IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MARAGA & WARSAME, JJ.A)

CRIMINAL APPEAL NUMBER 252 OF 2012

BETWEEN

HADIJA

UWAJENEZA……..APPELLANT

AND

REPUBLIC……..……..RESPONDENT

(being an appeal from the ruling and sentence of the High court of Kanya at Nairobi (Khaminwa, J.) dated

17th May 2010

in

H. C. Cr. A 417 of 2008)

JUDGMENT OF THE COURT

Hadidja Uwajeneza, hereinafter referred to as the appellant, was convicted of the offence of trafficking for sexual exploitation contrary to section 18 (1) (a) of the Sexual Offences Act, 2006. The particulars of that offence were that the appellant ***"in the year 2004, in Nairobi within***

Nairobi Area, intentionally and knowingly facilitated the travel of N F from Rwanda, across the border of Kenya for sexual exploitation".

The evidence led by the prosecution was that ***F N*** (PW1), aged 15 years, came into the country under the care of the appellant on 17th October 2004. PW1's evidence was that when the appellant brought

her to Kenya, she did so under the pretext of taking her to school. However, the appellant never took her to school. Instead she made her do domestic work and look after the appellant's children. At some point, the appellant travelled to Tanzania and returned with a man who she claimed was her brother. That alleged brother pestered PW1 for sex, but she refused. At some point, the appellant again travelled abroad for sometime, leaving her alone with the man.

When the appellant returned to Kenya, they all moved to a house on Kirinyaga road. While they were there, a business man came and visited them. The man demanded a kiss from PW1 but she declined

and went into the bedroom. The appellant then followed her there and told her that the man was offering her 1,000 US dollars, as well as a business in Malawi, if she would sleep with him. PW1 still refused, and the appellant told her that she was stupid.

In 2007, the appellant enrolled PW1 at ***[particulars withheld]*** Primary School. PW1 continued to live with the appellant until 2nd June 2007 when the appellant beat up both her and ***U E*** (PW2) and threw them out of the house. PW2 was the complainant in a second count against the appellant. On this count, she was accused of trafficking PW2 for sexual exploitation. PW1 and PW2 sought refuge in ***P M K's*** (PW3) house. PW3 took the children back to the appellant, who refused to take them in because they were allegedly disobedient and disrespectful. PW1 and PW2 later went and made a report to the police that they were being

sexually exploited by the appellant and that led to the appellant's prosecution.

In her defence, the appellant gave a sworn statement in which she denied that she had sexually exploited the two girls. She admitted to facilitating their travel into Kenya, but said that she had done it to ensure that they could get an education. She testified that the two children had begun to misbehave and that they stole from her and then went to hide in PW3's house.

B N (DW2) a teacher at ***[particulars withheld]*** Primary School gave evidence for the appellant. He produced in court a copy of the school admission registers which showed that PW2 was enrolled in that school on the 5th September 2006, while PW1 was enrolled in school on 19th February

2007.

After reception of this evidence, the trial court found that PW2 had not given any evidence to show that the appellant had sexually exploited her, and so acquitted the appellant with respect to the second count. Regarding the first count however, the trial court found that the evidence PW1 was forthright and candid, and that while PW1 was not able to state the dates when the sexual advances from the men took place, there were instances between 2004 and 2006 when there were sustained sexual advances. For these reasons, the trial magistrate found the appellant guilty of the first count, and convicted her accordingly. After receiving mitigation, the trial

court sentenced the appellant to a fine of Kshs 2,000,000.00; in default of the fine, the appellant was to serve 15 years in jail.

The appellant preferred a first appeal to the High Court of Kenya. In that appeal, the appellant faulted the evidence led by the prosecution for not discharging its duty to give evidence to prove its case beyond the required standard, that the evidence led did not accord with the charge and the sentence meted out on her was manifestly excessive, considering all the circumstances.

In its determination, the High Court found that there was evidence that the appellant exposed PW1 to men for sexual exploitation. The first appellate court therefore found that the prosecution had proved its case beyond a reasonable doubt, and dismissed the appeal, thus affirming the conviction and sentence meted out on the appellant.

The appellant is still aggrieved, and has now preferred this second appeal in which she has continued to challenge her conviction and sentence. During the hearing of the present appeal, the appellant submitted to us that there were no investigations conducted, as she was simply arrested and charged in court a day later. The appellant further faults the lack of medical evidence that would confirm whether PW1 was sexually assaulted.

Mr Monda, Senior Principal Prosecution Counsel, appearing on behalf of the state, opposed the appeal in respect of the conviction. Learned Counsel submitted that the concurrent finding of fact was that the appellant

had facilitated the travel of PW1 into Kenya for the purpose of sexual exploitation. Based on this concurrent finding by the two lower courts, Counsel would have us affirm the conviction. The State did, however, concede that the sentence meted out by the trial court was illegal. He submitted that as stated in section 28 (2) of the Penal Code, the default sentence should have been imprisonment for one year.

We have anxiously considered the entire record, the submissions of the appellant and those of counsel for the state, both in the first appellate court and those made before us.

