

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KIAMBU

CRIMINAL APPEAL NO. 2 OF 2023

YIBEKAL GETACHEW *alias* ADINAN
MOHAMED GALGAL.....APPELLANT

VS

REPUBLIC
RESPONDENT

(Appeal from the judgment of the Magistrate's Court, Kahawa (Hon. Boaz Ombewa (SPM) delivered on 7th September, 2023 in Criminal Case No. E037 of 2021)

JUDGMENT

INTRODUCTION

1. The Appellant, **YIBIKAL GATACHEW alias ADINAN MOHAMMED GALANO**, was charged with the three (3) counts Count I was Trafficking in Persons contrary to Section 3(1) (a) as read with Section 3(5) of the Counter Trafficking in Persons Act 2010. Count II was being in possession of false documents c/s to Section 347(a) of the Penal Code and the last Count III was Uttering of a false document c/s 353 of the Penal Code.
2. He was found guilty and convicted on Counts I to serve Thirty (30) years imprisonment and to serve one (1) year on Count III.
3. Being aggrieved by the conviction and sentence he filed this appeal. The grounds of appeal were as follows:-

- i. The learned Hon. Trial Magistrate erred in both law and fact in finding that the prosecution had proved their case beyond reasonable doubt.
- ii. The learned Hon. Trial Magistrate erred in both law and fact by misapprehending the law which was in conflict with the evidence on record hence perpetrating a miscarriage of justice.
- iii. The learned Hon. Trial Magistrate erred in both law and fact by shifting the burden of proof on the Appellant and failure to consider the defence tendered objectively.
- iv. The learned Hon. Trial Magistrate erred in both law and fact by passing a manifestly harsh and excessive sentence under the circumstances and in conflict with the objectives of sentencing despite the same being legal.

FACTS

4. The facts of the case as recorded were that **N.M. (PW1)** a 17 year old Ethiopian male testified that he buys shoes and clothes in Moyale for resale and that one day while in Moyale he was kidnapped by boda boda riders who were armed with knives and that he was taken to a forest where he met 42 other people and that together they walked day and night and eventually boarded a lorry where they were ferried to Nairobi and eventually to a house. he stated that they were asked to find money for them to be taken to South Africa or be released and that those who found the said money were released. He stated that the accused demanded for Kshs.

1000 per day for food which was given per day. For the six months they stayed in that house they never took a bath and that they were sleeping on torn mattresses. One day as the accused was outside the compound, five men attempted to escape but the accused was alerted by his wife and threatened them to go back but the neighbors rescued them by calling the police who came and rescued the others who had been left in the house.

5. **D. A. (PW2)** testified that he is a 17 year old from Ethiopia and that when he was in Moyale, Ethiopia four people armed with guns and knives kidnapped and forced him into a boda boda where he was taken to a forest on the Kenyan side where he met 39 other people and that they boarded a lorry and later a small vehicle where they were taken to a house in Nairobi where they were received by the accused who asked them to contact their families and ask them to send money for them to proceed to South Africa. He stated that they barely took a bath, ate food once a day and that some of them were chained in pairs and were locked in the house where they remained for about six months. The accused gave them phones to contact their families and threatened to sell their kidneys. He testified that on 3/11/2021 together with others they escaped via a window where he got injured and that they were rescued by neighbors who gave them food and called the police who took him to the hospital.
6. **TAFRSUS TARIKU (PW3)** a 20-year-old Ethiopian male adult testified that he went to buy clothes in Moyale when he was

kidnapped by four men who took him to a forest on the Kenyan side via a boda boda where they found around 42 people and they boarded a vehicle to a house where they were received by the accused. He was chained together with others and that food was given once a day and they were never allowed to go outside. They jumped through the window and neighbors rescued them and called the police. He identified the accused as the owner of the house.

7. **MARCOS DANIEL (PW4)** an 18-year-old Ethiopian male testified that as he was headed to work in Moyale when militia men stopped the minibus he was travelling in and he was put on a bodaboda and taken to a forest on the Kenyan side where he met other Ethiopians and four guards armed with guns. They were transported to a small house where they were received by the accused and he was put in a room with twenty others. They were chained, beaten up, never took a shower and were given food once a day. The accused demanded money to take them to South Africa and that after an unbearable stay, they decided to surrender to the Kenyan government by escaping through a window where they were rescued by neighbors who contacted the police. He identified the accused in court and the house through photos. During the escape he was injured on the leg and abdomen.
8. **SAMSON MACHOLI MATHU (PW5)** testified that he is the CEO of Skyplast Agencies which manages High View Estate House No. 30B. The accused approached them as he wanted to lease House No. 30B. He filled in the tenancy application

form and gave out a copy of his Alien Card No. 10116677. The paid the house deposit of Kshs. 40,000/= and Kshs. 2,500/= as water deposit. He paid a total of Kshs. 84,500/= and a tenancy agreement dated 29/07/2021 signed and he moved into the house on 1/8/2021. He stated that on 3/11/2021 he was notified by the police that he was required to present himself at Kilimani Police Station to record a statement as boys were found in house no. 30B.

9. **JOHN HOPE ALELI (PW6)** a tenant of High View Estate testified that on 3/11/2021 a guard approached him and informed him that there were some people who seemed to have escaped from jail as they had handcuffs on. He contacted the OCS Capital Hill Police Station and that he also drove into the estate where he found five men in chains and did not have complete clothing, one of them was limping and that they could not understand English. They communicated using sign language that they were hungry and they were bought food. One of them ran to house no. 30B and when the Deputy OCS arrived he was taken to the said house where seven other men were found hidden at the back yard. The accused was identified as the owner of house no. 30B.
10. **NO. 102510 PC CATHERINE WANJIKU (PW7)** testified that on 3/11/2021 together with other officers they were informed to proceed to Highview Estate where there were people who had been restrained. They found six people and five who had been chained and were shown the man who owned the house where the victims lived. The man produced his refugee card

bearing his name and ID card no. 10116677. The victims could not understand English or Kiswahili. She testified that they proceeded to search the house and seven more men were rescued. The accused was booked at Capital Hill Police Station and the twelve victims were booked at Kilimani Police Station and five victims were taken to Mbagathi Hospital. The accused was searched and two phones were recovered from him.

11. **NO. 237261 EVANS MARAGE (PW8)** testified that on 3/11/2021 he received a call from the OCS that people had been caught at High View Estate. He contacted **PW6** and proceeded to the estate with three other officers. He found five men chained together and they looked weak. The members of the public said that the accused is the owner of the house and seven more men were found in the house upon the house being searched. The accused was asked to produce his identification where he produced his alien ID which was taken by **PW8** as well as two phones.
12. **DR. CHEBET CHIRCHIR (PW9)** a Medical Officer based at Mbagathi Hospital testified that on 3/11/2021 she attended to Daniel Asafa who complained of pain on both feet from jumping out of a building. She also attended to Tarfsus who appeared unkempt, malnourished and wasted who also had tenderness from the fall. She also examined Marcus who appeared unkempt and complained of pains on both limbs. When she examined Mamuse, he reported of feeling pain on

both feet. The patients were treated with antibiotics and analgesics.

13. **RININ MUCHELULE MOSE (PW10)** the Registrar of Persons based in Nairobi testified that she received a letter from DCI requesting for the particulars of a registered ID No. 06523611 which they found belonged to Malaki Bonyo Ombura.
14. **IBRAHIM KHALIF (PW11)** a Legal Officer at the department of Refugee Services testified that he received a letter from the DCI requesting for verification of documents and taking of finger prints and identification of Adinan Mohamed holder of ID card No. 10116677. Upon checking Mohammed was untraced meaning that he was not registered as a refugee. They found that Adinan Galano is in their system but bearing a different photo. Yibekal had been issued with asylum pass on 24/7/2017 and the same has never been extended and that he was yet to undergo the process of determination.
15. **NO. 79969 SGT. HUDSON HENRY MASAKE (PW12)** testified that he was approached by Kombe of TOCU with CD that had photos and wanted the same printed. He printed the photos of a house, some individuals in the house and gate marked 30B and prepared a certificate of the same.
16. **NO. 86357 PC RACHAEL KOMBE (PW13)** the Investigating Officer testified that she was instructed to take over a case of human trafficking at Capital Hill Police Station. She proceeded to the scene and was briefed that twelve victims of human trafficking had been rescued after jumping out of house no. 30B and that they looked weak. The house belonged to a

