

IN THE COURT OF APPEAL
AT KISUMU
[CORAM: NYAMWEYA, ACHODE & MATIVO JJ.A.]

CRIMINAL APPEAL NO. 027 OF 2019

BETWEEN

DORIS KEMUNTO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisii (Ougo J.) dated 25th January 2019 in HCCRA No. 79 of 2018).

JUDGMENT OF THE COURT

1. **Doris Kemunto** (the appellant), was charged jointly with one Caren Moraa Asiago with the offence of trafficking in person contrary to section 3 (1) (b) as read with section 3(5) of the Counter Trafficking in Person Act at the Chief Magistrate’s Court at Kisii in **Criminal Case No. 168 of 2016**. It was alleged that on 7th May 2013 at Bomorenda Location in Kisii South District within Kisii County, she fraudulently transferred V. K., a child aged 8 years with the intent to deprive S.K., the parent who had the lawful charge, care and possession of the said V.K.
2. The prosecution case was founded on the testimony of 3 witnesses, namely, the complainant’s grandmother, (PW1), the complainant’s mother, (PW 2), and the Investigating Officer, (PW3). Caren Moraa Asiago, the appellant’s co-accused gave sworn evidence in her defence. However, the appellant herein opted to remain silent and did not call any witness in support of her defence. At the conclusion of the case, the trial court acquitted the said Caren Moraa Asiago for lack of evidence. However, the learned magistrate was satisfied that the prosecution had proved its case against the appellant

to the

required standard. Accordingly, the appellant was convicted on the main count for the offence of trafficking in person contrary to section 3 (1) (b) as read with section 3(5) of the Counter Trafficking in Person Act. There was no finding on the alternative count. After considering the appellant's mitigation, the trial magistrate sentenced the appellant to serve 30 years imprisonment.

3. The appellant's appeal to the High Court at Kisii being **Criminal Appeal No. 79 of 2018** against conviction and sentence was dismissed by **Ougo J.** for being devoid of merit. The appellant is now before this Court seeking to reverse the High Court decision.
4. When this appeal came up for virtual hearing before us on 1st September, 2025, the appellant appeared virtually in person while at Kisii Prison while Senior Assistant Director of Public Prosecutions, **Mr. Solomon Njeru** appeared for the respondent. Both parties relied on their written submissions which they highlighted briefly.
5. A reading of the appellant's undated grounds of appeal and submissions and her oral plea to this Court show that she is only challenging the sentence of 30 years imposed upon her. Her plea to this Court is that the sentence imposed on her be reviewed and she be accorded a less sentence (sic) or given a non- custodial sentence. She argued that the long incarceration would ruin her future prospects in life and urged this Court to consider that she is a first offender, that she is remorseful, that she is the bread winner of her family and a mother of three. Therefore, the 30 years imprisonment is heavy, harsh and the same defeats the purpose of correcting and rehabilitating her nor is there evidence that she cannot reform and be reintegrated in the society.
6. Mr. Njeru opposed the appeal and relied on in his written submissions dated

29th August 2025. In his brief oral highlights, he stated that the appellant was arrested after about three years and she admitted selling the child to her co-

accused Caren Asiago. It was Mr. Njeru's submission that the charges against the appellant were proved beyond reasonable doubt and upon being placed on her defence, she opted to remain silent.

7. Mr. Njeru maintained that the sentence passed by the trial court is the minimum sentence provided under the law and it is neither unlawful nor excessive, but, it is lenient since the child was still missing. Therefore, the instant appeal ought to be dismissed in its entirety.
8. We have considered the record, the parties' written submissions and their brief oral highlights made before us and the law. This is a second appeal in which the appellant is inviting this Court to interfere with the sentence of 30 years imposed upon her by the trial court and affirmed by the first appellate court. The definitive issue glaring at us is whether it is within our mandate to entertain this second appeal against sentence.
9. The answer to this pertinent question is located in Section 361 of the Criminal Procedure Code which aptly stipulates this Court's mandate in a second appeal as follows:

361 (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:

- a. on a matter of fact, and severity of sentence is a matter of fact; or***
- b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.***

10. The Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (amicus curiae) [2024] KESC 34*

(KLR) underscored the mandate of this Court in a second appeal as stipulated in the above section as follows:

“...we must take cognizance of provisions of Section 361(1) of the Criminal Procedure Code which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court...”

11. Unmistakably, the statutory bar erected by the above provision explicitly bars this Court from hearing a second appeal on a matter of fact, and Parliament in an unequivocal manner legislated that severity of sentence is a matter of fact. In terms of the above provision, this Court cannot hear an appeal against sentence, except where a sentence has been enhanced by the High Court, unless the trial court had no power to pass the sentence in the first place. This was not the case here. This ground is sufficient to dispose this appeal.
12. The appellant is complaining that the sentence of **30** years is harsh. Our answer to this still lies in section **361 (1) (a)** of the Criminal Procedure Code which provides that severity of sentence is a matter of fact. The section bars this Court from entertaining matters of fact. (See *Republic vs. Joshua Gichuki Mwangi (supra)*). The Court of Appeal's power in second appeals is limited to questions of law. In essence, section 361 ensures that the Court of Appeal focuses on ensuring the legal correctness of lower court decisions and does not become a court of second appeals on factual matters.

13. At the risk of flogging a dead horse, there is still another ground upon which this appeal collapses. The sentence of 30 years imposed upon the appellant is the minimum sentence stipulated by the law. Section 3(5) of the Counter-Trafficking in Persons Act provides that:

(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.

14. The question is whether, this Court can interfere with the said sentence. The Supreme Court in **Republic vs. Joshua Gichuki Mwangi (SUPRA)** stated as follows regarding minimum/mandatory sentences:

“56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences, however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although the term ‘mandatory minimum’ can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be

used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.”

15. Arising from our conclusions on the issues discussed in the above paragraphs, it is clear that this appeal is a non-stater. The upshot of the foregoing is that this appeal is without merit and the same is hereby dismissed in its entirety.

Dated and delivered at Kisumu this 30th day of January, 2026.

P. NYAMWEYA

.....
JUDGE OF APPEAL

L. ACHODE

.....
JUDGE OF APPEAL

J. MATIVO

.....
JUDGE OF APPEAL

*I certify that this is a
true copy of the original*

Signed
DEPUTY REGISTRAR