We are cognisant of the fact that this is a second appeal, and sitting as a second appellate court, we are enjoined by the law to consider only issues of law, unless we find that the conclusions of the courts below were

perverse. See the holding of this Court in the oftcited authority of ***M'Riungu***

***v Republic* [1983] KLR 455**, in which it was held that:

> ***"Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."***

This was reiterated in ***J.A.O v Republic* [2011] eKLR (Criminal**

Appeal No. 176 of 2010) where this Court stated that:

> ***"… [A] second appeal ought to be on matters of law as the Court will be slow to interfere with concurrent findings of fact unless they were based on no evidence at all or on a perverted appreciation of the facts."***

The main evidence linking the appellant to the offence with PW1 as a victim was her claim that the appellant left her with a man for a period of one month, and that on another occasion, the appellant tried to persuade her to have sex with a man who offered to pay her some money and to start a business for her if she would have sexual intercourse with him.

From our perusal of the record, it appears to us that this is the only evidence that links the appellant to committing the alleged untoward acts to PW1. Is this evidence enough to sustain the offence of trafficking for sexual exploitation contrary to section 18 (1) (a) of the Sexual Offences Act? That section provides for that offence in the following terms:

> ***18.(1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either***
>
> ***(a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act***
>
> ***…***
>
> ***is guilty of an offence of trafficking for sexual exploitation."***

A plain reading of this section shows that the essential elements of the offence which must be proved by the prosecution as against an accused person are that there has to be the facilitation or movement

of a person across the border, with the main intention of committing any crime under the Sexual Offences Act. Therefore, there must be evidence that the accused person was an active participant in the action of facilitating the movement across the border, as well as in facilitating the commission of the sexual offence.

This is an issue that was dealt with by this Court sitting in Nakuru in the decision of ***Kenneth Kiplangat Rono v Republic [2010] eKLR (Criminal Appeal 66 of 2009)*** wherein it stated of section 18 (1) that:

> ***"The section under which the appellant was charged focuses on the person who arranges or facilities travel of another person within Kenya or outside Kenya. It also focuses on the victim and then any other person who might take advantage of the arrangement and who does something to the victim which would amount to the commission of an offence."***

The Court then defined the term 'trafficking in persons for sexual exploitation' by drawing on both the dictionary meaning of the term, as well as the ***United Nations Protocol to Prevent, Suppress and Punish***

Trafficking in Persons and stated that:

> ***"There are thus three constituent elements: the act (recruitment, transportation, transfer, harbouring or receipt of persons); the means (threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments of benefits to a person in control of the victim) and the purpose (exploitation – including the prostitution of others, sexual exploitation, forced labour, slavery or similar practices). That definition informs the recent domestic legislation in Kenya (The Sexual Offences Act) focusing on sexual exploitation." (emphasis in original)***

These elements are essential in order to sustain the charge. We find that was not the case in the present appeal. While it is true, and it was conceded by the appellant, that she is the one who facilitated the entry into Kenya of PW1, we do not find that the element of purpose, that is, the element of sexual exploitation to have been proved. As we have stated, the evidence of PW1 was that the appellant left her with a man who, on several occasions solicited sexual intercourse with her; but it is her account that she refused, and that she avoided these advances by hiding in the bedroom. In addition, it was PW1's evidence that on one occasion, the appellant told her the man who would pay her 1,000 US dollars if she would concede to his advances, again, PW1 rejected this offer. It is therefore not clear at what point any sexual offence took place.

In addition, we fail to see the nexus of the appellant to the commission of the alleged crime. In contrast, the evidence of PW2 and PW3

was to the effect that both PW1 and PW2 were attending school. This evidence was similar to that of the appellant as well as DW2. The evidence of sexual exploitation was very remote, and we find that it does not support the charge, and that it is perverse to let it stand. The facts as narrated even by PW1 do not support the charge. Instead, they leave doubt in our minds as to whether the true intention of the appellant was to bring the children into the country for sexual exploitation, if they were exploited at all. This doubt must accrue to the benefit of the appellant, and for this reason, we find that this appeal is meritorious.

Before we conclude, we wish to make a comment on Mr Monda's submission regarding the propriety of the sentence imposed on the appellant, which was to the effect that the sentence imposed on her was illegal. Learned counsel obviously misapprehended the import of section 28 (2) of the Penal Code which states, in part, as follows:

> ***In the absence of express provisions in any written law relating thereto, the term of imprisonment … ordered by a court … in respect of the nonpayment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—***

Amount ***Maximum period***

Exceeding Kshs 50,000……...12 months

(emphasis ours)

In the case of the offence of trafficking for sexual exploitation, the penalty is expressly provided for at section 18 (2) of the Sexual Offences Act in the following terms:

> ***"A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both."***

It is therefore not correct, as Mr Monda submitted, that the sentence was not proper. For the offence which the appellant was charged, the penalty is expressly provided for under section 18 (2). The only way in which the provisions of section 28 (2) of the Penal Code would have applied is if

there was no express provision relating to the default sentence ***"in any written law relating thereto"***. That is clearly not the case here.

The upshot of our findings is that this appeal has merit. We therefore quash the conviction and set aside the sentence of the trial court affirmed by the first appellate court, with the result that the appellant shall be set at liberty, unless otherwise lawfully held.

Dated and Delivered at Nairobi this 11th day of July, 2014

P. WAKI

JUDGE OF APPEAL

D.K. MARAGA

JUDGE OF APPEAL

M. WARSAME

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR