



REPUBLIC OF KENYA



**Odera & 2 others v Republic (Criminal Appeal E148, E169 & E188 of 2025
(Consolidated)) [2026] KEHC 3939 (KLR) (18 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3939 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKADARA
CRIMINAL APPEAL E148, E169 & E188 OF 2025 (CONSOLIDATED)**

J WAKIAGA, J

MARCH 18, 2026

BETWEEN

SAMUEL ODERA 1ST APPELLANT

ALPHONCE MAGHANGA MWANYOLO 2ND APPELLANT

PETER MUSA MOSIRIA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in Criminal Case No e034
of 2022 of the Chief Magistrates Court at JKIA delivered on 21st November 2024)*

JUDGMENT

1. This appeal arises from the judgement and subsequent sentenced by Hon. Njeri Thuku in which she found the appellants guilty of the charge of facilitating exit out of the country contrary to section 7 of the Counter trafficking in persons Act and conspiracy to commit a felony contrary to section 393 of the Penal Code and sentenced them to serve thirty years imprisonment on the charge of facilitating exit without an option of a fine and two years for the offence of conspiracy to commit a felony, with the sentences running concurrently.
2. It is of note that one of the appellants co-accused (Pauline Nyambura Kagai (3rd accused before the trial court was acquitted on all the counts on the basis that there was nothing to show that she participated in facilitating the three Ethiopians and that there was no evidence produced in court of a phone call between the (Pauline and Musa) or any form of messages to prove this communication.
3. Being aggrieved by the said determinations, the appellants each filed individual appeals initially at the High Court Criminal Registry at Kibera which appeals were consolidated for the purposes of trial and determinations with the appellants appearing on how they were before the trial court.



4. The appellants raised the following grounds of appeal:
 1. 1st Appellant
 - a. The trial court failed in law and fact considering the evidence adduced did not meet the threshold for conviction
 - b. The prosecution case was full of contradictions
 - c. The appellants defence was not considered
 2. 2Nd Appellant
 - a. The trial court erred in convicting the appellant on the basis of insufficient evidence
 - b. The ingredients of the charge were not established
 - c. The charge sheet was incurably defective and the evidence adduced at variance with the particulars thereof
 - d. The appellants right to fair trial were violated
 - e. The trial court ignored the appellant defence and placed emphasis on extraneous consideration
 - f. The case was not proved to the required standard
 - g. The sentence imposed was harsh excessive and untenable
 3. 3Rd Appellant
 - a. The appellant was not properly identified
 - b. The court relied on circumstantial evidenced which did not meet the requisite threshold for a safe conviction
 - c. The court ignored the prosecution evidence which was favourable to the appellant
 - d. The prosecution case was riddled with contradictions
 - e. The court failed to consider the appellant defence and submissions

Submissions

5. The directions were given on the disposal of the Appeals herein by way of written submissions. On behalf of the first appellant it was submitted that the same was not on duty on the material day and was only convicted on the basis of the testimony of PW4 a co-worker who allegedly received information from the appellant to aid in boarding of specific passengers and that then trial court found that he was at the airport which was contrary to the evidence tendered and that there was no evidence of the same having communicated with the prosecution star witness PW4 who did not produce communication between her and the appellant and that her evidence that the appellant was at the airport was not corroborated .
6. On the charge of conspiracy to commit a felony, it was submitted that the prosecution had to prove common intention between the appellant and his co-accused as was stated in the case of Yegon v Republic [2024] KEHC 3128(KLR). In convicting the appellant, the court stated that there was a deal between the appellant and PW4 while there was no evidence of any communication between the



- appellant and the said witness. It was contended that since the said witness was an accomplice, her evidence needed corroboration.
7. On sentence it was submitted that the same was manifestly excessive as the court did not take into account the mitigating circumstances.
 8. On behalf of the second appellant it was submitted that there was contradiction between the testimony of PW4 and the alleged victims and that the 2nd appellant and the first three prosecution witnesses did not know each other as per the evidence on record. And that PW4 was only re-assigned because there was unprecedented traffic at gate 18 which necessitated need for extra personnel. Further there was no evidence of money having changed hands between the accused and the victims. It was contended that there was no evidence of any communication between the 1st appellant and 2nd appellant as regards any instruction to the star witness.
 9. It was contended that the re-assignment of the said witness was for the comfort of the passengers and not as part of any conspiracy and that her testimony before the court was to appease the prosecution having been dropped as an accused person and was therefore not a credible witness. It was submitted further that there was no evidence linking the appellant to the offence herein.
 10. On behalf of the third appellant, it was submitted that the same was within his duties which included screening passengers and had a duty to facilitate the passengers by showing them the way to board the aircraft and that the telephones recovered from the accused persons did not mention the third appellant and neither was there any evidence adduced that implicated him. It was contended that the evidence adduced by the prosecution did not meet the standard to sustain a conviction as the same not mentioned by any witness and neither was the same positively identified.
 11. It was contended further that the court relied upon circumstantial evidence to link the appellant to the offence but the same did not meet the required legal threshold as set out in the case of *same v Republic* [2003] KLR 364 and that the prosecution key witness stated that she had not met the appellant before the said incidence and therefore his identification was not positive. In support of the submissions reference was made to the case of *Maitanyi versus Republic* [1986] KLR 198. It was submitted that the prosecution failed to establish intention on the part of the appellant and neither was he placed at the scene by any of the prosecution witnesses.
 12. It was submitted that the trial court did not take into account the evidence of PW12 to the effect that assisting passengers who had difficulties in understanding signage or direction was within the jurisdiction of airport personnel including the 3rd appellant in line with ICAO annex 9 and did not constitute an offence under the Kenyan law which amounted to a miscarriage of justice and made the decision amenable to be set aside by the appellate court as was stated in the case of *Kanyi v Republic* [1991] KEHC 22(KLR).
 13. It was contended that the trial court failed to give due consideration to the appellant plausible defence in particular those pointing to the lawful nature of the acts performed by the appellant which raised doubt as to the guilt of the appellant, the benefit of which he was entitled to.
 14. It was submitted that the charge sheet was defective as it did not disclose the offence charged as it did not specify how the 3rd appellant facilitated illegal migration, what documents were forged and or how he participated in the alleged conspiracy and that the ingredients of section 3 of the Act were not established as regards the victims as no exploitive motive was established in their movement.
 15. It was finally submitted that the sentence was harsh and that an appropriate sentence should neither be too light nor too severe.



16. On behalf of the respondent it was submitted that under section 7 of the Act , the prosecution to sustain a conviction must prove that the appellants not only facilitated aided or abetted exit but that the same was for purposes of promoting trafficking in persons which was contrary to the evidence on record and therefore the prosecution was not able to prove the case of trafficking as against the appellant , it was however contended that as per the evidence of PW4 there was an agreement between her and the 2nd appellant who was her supervisor to participate in the exit of the Ethiopians from Kenya who had tickets falsely representing them as Kenyans .
17. On the charge of conspiracy it was conceded that the same was not established as there was no evidence that the 1st appellants mobile phone through which it was alleged that the 1st appellant communicated with the PW4 was subjected to forensic analysis and that all the appellants gave plausible defences.
18. The appeal by the 2nd and 3rd appellants were conceded to but the court was urged to uphold the conviction and sentence against the 1st appellant.
19. At the hearing hereof , the 1st appellant appeared in person , and relied on his written submissions and stated that on the material day he was not on duty and that an alleged communication between him and PW4 which connected him to the offence was never produced , Ms Nekesa appeared for the 2nd appellant and submitted that having been an accomplice , the evidence of PW4 was doubtful , Mr. Omwoyo submitted that the prosecution witnesses exonerated the 3rd appellant and that the circumstantial evidence tendered did not link him to the offence. Ms Kariuki for the prosecution conceded to the appeals by the 1st and 3rd appellant but on the 2nd appellant it was submitted that he was on duty on the material day though the link was weak. She therefore conceded to the appeal by the same .

Proceedings

20. The court on appeal is not obliged to allow the appeal simply because it is conceded to by the prosecution but is under a duty as a first appellate court to analyse the evidence tendered by the prosecution and to come to its decision thereon while giving the allowance to the fact that unlike the trial court it did not have the privilege of seeing and hearing witnesses.
21. PW1 Kebebus Wondimu testified that she came to Kenya from Ethiopia with the intention of going to South Africa having booked the ticket through a broker called Teddy and was received by the Broker who secured from her a visa to south Africa and that since the visa was not on the passport she was returned to Nairobi where she arrested. It was her evidence that it was the broker who paid for everything. It was her evidence that the brokers were Ethiopian and Eritrean. In cross examination she stated that she was going to make a person she was in relationship with and that she did not communicate with any of the appellants
22. PW2 Hirut Assefa stated that she came to Kenya through Moyale and was received by someone called Mohammed who took her to his house and in Nairobi she was met by someone called Tade and that she was enroute to South Africa to marry Elias Daniel. In cross examination she stated that her travel to SA was her own initiative and that Tade is the one who paid for everything.
23. PW3 Tsehay tagessa stated that she was brought to Kenya by a broker who was to facilitate her going to south Africa and was received in Nairobi by Tade and that on reaching Malawi they were returned back to Nairobi where they were arrested. PW4 Mumtaz Iqbal Hussein a customer service agent with Kenya Airways stated that she was on duty when a colleague called Opile told her that he was taking his child to school and requested her to assist in flight QQ 756 to Lilongwe and that he had liaised with



- the 2nd appellant who would assign her to the said flight but when the roster came she was not assigned to gate 17 , she called him and informed him of the changes.
24. It was her evidence that the 2nd appellant later came and reassigned her to the said gate and was asked by the 2nd appellant to ask Opile for the names of the three passengers that she was supposed to handle and he sent the names on WhatsApp, she then proceeded to her gate no 16 to check if everything was ok before going to gate no 17 which was being attended to by Neema Karanja in the presence of the 2nd appellant which was later on changed to gate 20A and she checked the three passengers in question before proceeding to gate no 16, from where the 2nd appellant asked her whether she had seen the subject passengers to which she stated that she had not and was asked to call Opile who told her that they would be brought by an Immigration officer and later on when she inquired of their whereabouts was told that they would be brought by a KAA officer called Moses which information she gave to the 2nd appellant .
 25. It was her further evidence that the said Moses brought to her the boarding passes for the said passengers which she market as checked and told him to take the passengers to the 2nd appellant. She was later on called by the duty manager to go to the security where she was told that the passengers they had cleared were inadmissible in Lilongwe, it was her evidence that Opile was the first appellant who had told her that the passengers were to pay kshs 700,000/= out of which the first and second appellant would take 300,000/= each and give her kshs 100,000/=.
 26. In cross examination she stated that she received a telephone call from the 1st appellant who told her that he wanted her to assist him with passengers who were going to Lilonwe and that he met him with his daughter and that the 2nd appellant as her supervisor could give her instructions and that she was arrested and stayed in custody for five days. It was her evidence that she could not take instructions from the 1st appellant and neither could he assign her duties, she stated that she had not met the 3rd appellant before he brought the documents to her.
 27. PW5 Papius Karenga Gachura stated that he was on duty when he received the documents from the subjects and confirmed that they were in order which he processed. The following day he was informed that they had been returned having been denied entry on allegation of being trafficked. He confirmed that they all had valid documents .PW6 Rebecca Toto confirmed those who were on duty and stated that they recorded no incident until the next day when she was not on duty when the return of the subjects was reported.PW7 Samwel Mbugua Kanyingi a senior Immigration Officer was approached by one of the subjects whose documents were in order and was not on the stop list so she was allowed to proceed. He was not told the reason to her return.
 28. PW8 Olosiriani Collins Kolian cleared one of the subjects whose documents were all valid so he cleared her, the next day he was told that she had been denied entry but no reason was given for the same. He stated that he did not know the 1st and the 2nd appellants and that they did not play any role in his duties.PW9 Neema Karanja a KQ customer Agent was on duty when PW4 asked whether she could assist her with the processes to which she consented and that there was later a gate change so they signed on the boarding passes they had cleared so as not to repeat the process at the new gate where they were joined by the 2nd appellant who assisted them in boarding passengers and at 1.05 pm they were missing six passengers , three of who were at the lounge and that three Ethiopians got up from the gate and proceeded to gate 20A where the 2nd appellant was who said their documents had been checked
 29. In cross examination she stated that she had not dealt with the first appellant and that she had worked with the 2nd appellant for three years and that the documents the subjects were carrying were legitimate.
 30. PW10 Jacob Ochieng Agengo sent the customer manifest where they confirmed that the subjects had checked in online where their passports were entered as Kenyans and that they were boarded by the 2nd



