



**REPUBLIC OF KENYA**

**IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU**

**CRIMINAL CASE NO 388 OF 2020**

REPUBLIC.....PROSECUTION

**VERSUS**

STEPHEN MUATHE KYUNO.....1<sup>ST</sup>

ACCUSED

RONALD MUKEYA.....2<sup>ND</sup> ACCUSED

**JUDGMENT**

**THE CHARGE**

Stephen Muathe Kyuno and Ronald Mukeya (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> accused persons respectively) were jointly charged with the offence of Human Smuggling contrary to section 53(1)(p) as read with section 53(2) of the Kenya Citizenship and Immigration Act. The particulars of the offence are that on 5/8/2020 at Mtito Andei Market along Mombasa-Nairobi Highway within Makueni County, the accused person were jointly found smuggling five Ethiopian nationals namely Teshale Ashebo, Abaine Ashebo, Beruke Biriha, Asfaulu Deshale and Charinat Kandamo, who were unlawfully present in Kenya by ferrying them in motor vehicle registration number KCN 032F. There was a 2<sup>nd</sup> count against the 1<sup>st</sup> accused but he pleaded guilty and was convicted and sentenced accordingly. This judgment is thus in respect of the 1<sup>st</sup> count alone. When the plea was taken, the accused persons pleaded not guilty. The matter was later set down for hearing.

## **THE EVIDENCE**

### **The Prosecution Case**

The prosecution case was wholly heard by another Magistrate who was subsequently transferred. Upon taking directions under section 200(3) of the Criminal Procedure Code, it was directed that the matter proceeds from where it had reached. I will thus rely entirely on the record as far as the prosecution evidence is concerned, noting that I neither heard nor saw the prosecution witnesses. The prosecution called a total of three (3) witnesses in a bid to prove their case against the accused persons. PW 1 Police Constable Joseph Mugo testified that at the material time, he was a Traffic officer based at Mtito Andei police station. That on 4/8/2020 at about 11:50 pm he was manning a road block together with his colleagues along the Mombasa-Nairobi highway. They were enforcing Covid-19 restrictions. The witness testified that he received a call from a DCI officer who requested that they should intercept motor vehicle registration number KCN 032F.

PW 1 stated that he was informed that the motor vehicle was moving from Nairobi direction towards Mombasa direction. That the motor vehicle appeared and was stopped by the witness. He realised that the motor vehicle had six passengers. The witness also realised that five of the occupants could not respond to either English or Kiswahili. PW 1 identified the 1<sup>st</sup> accused person as the driver of the motor vehicle whereas the 2<sup>nd</sup> accused person was a passenger who was seated on the front seat. PW 1 further testified that DCI officers arrived at the scene and took away all the seven occupants. The witness stated that he later learnt that the other five passengers were Ethiopians who were charged with being unlawfully present in Kenya.

PW 2 Police Corporal Thomas Kikwai testified that he was the investigating officer in the matter. That on 4/8/2020 he was on night patrol with his colleagues within Mtito Andei when at about 11:50 pm, they spotted a black motor vehicle being driven at a very high speed. The motor vehicle was being driven from Nairobi general direction towards Mombasa general direction. The officers pursued the motor vehicle but could not reach it. PW 2 then called PW 1 who was manning a police road block and asked him to stop the motor vehicle. When PW 2 and his colleagues reached the road block, they found that the

motor vehicle had been stopped. The motor vehicle had seven occupants including the driver. PW 2 identified the 1<sup>st</sup> accused person as the driver of the motor vehicle whereas the 2<sup>nd</sup> accused person was a passenger seated on the front seat.

PW 2 stated that five of the passengers could not speak either English or Kiswahili. The witness stated that he established that the five were of Ethiopian origin and had no permit to be in Kenya. According to PW 2, the five passengers were charged with being unlawfully present in Kenya and were convicted and sentenced on their own plea of guilty. PW 3 Eric Mwendwa Kyalo testified that he was the owner of the subject motor vehicle registration number KCN 032F. The witness confirmed that the 1<sup>st</sup> accused person had borrowed the motor vehicle, stating that he was to take his Aunt and her children from Mombasa to Nairobi. That later, the 1<sup>st</sup> accused person called and informed him that he had been arrested at Mtito Andei. The witness travelled to Mtito Andei and saw his motor vehicle. The motor vehicle was later returned to PW 3.

### **The Defence Case**

The accused persons were placed on their defence by my predecessor. The 1<sup>st</sup> accused person gave a sworn testimony without calling any other witness. The 1<sup>st</sup> accused person admitted that on the material night, he was driving the motor vehicle in question from Nairobi to Mombasa. He further admitted that he was with the 2<sup>nd</sup> accused person. It was the testimony of the 1<sup>st</sup> accused person that they were just the tow of them in the motor vehicle. The 1<sup>st</sup> accused person confirmed that he was stopped by the police at the road-block at Mtito Andei. That the police asked them to go to Mtito Andei police station where they were detained for about 5 to 6 days before being brought to court. The 1<sup>st</sup> accused person admitted breaching the Covid-19 regulations but denied committing the offence disclosed in the first count. His testimony was that they were framed up because they declined to bribe the police.

The 2<sup>nd</sup> accused person also gave sworn testimony without calling any other witness. His testimony was that on the material day, he boarded the motor vehicle in issue at Mlolongo area, as he could not get a passenger service motor vehicle. That he had not known the 1<sup>st</sup> accused person before. The 2<sup>nd</sup> accused person stated that he boarded the motor vehicle as

a fare-paying passenger. He further stated that they were arrested at Mtito Andei police road-block and detained. That the police did not tell him why they were being detained. They were later brought to court. According the 2<sup>nd</sup> accused person, they were detained in police custody for about two weeks from 5/8/2020.

### **FACTS NOT IN DISPUTE**

From the evidence of both parties, the following facts are not in dispute:

- a) On 5/8/2020 the accused persons were travelling in motor vehicle registration number KCN 032F along Nairobi-Mombasa highway;
- b) The 1<sup>st</sup> accused person was the driver of the said motor vehicle whereas the 2<sup>nd</sup> accused person was a passenger thereof;
- c) The accused persons were stopped by the police at Mtito Andei road block and arrested.

### **MAIN ISSUES FOR DETERMINATION**

In my view, and in consideration of the charge, the main issues for determination are as follows:

- i. Whether the accused persons committed the offence of human smuggling;
- ii. Whether the prosecution has proven its case against the accused persons to the required standard.

### **SUBMISSIONS ON BEHALF OF THE 2<sup>ND</sup> ACCUSED PERSON**

The 2<sup>nd</sup> accused person submitted that the prosecution called witnesses who did not satisfy the four main elements to prove the criminal charge against the 2<sup>nd</sup> accused person. That the prosecution has not proven the case against the 2<sup>nd</sup> accused person beyond reasonable doubt and that it is not safe for the court to convict the accused. He urged the court to give him the benefit of doubt and acquit him under section 215 of the Criminal Procedure Code. The 2<sup>nd</sup> defendant relied on the authority of *Republic v Ndala & another (Criminal Case 3 of 2020) [2025] KEHC 3541 (KLR)*, without pointing out what aspect of the authority he was relying upon.

## ANALYSIS AND DETERMINATION

I have carefully considered the evidence on record as well as the law applicable. Section 53(1) (p) of the Kenya Citizenship and Immigration Act provides:

*“A person who—*

*smuggles or is reasonably suspected to be engaged in smuggling of human beings;*

*commits an offence.”*

Section 53(4) thereof provides:

*“For purposes of paragraph (1)(p), a person who is a victim of the offence of human smuggling may not be held liable so long as he identifies and is willing to act as a witness in the prosecution of the smuggler.”*

Section 2 of the Act defines human smuggling as the procurement, in order to obtain, directly or indirectly a financial or other material benefit, of the illegal entry (and exit) of a foreign national into and outside Kenya. From the above definition, I find that the essential ingredients of the offence and which the prosecution must prove are:

- 1) **Procurement:** That the accused procured, facilitated, or enabled the movement in question;
- 2) **Illegal entry or exit:** That the procurement related to the illegal entry into or exit from Kenya; the entry or exit was unlawful, that is, in contravention of immigration laws;
- 3) **Foreign national:** That the person whose movement was procured was a foreign national;
- 4) **Financial or material benefit:** That the accused acted in order to obtain, directly or indirectly, a financial or other material benefit;
- 5) **Mens rea (Knowledge/Intent):** That the accused knew or ought to have known that the entry or exit was illegal and acted with the intention of obtaining the benefit.

