On cross examination, he stated that he was confident in his report and its accuracy.

16. PW14, Gilian Karimi Njeru, served at Imani Children Home as a manager. She testified that all the three children (two boys and one girl) subjects of this case were all received at Imani Children Home by VCO one Wycliff Anami. He presented the relevant documents included a discharge from Mama Lucy Kibaki Hospital and the release forms. She told the Court that baby O.M, passed away 10 months after he was received at the Children Home. She produced documents in relation to the home and death certificate of baby O.M as exhibits. The two children who survived were presented to court in good health.
17. PW15, Francis Githaiga, was the Human Resource Manager at Mama Lucy Kibaki Hospital. He confirmed that both the accused persons were employees of Mama Lucy Kibaki Hospital and that the accused persons had been suspended from work as per exhibit 24 (a to d) and 25(a to d).
18. PW16, Doctor Emma Mutio the medical Superintendent at Mama Lucy Kibaki Hospital at all relevant material times to this trial introduced herself and outlined her duties. She testified that on the 29/10/2020 the hospital received a letter from BBC World Service Group (Exhibit 26 a) informing the hospital about a documentary they had carried out for 12 months. The letter was about human trafficking in the facility by a medical social worker by the name of Leparan. They mentioned about Abandoned children in the facility. She informed the director of Health Nairobi Metropolitan Services as well as the legal department. Investigations were commenced and two accused persons were arrested and subsequently interdicted.
19. PW 17, Doctor Silvester Maingi working as a government pathologist with Nairobi City County testified that on the 1/4/2021 at Mama Lucy Kibaki Hospital Mortuary, he performed a postmortem of a minor by the name of O.M about ten (10) months old. The minor was under the care of Imani Children Home where he got sick and eventually died at Mama Luck Kibaki Hospital while undergoing treatment on the 26/03/2021. He was of good nutrition and looked appropriate for his age. The minor had no external injuries. The cause of death was aspiration of vomitus of the stomach contents.
20. PW18 Chief Inspector of Police Ezekiel Wanga Masake testified that on the 16th November, 2020 he was summoned by the Regional Police Commandant Nairobi Area to accompany him to the office of the C.S Social and Labour where a meeting was held following an Expose by BBC eye Africa on issue of child stealing at Mama Lucy Kibaki Hospital. The BBC staff by the name of Murimi played the clip in the said meeting. He interrogated accused 1st accused and Doctor Musa the Deputy Director NMS medical services and the director Dr. Oluga. He treated Fred Leparan who could be identified from the clip as the key suspect. He collected several files from Mama Lucy Kibaki related to abandoned children. DCIO Kayole arrested the 2nd accused person as well. The accused persons being medical social workers were treated as the key suspect and charged while Doctor Musa was treated as a witness. The three minors/subject O.M Alias A.T (boy) rescued by PW1 &1 at Donholm while N.H Alias L.K (girl) and J.S (boy) were abandoned at Mama Lucy Kibaki Hospital. They were discharged from the hospital and released to Imani Children Home as per Release Form. By the time investigation was beginning baby O.M had passed on. The other two were under care of Imani Children Home. He produced the flash disk of the down loaded BBC Documentary. The I/O produced release forms in respect of the three babies and their files retrieved from Mama Lucy Kibaki Hospital. The release forms



were signed by the 1st accused person for the Medical social worker as confirmed by forensic document examiner. Later the 2nd accused called for the three files of the children at Mama Lucy Kibaki Hospital (refer to exhibit 3,4 & 5) and the register (Exhibit 7). He also got several documents from the hospital which were subjected to forensic document examiner.

21. The subject child O.M alias A.T was rescued by PW1& 2 as per letter dated 12th May, 2020 as per exhibit 2. PW 1 & 2 followed the baby but accused ensured they could not get access since he had already left the hospital and disposed of by the 1st accused. The undercover took the three babies to Imani Children home even after paying for one at Ksh. 300,000/=. He charged accused persons jointly with conspiracy, trafficking in person and child neglect.

He confirmed that the 2nd accused was not mentioned but the register related to abandoned children was taken by her and locked it up. In cross examination, he confirmed that Anami is at large. Only three files in question had evidence of child stealing.