- appellant and in cross examination stated that it was normal for the supervisor to move from one gate to another .PW11 Gerald Kipchirchir Limo stated that they got a report from a whistle blower on the travel of the subjects and when he checked customer manifest they were indicated as Kenyans and that the flight had departed at the time the information was received. He stated further that he requested for the information on the staff who had handed the flight and they interviewed PW4 who gave the name of the 1st appellant and the role allegedly played by the 2nd appellant and that the passengers were returned back before their visa status was confirmed.
31. In cross examination he confirmed that they had valid passports and ticket but that there was nothing to confirm their visa status and that the red flag came on the change of nationality and that at the return of the subject the visa issue had not been determined and that he could not tell whether PW4 received any WhatsApp communication and whether money changed hands.
 32. PW12 Teddy Mugambi Kiara received request on CCTV footage which showed the movement of the 3rd appellant at gate no 20A , the subjects with the 3rd appellant and the subjects at the screening area and in cross examination he confirmed that the movements were normal at the airport .PW13 CI John Mbaiyo Kahonge received the phones for extraction and prepared his report and that the phones of PW4 and the 2nd appellant did not support extraction of SMS and WhatsApp chats and that there was communication between PW4 and the 1st appellant .
 33. PW14 CPL Anthony Wanguya arrested PW4 and the 2nd appellant based on the information by Limo and that the 1st appellant had contacted PW4 to assist in the smooth movement of the subjects with the assistance of the 2nd appellant and that the 3rd appellant brought the subjects to the gate where she indicated their boarding passes as checked. In cross examination he confirmed that the 1st appellant was not at work and that there was no document to prove that the Ethiopians could not be accepted in Malawi.
 34. When put on their defence , the 1st appellant stated that he did not play any role in the matter as he was not on duty having taken his daughter to school ,in cross examination he denied that he was known as Opile and that he only communicated with PW4 on 3rd may 2024and that he only knew about the case when his manager called him from Kisumu. The second appellant stated that he was to oversee gate processing check-in and transfer desk , he also plans gate to align with parking bays and that the subjects were processed through gate 20A as the flight was delayed and that he deployed PW4 to assist since she was not busy and that he cleared the subjects in his line of duty .
 35. The third appellant stated that his duties included screening and facilitating passengers including the subjects whom he had never met since they had language barrier

Determination

36. From the proceedings herein and the submissions before the court which I have considered it is clear that the appellants were convicted on the strength of circumstantial evidence on an alleged communication between PW4 and one Opile who was alleged to be the 1st appellant and the fact that the 2nd appellant gave instructions to PW4, however there was no evidence tendered by the prosecution to join the link between PW4 whom the court called star witness and the appellants herein. further the prosecution failed to establish that the said Opile was the 1st appellant.
37. In convicting the appellant, the trial court stated at paragraph 77 of the judgement thus “there is much to be gleaned from the chat above. First there was a deal which Samuel , Alphonce and Mumtaz knew about but it was ruined according to Samuel by his colleague Regina. Secondly this deal wad beyond just the three of them. It involved a senior person known as Bernard who heads a significant



department. His blessing and possibly his cut are in this deal. Samuel knew the exposure would be great and hence his advise to Mumtaz to delate any conversation she had and to stick to WhatsApp. At this point, Mumtaz was still interested in the money but what alarmed her more was the thought of losing her job”

38. This finding by the court is not supported by the evidence on record and therefore the court took into account matters which were not presented before her by way of evidence. Further the so called star witness was an accomplish whose evidence required corroboration.
39. As noted from the trial courts observation whereas the 3rd appellant confirmed that he assisted the subjects in the course of his duties, there was no evidence tendered to show that he knew the subjects and having found as a fact that the mobile phones belonging to the 1st and 3rd appellants and the subjects were not exploited so as to link the same, this rose a doubt on the prosecution case the benefit of which should have been given to the appellant. There was further no evidence tendered on the participation of the appellant on the online checking of the subjects and as at the time of the decision by the court there was no evidence tendered to show that the subjects were denied entry based on the invalidity of their Visa going by the evidence of PW 11 to the effect that they were stopped not by the immigration department in Malawi but by the Kenya Airways personnel acting on what he stated to had been a whistle blower.
40. Further there was evidence before the court that the movements by the subjects were voluntary and therefore the charge of trafficking was not proved. On the charge of conspiracy to commit a felony, the court failed to establish common intention on the part of the appellants and therefore their conviction was not safe and free of error.
41. It is therefore the finding of this court that the prosecution case against the appellants herein was purely based on suspension and suspension however strong cannot form a basis for conviction and therefore the prosecution was right in conceding to the appeal herein which I hereby allow and set aside the conviction of all the appellants evidence having been tendered to prove that what ever the 2nd and 3rd appellant did was in the course and scope of their duties at the airport and that the 1st appellant was not on duty at the material time.
42. Sentence is a function of the trial court and had the appeals failed I would not have interfered with the same but having set aside the conviction, I hereby quash the sentence herein.
43. The appeal is allowed both on conviction and sentence. The appellant to be set free unless otherwise lawful held.
44. The cash bail herein in respect of bail pending appeal shall be returned to the appellants and or the depositors thereon and it is ordered.

DATED SIGNED AND DELIVERED THIS 18TH DAY OF MARCH 2026

J. WAKIAGA

JUDGE

In the presence of: -

Court assistant –

Counsel for the State

Applicant -