Has the prosecution satisfied the above ingredients beyond reasonable doubt? I will discuss each ingredient separately.

**a) Procurement.**

Other than merely stating that the alleged Ethiopians were found as passengers in the motor vehicle that the 1<sup>st</sup> accused person was driving, there is absolutely no evidence to prove or even show that the accused persons or either of them arranged, assisted, or enabled the exit of the alleged Ethiopians from Ethiopia or their entry into Kenya. The evidence of the investigating officer indicates that they were attracted to the motor vehicle because of the speed at which it was being driven and the fact that it was during curfew hours at the time when the country was battling the Covid-19 pandemic.

In fact, there is no tangible evidence to prove that the Ethiopians existed. The investigating officer testified that the Ethiopians were charged with the offence of being unlawfully present in Kenya whereupon they pleaded guilty and were convicted and sentenced vide Criminal case number 386 of 2020. The proceedings of the case were not produced in evidence. Not even a copy of the charge sheet was produced. I do not think it would suffice for the investigating officer and prosecution witnesses in general to merely state in testimony that Ethiopians were found in the motor vehicle that the 1<sup>st</sup> accused person was driving. Their existence must be proved.

The prosecution ought to have taken advantage of section 53(4) of the governing Act and treated the alleged Ethiopians as witnesses against the accused persons, in the event they existed. There is absolutely no evidence as to how the exit from Ethiopian and entry into Kenya was organized and executed. There is no evidence such as surveillance reports, call data records, or correspondence to show any link between the accused persons and the alleged Ethiopians.

**b) Illegal entry or exit.**

There must be proof that the movement of the Ethiopians out of and/or into Kenya was unlawful under immigration law. There is no report from the Immigration department to show that the alleged Ethiopians mentioned in the charge sheet were not given exit and entry passes by the immigration departments in Ethiopia and Kenya. The police are not

responsible for immigration matters. In my view, for a person's exit or entry into a country to be termed as illegal, there must be evidence from the authority that issues passes or regulates exit and entry, showing that the person in question did not either exit or enter the country concerned with authority from the relevant department.

In the authority of *Kipng'eno & another v Director of Public Prosecution [2023] KEHC 22940 (KLR)*, the court observed thus:

***"The prosecution evidence that Fikire Yohanis, Abdikadir Mohamed, Zehinu Mundinu and Shamiso Solita were arrested from M/V KCU 447 U Toyota Wish that 1<sup>st</sup> appellant was driving was well corroborated. What the prosecution needed to further prove was not only that the four were found in 1<sup>st</sup> appellant's motor vehicle and that he was in company of the 2<sup>nd</sup> appellant but also that they were foreigners and they had entered Kenya illegally."***

The foregoing illustrates that proof illegal movement and the fact that the persons of interest were foreigners is essential.

**c) Foreign national.**

There must be evidence that the person smuggled was not a Kenyan citizen. The investigating officer testified that the Ethiopians did not have any travel documents with them. When the investigating officer was cross-examined by counsel for the 2<sup>nd</sup> accused person he stated that he had no documentary evidence to prove that the persons in issue were Ethiopians. None of the persons was called as a witness to confirm their nationality. I have already made a finding that there is no sufficient evidence to show that the Ethiopians existed. The court is dealing with rumours from the prosecution side.

In the authority of *Kipng'eno (supra)*, the court observed:

***"In support of its case, prosecution only availed the charge sheet in which the alleged four foreigners were charged. Proceedings in which the four are alleged to have pleaded guilty to being Ethiopian Nationals who were found unlawfully in Kenya without a valid pass or permit were however not presented before the trial court. Having said that, I find that the prosecution failed to prove that Fikire Yohanis, Abdikadir Mohamed, Zehinu Mundinu and Shamiso Solita were not only Ethiopians but that they had illegally been facilitated to***

*enter into Kenya by appellants. In the absence of such evidence, I find that the conviction of appellants on the charge of human smuggling was in the circumstances unsafe.”*

**d) Financial or material benefit.**

This is a central distinguishing element of smuggling. There is no evidence to prove that the accused persons were paid or even promised payment. The prosecution did not even adduce evidence of any agreements or communication indicating fees or rewards. Not even the alleged smuggled persons were called to testify to the fact that payment was made or promised. There is no evidence to show that the accused persons were found with unexplained money that could reasonably be suspected to have been proceeds of the crime.