22. The prosecution closed their case at this point. The Court evaluated the prosecution evidence as well as defence submissions on record and considered the same. The Court found that a prima facie case had been established against each of the accused persons to warrant the court to place them on their defence.

1st Accused Person's Defence

23. Upon being placed on his defence, the 1st Accused Person (DW1) elected to give a sworn statement and called two (2) witnesses, DW2 and DW3.

24. DW1, Fred Makallah Leparan (the 1st Accused Person) denied the charges leveled against him. He acknowledged that he signed the release form for the three subject babies. When referred to the BBC documentary, he contended that he had gone to the Children Office at Embakasi to report to a Voluntary Children Officer about abandoned children. He testified that when he arrived there, he met with a stranger who wanted to enquire about the adoption process. The 1st Accused person further testified that in his duties as a social worker, he advised her on the adoption process and the money mentioned in the video was an estimate of how much the adoption process would cost the lady.

On cross examination, the 1st Accused Person positively identified himself in the video and explained to the Court the reason behind him saying that there was a previous case that scared him. He contended that the case he was referring to was one of Gender Based Violence. He contended that there had been a lady who was being assaulted by her spouse. That; the lady wanted them to give her guidance on whether to report the case. He stated that he was sacred that her husband would know that he gave her some advice. He contended that the person he was apprehensive of knowing that he worked at Mama Lucy Kibaki Hospital was the said husband since he had advised the lady victim to sue her husband. He contended that it was this lady he agreed to meet with.

When referred to the second meeting in the video, he contended that he could not recall who the lady and the gentleman he was meeting with were. He also, surprisingly, stated that the lady in the meeting was the Gender Based Victim he had advised. He contended that he recalled that he had a discussion with the said lady about adoption. When questioned about the assertions he is heard making in the video, he stated that he could not recall what was being discussed.

When referred to the third meeting in the video, he denied that he told the lady in the video to place money on the table. He contended that the money seen in the video was intended for the whistleblower and not himself.



25. DW2, Ednah Moraa, was a medical social worker based at Mathare North Health Facility. She testified on behalf of the 1st Accused person. While she could not testify as to the facts of the case at hand, she stated that she did not believe that the 1st Accused was capable of the charges he is faced with.
26. DW3, Karen Kengere, was a casual worker at Mama Lucy Kibaki Hospital. She was involved, alongside two of her fellow casual workers, in the handing over of the three subject children to persons she believed at the time to be representatives from the Children Home. She testified that the 1st Accused never gave her any instructions with regard to helping get the children to the motor vehicle on the day of release. She also stated that the 2nd Accused was not present when the three subject Children were released.
27. The 1st Accused Person closed his defence at this point.

2nd Accused Person's Defence

28. Upon being placed on her defence, the 2nd Accused person (DW4) elected to give a sworn statement and called one (1) Witness, DW5
29. DW4, Selina Awuor Adundo, the 2nd Accused person, informed the court that at the material time, she was in charge of medical social workers at Mama Lucy Kibaki Hospital. She testified that there was no standard operation procedure for dealing with abandoned children. DW4 further informed the court that medical social worker's department gave guidelines that were adopted by the hospital. She explained that once an abandoned baby is taken to the hospital, first an out-patient number or an in-patient number is given depending on the need of the child. The Child is then kept in the children ward. She further explained that a social worker would give a report which would include an O.B number and a contact of the person who took the child to the hospital. The baby would remain in the ward for treatment as the medical social worker contacts the children's department. The Children department would look for a suitable home to place the child in according to their needs. The Children department would thereafter notify the social worker department of the identified placement home. A representative from the children department would then go to the Children Department to obtain a referral form. The representative from the identified children home would then go to the hospital with the referral form. The referral form would be received by the social worker handling the case.

The social worker then begins preparation for the release of the abandoned baby. The release form is taken to the nurse at the ward in which the abandoned baby was placed in. The nurse would fill in the information of the child. The social worker will thereafter take the form to the Nursing Service Manager who would sign and then the medical social worker would co-sign. The form is then stamped at the hospital registry.

After the form is duly executed, the social worker and the representative would go to the ward where the child is admitted. The social worker hands over the duly executed release form to the nurse who upon verifying would hand over the children to the representative of the children home. She stated that the presence of the social worker is important since the nurse would not know the representative from the children home.

She testified that she was neither aware of the meeting that happened as portrayed in the BBC documentary nor did she authorize any such meeting. She explained that she only took the files relating to the three subject babies from the hospital records department because Dr. Musa (PW8) had asked her to come up with a summary report of the three subject children.

30. DW5, Peter Ojiambo, testified on behalf of the 2nd Accused person and informed the court that he worked as a medical social worker at Mama Lucy Kibaki Hospital and left in 2016. He testified that



there were no set guidelines on handling of abandoned children within the job description of a social worker. That, over the years they have had to come up with a framework and procedures over the same. He further stated that while the 2nd Accused Person was in charge of social workers; she would not know what each of them was doing unless she was briefed

31. I have analyzed both defence and prosecution evidence on record as well as the defence submission on record. There is no doubt the two accused persons were employees of Mama Lucy Kibaki Hospital working the Medical Social Worker. The 2nd accused was senior to the 1st accused and as such she was his immediate supervisor as per employment documents produced as exhibit by the prosecution. The role of a medical social worker was outlined my prosecution witnesses and not challenged although there were no regulations cast on stone on their daily running of business.
32. The accused persons are jointly charged with Conspiracy to Commit a Felony namely trafficking in person contrary to Section 393 of the Penal Code, Cap 63 Laws of Kenya as per Count 1.

Section 393. Conspiracy to commit felony

Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.

The Court of Appeal in *Moses Kathiari Rukunga v Republic* [2018] eKLR dealt with the definition and ingredients of conspiracy and stated thus:

“... In Archibold Criminal Pleading, Evidence and Practice, Sweet & Maxwell 2003 (page 2689, para 33-2) the definition of a conspiracy is from the Criminal Law Act 1977 of England which is defined as a situation where a person agrees with another person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions either will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement or would do so but for the existence of facts which render the commission of the offence or any of the offences impossible. The essential ingredient to thus prove the offence of conspiracy to commit a felony is that two or more people agree to put into effect a scheme whose ultimate aim would be the commission of a criminal offence. It will not matter that the criminal offence proposed to be done may be impossible to be undertaken. Proof of the existence of a conspiracy is generally a, “matter of inference, deduced from certain criminal acts of the parties accused, done in the pursuance of an apparent criminal purpose common between them, “*R v Brisac* [1803] 4 East 164, 71 (as quoted at page 2692 Archibold para 33 – 11 (supra) (see *Njenga and 2 Others v Republic* NKU HCCRA No. 163 of 2003 [2005] eKLR).” [Emphasis added]

33. Therefore, as explained herein above, the conclusive element of the charge of conspiracy is that there has to be an agreement by more than one person to commit the offence. From the above evidence, it is clear that 1st accused held meeting with the whistle blower on the sale of a baby on the first meeting. The 1st accused knowing his role as a medical social worker at Mama Lucy Kibaki Hospital, breached his code of conduct and conspired to commit an unlawful act. He went ahead to meet the intended purchaser of the baby and set a price for the same. The oral agreement between accused, whistleblower and Rose materialized and ensured that Rose gets the baby boy intended for the sale. As the three



children are being discharged from the hospital he instructs casual carrying the baby on how to hand over the baby intended for sale. He followed them to the car to ensure the transaction went as planned. 1st Accused person knowing very well that Rose was not a representative of Imani Children home he ensured two other children are handed over for disposal as Rose would wish. This was a clear case of conspiracy to commit a felony namely trafficking in person. 1st accused did not avail any representative of Imani Children Home at the time of release as ought to be. 1st Accused was successful in his deal not knowing he was being recorded for an investigation that was on going.

34. From the discussions between the 1st accused, Whistleblower and Rose, 1st accused warned that the deal should be very secret. He warned that meeting should not be held at Mama Lucy Kibaki Hospital and agreed for a meeting at Embakasi Children Officer. The three meetings were held without the knowledge of 2nd accused and the Children officer Embakasi (PW5). PW5 was not even updated about the three children subject of the trial.
35. It is therefore without doubt that the prosecution did not adduce evidence against the 2nd accused on the offence of conspiracy. There is no doubt 1st accused is guilty of the offence of conspiracy to commit a felony namely trafficking in person contrary section 393 of the Penal Code as per the BBC Documentary and corroborating evidence on record. 2nd accused is hereby acquitted of the offence of conspiracy.
36. The two accused persons are charged with three counts of Trafficking in person contrary to Section 3(1) (e) as read with Section 3(5) of the Counter Trafficking in Person Act 2010

Section 3 (1) (e) and 3 (5) of the Counter-Trafficking in Persons Act, 2010 provides as follows:

3. Trafficking in persons

- (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—
- (e) abuse of power or of position of vulnerability.
- (5) A person who trafficks 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.

37. The High Court in Muhammad Asif v Republic [2017] eKLR explained that the offence of trafficking in persons captures the entire trafficking continuum, and engagement in just one of these trafficking “stages” is sufficient. That; the offence is formulated in such a way as to capture the different actors along the trafficking continuum, so long as they knew their action was for the purpose of exploiting or facilitating the exploitation of a person.
38. Accordingly, as stated in Bernard Onyandi v Republic [2018] eKLR, 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.



39. The standard of proof in criminal cases is “proof beyond reasonable doubt”. In reference to this, Lord Denning in *Miller v Ministry of Pensions* [1947] 2 All ER 372 explained thus:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.” [Emphasis added]

40. The High Court in *Philip Muiruri Ndaruga v Republic* [2016] eKLR explained that reasonable doubt is not mere possible doubt. It is neither imaginary or frivolous doubt. It is based on reason and common sense; and is logically derived from the evidence or absence thereof. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.

41. The Accused persons were arrested and charged following investigations that took place after the BBC documentary dubbed “The Baby Stealers” was aired; which video was used by the prosecution. The documentary portrays the process in which the sale of a child took place.

42. As corroborated by PW12, there is a first meeting where the 1st Accused is told of by the whistleblower that there is a lady (referred to as Rose in the video) who was willing to offer three hundred thousand shillings (KShs. 300,000/-) for a baby. The 1st Accused mentions that there is a healthy baby boy who had been abandoned at the hospital and that the person who abandoned him was unlikely to come back for the child.

The 1st Accused expressed some concern but after assurances that she could be trusted from the whistleblower, he agreed to a meeting with the lady. He, however, did not want the lady to know that he worked at Mama Lucy Kibaki Hospital and therefore wanted the meeting to be held elsewhere, away from the hospital premises.

In the said meeting, Rose explains to the 1st Accused that her efforts with her husband to conceive a child had failed and therefore pressure had been building from the family for the husband to get another woman. The 1st Accused asked her whether she had tried adoption but Rose explains that they considered the process to be too complicated. The 1st Accused proceeds to ask what gender of child Rose would prefer. Rose tells him that it did not matter; only that the child is healthy. The 1st Accused proceeds to ask whether she was told by the whistleblower how much procuring a child would cost her, which she confirms that she was informed it would be about three hundred thousand shillings (KShs. 300,000). The meeting ends with the 1st Accused telling Rose that he would contact her.

The following day, the whistleblower and Rose head to the hospital. The 1st Accused enters the hospital building with the whistleblower. When the whistleblower suggests that Rose joins them to assist with the babies, the 1st Accused refuses stating that since they had started the discharge process, the subsequent inclusion of other persons might raise suspicions. After the children are brought out and handed over, the whistleblower asks the 1st Accused whether the nurses might want to follow them outside the hospital. The 1st Accused assures them they won’t because they still had work to do.

Another meeting is shown wherein Rose expresses her happiness and states that she had the money as discussed. The 1st Accused asks her to place it on the table. The 1st Accused is then seen taking the money and placing it beside him.



43. While the BBC documentary undoubtedly portrays damning evidence of foul play on the part of the 1st Accused, the Court has to ensure that the video itself is trustworthy. To that end, I note that a certificate of electronic evidence was duly produced by PW12. Further, PW12, being well versed with the pertinent facts of the case as the director/producer of the documentary was able to furnish the Court with salient details of the occurrences shown in the video including dates of the meetings and specific times they were held. The testimony of PW4, the nurse in charge of the new born unit at the material time, further collaborates the timelines given to the Court by PW12. She testified that the three subject babies were released from the hospital on 12th May, 2020 which is in line with the period PW12 stated that the babies, including the one they purchased, were picked by Rose from the Hospital.
44. The defence tried to paint a different picture with regards the context of what was being said and/or discussed in the video. In his testimony, the 1st Accused contended that he was reporting a case of an abandoned child. The 1st Accused person testified that when he got there, he met with a stranger who wanted to enquire about the adoption process, and as part of his duties as a social worker he advised her on the adoption process and the money mentioned in the video was an estimate of how much the adoption process would cost the lady. The 1st Accused further stated in his evidence that the money he is seen placing by his side in the video was not his but was meant for the whistleblower, and that he had been asked by the whistleblower to keep it for him.
45. With regards to context, a single act alone is not sufficient to form a picture of the context of a setting; other elements related to the act must be considered. The BBC documentary provided a personal perspective of the events in the meeting and in determining the case at hand. Considering that the 1st Accused, on cross examination, positively identified himself in the three meetings and never denied being in attendance, I shall consider the utterances of the persons in the meetings and not the narration by the reporter.
46. There were three meetings wherein the 1st Accused was involved. The first meeting is one between himself and the whistleblower. While it is not specifically mentioned by either of them that the money offered by Rose was for the purchase of a child, the key takeaways from the conversation in relation to the case at hand are that:
- a. There was an amount of money being offered for something;
 - b. The whistleblower needed to meet with the 1st Accused to discuss about meeting Rose;
 - c. The 1st Accused was worried whether Rose could be trusted or not;
 - d. There was an abandoned baby boy at the hospital and whoever abandoned him there, was in the opinion of the 1st Accused, not likely to come back for him;
 - e. The 1st Accused did not want Rose to know he worked at Mama Lucy Kibaki Hospital. Consequently, he did not want the meeting to be held at the hospital; and
 - f. For whatever they were planning to do or whatever deal they wanted to make, he did not want it to bring them problems later on
- From the second meeting, the key takeaways are that:
- a. The 1st Accused asks Rose whether she has tried adoption but Rose states that she considers the adoption process too complicated;
 - b. The 1st Accused enquires about the preferred gender of the child;
 - c. The 1st Accused asks whether the whistleblower told her about “the” price;



The 1st Accused is risking something that might ruin the lives of all those involved in the deal;

From the third meeting, the key takeaways are that:

- a. Rose came with the agreed amount of money;
- b. The 1st Accused directs her to place it on the table and proceeds to take it from her end of the table to his;

47. From the aforementioned, the following series of events is deduced. There was:

- a. An amount of money being offered;
- b. A baby boy abandoned at the hospital by a person unlikely to come back for him;
- c. A lady who discussed with the 1st Accused about her need for a baby and showed clear unwillingness to consider the process of adoption;
- d. A discussion over an amount of money;
- e. Subsequent to the above, handing over of a baby to the lady, who was known to the 1st Accused and who he knew not to be a representative of a Children Home;
- f. Exchange of an “agreed” amount of money after the fact.