tenant who produced his refugee card no. 10116677 bearing the name Adinan Mohamed and two phones were recovered from the house. Five men who appeared weak were taken to Mbagathi Hospital. She stated that the victims recorded their statements. The phone no. 0740548584 was registered in the name of the accused's wife Gashere Eshedu.

17. **GEORGE OKUMU BONYO (PW14)** the son of Maliki Bonyo Obura testified that his father is over ninety years and sickly and in Homabay as such could not record a statement. His father has never given out his ID to someone else for use and that he only has access to it when needed by NHIF.
18. The Appellant was put on his defence. He gave a sworn statement and did not call any witnesses. It was his defence that he received the victims and that he used to give them food three times a day. He stated that the victims were brought by his employer who owned the vehicle that delivered the victims and that he was paid Kshs. 40,000/=, his house expenses and rent. He had worked for two months and that his employment entailed feeding the victims.
19. The appeal was canvassed by way of written submissions; a brief summary of the respective submissions is as follows;

APPELLANT'S SUBMISSIONS

20. The Appellant submits that the victims were persons seeking greener pastures in South Africa and came to Kenya voluntarily which narrative does not fit the ingredients of the offence of human trafficking. His employer was Yahnis and

that he had no knowledge of the victims and his job was to feed them so as to be able to be paid and feed his family. The prosecution erred in failing to charge his employer and that there is no evidence that he knowingly exploited the victims. Reliance was placed in the case of ***Matare Getange & 2 others vs Republic (2021) eKLR***. The Court was urged to consider the mitigation and set aside the sentence. Reliance was placed in the case of ***Mombasa Criminal Appeal No. 65 of 2014 Caroline Auma Majabu vs Republic***.

RESPONDENT'S SUBMISSIONS

21. It was submitted that there was clear evidence that the Appellant was part of a cartel that trafficked **PW1, PW2, PW3** and **PW4** into the country from Ethiopia and were being held against their will. The Appellant could not plead innocence as he had the opportunity to report to the police. In any case it was established that he was the one who had rented the house. Having given his alien card which was forged, the conviction in Count III was proper. Further, the court's reliance on evidence that was direct and consistent and not circumstantial cannot be faulted and that the Appellant's defence was considered and rejected and reasons were given for the same. Lastly, the sentence was said to be neither excessive nor unlawful as it is prescribed by the law being the mandatory minimum sentence of thirty years. The appeal was devoid of merit and ought to be dismissed.

ISSUES FOR DETERMINATION

22. Upon reading the parties written submissions, this court has framed the following issues for determination;

- (i) Whether the charges were proved to the desired threshold
- (ii) Whether the trial court failed to consider the Appellant's defence.
- (iii) Whether the sentence was manifestly excessive.

ANALYSIS

23. This being the first appeal it is the duty of this court to evaluate the evidence as a whole and subject it to an exhaustive examination. Refer to the case of **Okeno vs R [1972] EA 32.**

Whether the charges were proved to the desired threshold

24. The Appellant herein was found guilty of the offence of trafficking in persons contrary to section 3(1) (a) as read with Section 3(5) of the Counter Trafficking in Persons Act 2010.

25. **Section 3(1) of the Counter Trafficking in Persons Act of 2010** provides that:-

A person commits the offence of trafficking / 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 the victim of trafficking in persons; or

g) Giving or receiving payments or benefits to obtain the consent of a person having control over another person.

26. The offence of trafficking in persons consists of three key elements which must be proven in order to secure a conviction and it occurs only when all three elements namely act, means and purpose are present, the absence of any of them renders the offence incomplete. There is however an exception in the case of minor victims where it is not necessary to prove the means.

27. The prosecution is required to demonstrate with regard to the first element the act, that an accused person did one or more of the acts envisaged in law being that they recruited, transported, transferred, harboured or received another person for the purpose of exploitation.

28. Refer to the case of **Geoffrey Mutemi Manzi vs Republic (2021) eKLR** where the High Court had this to say;

“.....this means that for human trafficking to occur, the offender must commit at least one of the acts envisaged for the offence against another individual, by using some means.”

29. In the instant case, the evidence on record is that **PW1, PW2, PW3** and **PW4** were kidnapped by militia men while in

Ethiopia and they were transported to Nairobi, Kenya where the Appellant received them in his house and harboured them for a period of about six months before they escaped and were rescued by neighbors who called the police. During this period the Appellant threatened them and provided them with phones to call their families to ask them for money.

30. This Court is therefore, disinclined to interfere with the trial courts finding as the prosecution proved one of the key elements and acts of harbouring as envisaged for the offence in Count I to the desired threshold.

31. With regard to Count III there is overwhelming evidence that the alien card number 10116677 given to **PW8** could not be traced by **PW11** as it was not registered as such it was clear that the Appellant had uttered a false document.

32. This ground of appeal is wanting in merit and it is disallowed.

Whether the trial court failed to consider the Appellant's defence.

33. Having perused the Appellant's sworn statement of defence this Court concurs with the Respondent's submissions that it does not in any way controvert the evidence of the prosecution witnesses that places him at the house where the victims were held; and the defence did not in any way controvert the evidence that the house was used for trafficking purposes at all material times.

34. This Court is satisfied that the trial court analyzed the

Appellant's statement of defence and had good grounds for rejecting it as it did not raise or cast any doubts in the prosecution's case.

35. This ground of appeal is found to be devoid of merit and it is disallowed.

Whether the sentences were manifestly excessive.

36. The sentence imposed by the trial court was for a term of Thirty (30) years on Count I and One (1) year on Count III; the contention by the Appellant is that the sentences imposed upon him were harsh and excessive considering that he was a first time offender;

37. The court record reflects that before passing the sentence, the trial court invited the Appellant to mitigate; and he stated that he was a first offender and that the trial court it is noted gave him the benefit of the minimum sentence;

38. The applicable law is found at Section 3(5) of the Counter Trafficking in Persons Act 2010 and it prescribes a minimum mandatory penalty of Thirty (30) years imprisonment; the section reads as follow:-

“Section 3(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.”

39. The trial court had the benefit of seeing the Appellant and after hearing the case, found that the Appellant was a first offender and this was taken into consideration by the trial

court when exercising its discretion after conviction sentenced him to the mandatory minimum of Thirty (30) years; The Appellant owed a duty of care to his fellow Ethiopians in a foreign country but he instead exposed his fellow countrymen to an exploitative act that is prohibited in law;

40. On Count III this Court concurs with the Respondents sentiments that the sentence is extremely lenient.
41. The sentences are found to be lawful and are as provided for in law; therefore, it is evident that the trial court did not act upon a wrong principle of law nor had it failed to take into account the proper provisions of the law when passing the sentences;
42. There are no good reasons found by this Court to interfere with the sentences imposed;
43. This ground of appeal is devoid of merit and it is hereby disallowed.

FINDINGS

44. For the foregoing reasons this court makes the following findings;
 - (i) The charges in Count I and Count III were proved to the desired threshold;
 - (ii) The trial magistrate considered the Appellant's statement of defence and had good reasons for rejecting it.
 - (iii) The sentences are found to be legal and not manifestly excessive in the circumstances.

DETERMINATION

45. For the forgoing reasons the appeal is found lacking in merit in its entirety and it is hereby dismissed.

46. The convictions and sentences are hereby affirmed.

That is the Order of the Court.

**DATED, SIGNED AND DELIVERED VIA TEAMS AT KIAMBU
THIS 31ST DAY OF OCTOBER, 2025.**

**A. MSHILA
JUDGE**

In the presence of;

Sanja - Court Assistant

Obulli - For the Appellant

N/A - For the State