**e) Mens rea (Knowledge and Intent).**

There is absolutely no evidence to show that the accused persons knew of the illegality and acted for gain. The investigating officer did not testify as to any conduct on the part of the accused persons that would suggest concealment, save for the mere fact that the accused persons were travelling at night during curfew hours. There is no communication showing awareness of illegality on the part of the accused persons. Not even circumstantial evidence from which knowledge can be inferred.

It would appear that the investigating officer made an assumption and the prosecution ran with it with a lot of enthusiasm. In his testimony, the investigating officer did not address the offence at all. He did not even mention it. The investigating officer merely strived to show that the accused persons were found in a motor vehicle with five other persons believed to be Ethiopians, who had no permits to be in Kenya. He did not bother to establish and prove the elements of the offence. I doubt that the investigating officer knew the elements of the offence. The mere fact that the accused persons could have carried foreigners who had no passports or permits allowing them to be in Kenya does not establish the offence of human smuggling.

I have considered the accused persons' defence. The gist of their defence is that they were just the two of them in the motor vehicle and that they were framed up because they declined to bribe the police officers. The issue of bribery was raised by the 1<sup>st</sup> accused person. The accused persons appear not to have said the truth on the issue of how long

they were detained in police custody before being brought to court. The record indicates that they were arrested on 5/8/2020 and brought to court on 6/8/2020. The court record as to when they were brought to plead to the charges cannot be false. It cannot therefore be true that the accused persons were detained in police custody for five days or two weeks as they stated.

I am however alive to the fact that the accused persons are under no duty to prove their innocence. The duty is on the prosecution to prove its case against the accused persons beyond reasonable doubt. In *Philip Nzaka Watu v Republic [2006] eKLR*, it was held that to find a conviction in a Criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in *Stephen Nguli Mulili v Republic [2014] eKLR*:

***"It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, [2013] eKLR."***

In the famous case of *Miller v Ministry of Pensions [1947] 2 All ER 372*, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

***"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."***

In *Bakare v State (1987) 1 NWLR (PT 52) 579*, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

***"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the***

**evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.**” (Emphasis mine)

It matters not that the accused persons may not have told the truth. What matters is whether there is sufficient evidence against them. I have already pointed out that the prosecution has failed to prove the ingredients of the offence. Besides, there is no evidence to prove a common intention between the accused persons. The 2<sup>nd</sup> accused person indicated that he had not known the 1<sup>st</sup> accused person before and merely boarded the motor vehicle as a fare-paying passenger. This evidence was not rebutted by the prosecution. There is no evidence of any prior communication between the accused persons. In my view, the prosecution evidence has not ruled out the fact that the 2<sup>nd</sup> accused person had only boarded the motor vehicle as a fare-paying passenger.

It was the duty of the prosecution to adduce sufficient evidence proving the key ingredients of the offence. It is not for the court to imagine that the offence was committed. I have no reason to disregard the accused persons' defence. There is room for reasonable doubt and as a matter of law, the doubt must be resolved in favour of the accused persons. The offence under section 53(1) (p) of the Kenya Citizenship and Immigration Act has two segments. The prosecution may either prove that the accused persons smuggled in humans or, judging from the circumstances of the case, they are ***reasonably suspected to be engaged in smuggling of human beings.***

The prosecution has failed to prove the first segment of the offence. The second segment will suffer the same fate. I say so because, as already pointed out, not even the existence of the Ethiopians was established. There are no circumstances that would enable the court draw an inference or reasonably suspect that the accused persons could have been engaging in the business of smuggling of human beings. No evidence of prior conduct of the accused persons was given. I think I have said enough to show that the charge is untenable.

**DISPOSITION**

In view of the foregoing, it is my considered view that the prosecution has failed to prove its case against the accused persons beyond reasonable doubt. Consequently, I find and hold that **BOTH** accused persons are **NOT GUILTY** of the offence of Human Smuggling contrary to section 53(1) (p) of the Kenya Citizenship and Immigration Act. As the glove does not fit, I proceed to **ACQUIT** them accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 2<sup>ND</sup> DAY OF APRIL,  
2026.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**