48. These set of facts from the video, coupled with the evidence presented lead to the conclusion that the 1st Accused was indeed involved in the sale of a child. He was working a medical social worker and hence had all the information about abandoned babies in Mama Lucy Hospital in line with his duty. The 1st accused abused his powers as a medical social worker and took advantage of the vulnerability of the abandoned babies since he knew very well no one would ever come back to claim them. As stated in the BBC Documentary, it was not his first time to sale babies. He even was afraid the deal might back fire and expose him not knowing his day of exposure had come. 1st accused would not even want to hold the meeting with his “Client Rose” within the hospital and did not want Rose to know he was an employee of Mama Luck Kibaki Hospital. He pretended to “act safely” across all the process involved to complete handing over. He knew very well the persons to receive the three babies were not employees of Imani Children Home and he mislead the Nurse in charge that the three babies were being picked by a representative of Imani Children Home. This was fraud of the highest order on the side of the 1st accused. Be fraudulent means the children were handed over to Rose for purposes of exploitation which was in abuse of power bestowed upon the 1st accused. 1st accused went beyond his call of duty in a mischievous manner and ended up ensuring Rose gets her baby boy namely Baby J.S, the two weeks and two days old baby boy he refers to in the first meeting in the video; and the subject of subsequent discussions in the latter meetings. She is given to other baby(s) at her disposal. 1st Accused followed the casual to the car and ensured Rose received baby boy J.S. Without any explanation to Rose and whistleblower two other children are placed inside the car and they had to leave since the deal had been sealed. 1st Accused abused the process of handing over because he had influence or control over the movement of the three baby(s)(victims). He took advantage of their vulnerability and disposed them for a payment of three hundred thousand shillings.

49. I do note that the 1st Accused contended that the topic of discussion with Rose was on adoption and what it would cost her to undertake the same. Taking into account all the circumstances of the case and evidence produced against the 1st Accused, his contention does not create any reasonable doubt. While it is possible that it may have been the case, it is however, not in the least probable. With that said, it is my finding that the prosecution has proved its case against the 1st Accused to the required standard on



the three counts of trafficking in person as per count 2,3 and 4. The 1st accused caused to be transferred from Mama Lucy Kibaki Hospital three baby(s) that is baby J.S, N.H alias L.K and O.M alias A.T by false pretending they were being handed over to representatives of Imani Children Home a fact he knew and ought to know it was fraud means and abuse of his position and victims vulnerability and received payment for one baby J.S from Rose. The children were handed over under supervision of the 1st accused in absence of any representative of the Imani Children Home. The Nursing unit was also at fault in releasing the three children in the absence of the representative of the Imani Children Home.

50. In any case, the evident approbation and reprobation in DW1's testimony as well as his denial of assertions he is clearly heard stating create an impression in the mind of the Court that he was either being economical with the truth or entirely untruthful. The evidence produced by DW1, properly evaluated, falls in the category of what the Court of Appeal in Joseph Ndungu Kimanyi v Republic [1979] eKLR as follows:

“The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

51. With regard to the 2nd Accused Person, her only involvement in this case was that she retrieved three files pertaining to the three subject babies and never returned them. This alone cannot suffice for a conviction; thus, the 2nd Accused is deserving of the benefit of doubt. She might not have been aware the three victim were in process of being trafficked. 1st accused ensured meetings are held away from the office of medical social workers. She was not mentioned in the discussions and the court find her not guilty of the charges of trafficking in person. The Court in Philip Muiruri Ndaruga vs. Republic (supra) stated thus:

“The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him.... The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty”

52. Accused persons were charged with the offence of neglect of a child contrary to section 127 (1) (b) of the Children Act, 2001 (repealed). The transitional provisions at Section 6 of the Seventh Schedule of the Children Act, No. 29 of 2022 provide as follows:

6. Legal Proceedings.

- (1) Subject to this Schedule, legal proceedings pending immediately before the coming into force of this Act before a court of competent jurisdiction, including proceedings against or by the State, shall not be affected by the coming into force of this Act, and may be continued.
- (2) Where proceedings for an offence against any person were commenced before the coming into force of this Act, the offence shall, after the coming into force of this Act, be dealt with, tried and determined in accordance with this Act, and the forfeiture, penalty or punishment in respect of that offence shall, subject to subparagraph (3), be imposed as if this Act had not come into force.



- (3) Where under this Act the forfeiture, penalty or punishment is mitigated or reduced in relation to the forfeiture, penalty or punishment that would have been applicable had this Act not come into force, the provisions of this Act relating to forfeiture, penalty or punishment shall apply.
53. Accordingly, the corresponding provision to Section 127 (1) (b) of the Children Act, 2001 is Section 152 (1) (b) of the Children Act, 2022 which provides:
152. Penalty for cruelty to and neglect of children.
- (1) Any person who, having parental responsibility, custody, charge or care of any child, and who—
- (b) by any act or omission, knowingly or willfully causes that child to become, or contributes to his becoming, in need of care and protection, commits an offence and is liable, on conviction, to imprisonment for a term not exceeding ten years or to a fine not exceeding five hundred thousand shillings, or to both.
54. The accused persons are Medical social worker at Mama Lucy Kibaki Hospital and as part of their duties, they were involved in the process of ensuring children get placement in children's homes. They were evidently persons who were involved in the care of children at Mama Lucy Kibaki Hospital. The 2nd accused was the in charge medical social worker office at Mama Lucy Kibaki Hospital. She knew all cases of children in need of care after having been abandoned in and outside the hospital and admitted the pediatric ward. Baby A.T was brought to the hospital by a Good Samaritan like PW1 and 2 and her office would follow up whether there was any contact person or relative to be traced. The other two baby(s) were abandoned in the hospital and office of the medical social worker kept the records among other records of patient fees waivers.
55. Medical social workers would ensure every case has an OB no. from the nearest police station. The office would do hospital ward rounds with doctors on daily basis to pick cases where patient is in need of bill waiver. For baby(s) they would keep checking with the Nursing desk to recommend placement home upon discharge if no relative is found. The three victims in this trial were in Mama Lucy Hospital Pediatric ward for a couple of weeks. The office of the Medical Social worker got an OB NO. for abandoned case in the ward. As the in charge of the medical social worker, it was within her mandate to ensure smooth handover and proper record keeping. The information of abandoned baby ought to have been transmitted to the Children Office and for this case at Embakasi Children office.
56. The children officer Embakasi (PW10) testified that her officer was never notified about the three cases in question. As the in charge she ought to receive such information from the medical social worker (now accused persons). 1st Accused person failed in her duty to keep proper information updated to the children officer even after release of the children on the 12th May, 2020. In the other side it has been established the 1st Accused was involved in selling one of the three abandoned children that were released from Mama Lucy Kibaki Hospital on 12th May, 2020. 2nd accused was in negotiation with Rose about one baby boy but he supervised and fraudulently ensured all the three are handed over to Rose to deal with the two as she would wish. Rose had no obligation to escort the two other children at Imani Children Home as she retained one. The three children who required protection and care from the accused persons were instead disposed of to a stranger. 2nd accused failed to ensure lawful transition of the three children from the hospital to Imani Children Home and failed to inform the officer of the children officer about the three issues from admission to discharge and handing over. 2nd Accused persons knew the three subjects had been abandoned and had no guardian would avail but failed to protect them causing them to be victims of human trafficking by the 1st accused. The referral forms



ought to have been signed by the children officer (PW10) but they were signed for as can be seen in exhibit 9, 10 and 11 which demonstrated the how 1st accused person concealed information to causing the babies to be subjects of human trafficking.

57. Section 144 of the Children Act, 2022 provides that:

For the purposes of this Act, a child in need of care and protection includes a child—

- (a) ...
- (o) who is a victim of human trafficking;
- (aa) who has had any of the offences mentioned in the Third Schedule to this Act committed against him or her, or if he or she is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child;

58. By virtue of selling one baby and unlawfully handing over two other babies to Rose and the whistle blower, the 1st Accused committed the offence of child trafficking against the children thus causing them to be a child in need of care and protection. The I/O noted that the file in relation to baby OM alias AT did not even indicate the name of the Good Samaritans (PW1&2). Having already established that they had a duty of care of children by virtue of being medical social workers and being involved in ensuring abandoned children get placement in children's homes, the ingredients of the offence of neglect have been satisfied. The Accused person are equally guilty of neglect of a child contrary to section 127 (1) (b) of the Children Act in respect of the three subjects.

Conclusion

539. The 1st Accused is found guilty on all count as charged while the 2nd accused is acquitted of count 1, 2, 3, 4 and convicted of count 5, 6, and 7 accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF SEPTEMBER 2023

ESTHER K. KIMILU

SENIOR PRINCIPAL MAGISTRATE

