



REPUBLIC OF KENYA



**Ndatho v Republic (Criminal Appeal E055 of 2022)  
[2024] KEHC 6907 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 6907 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E055 OF 2022**

**GMA DULU, J  
APRIL 30, 2024**

**BETWEEN**

**JACKSON KINOTI NDATHO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Criminal Case No. E291 of 2020 at  
Voi Law Courts delivered on 28th July 2022 by Hon. C. K. Kithinji (PM))*

**JUDGMENT**

1. The appellant was charged with two counts. Count I was abduction with intent to confine contrary to Section 259 as read with Section 256 of the [Penal Code](#).
2. The particulars of offence were that on 7<sup>th</sup> October 2020 at Mwakingali estate in Voi town within Taita Taveta County jointly with another not before court with intent to cause Gaudencia Wambugha Mwakuro to be secretly and wrongfully confined, confined the said Gaudencia Wambugha Mwakuro.
3. Under count II, he was charged with trafficking in persons contrary to Section 3(1)(d)(5) of the [Counter Trafficking Act](#) No. 8 of 2010, the particulars of which being that on 17<sup>th</sup> October 2020 at Machakos town within Machakos County, jointly with another not before court harboured Gaudencia Wambugha Mwakuro by means of deception for the purpose of exploiting the said Gaudencia Wambugha Mwakuro.
4. He denied both charges. After a full trial, he was convicted on both counts and sentenced to 5 years imprisonment on count I, and 30 years imprisonment for count II, sentences to run concurrently, which is thus a total of 30 years imprisonment.
5. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following amended grounds of appeal:-



- a. The learned Magistrate erred in convicting him while relying on prosecution evidence that raised a lot of doubt.
  - b. The learned trial Magistrate erred in convicting him while relying on a section of the law that did not warrant his conviction.
  - c. The trial Magistrate erred by failing to find that the prosecution's case was riddled with contradictions and inconsistencies and this would not have been misconstrued as trafficking in persons.
  - d. Sentence imposed was harsh and excessive since it was applied in mandatory terms as provided by statute without considering the appellant's mitigation or the unique facts and circumstances of the case.
6. The appeal was canvassed through written and oral submissions. In this regard, I have perused and considered the written submissions filed by the appellant, and the oral submissions made by Mr. Sirima learned Prosecuting Counsel who has conceded to the appeal on both counts, citing contradictory prosecution evidence, and intention of appellant and complainant to marry.
  7. This being a first appeal, I have to remind myself of the duty of this court to consider all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno =Versus= Republic* (1972) EA 32.
  8. The burden was on the prosecution to prove the charges against the appellant – see Section 107 of the *Evidence Act* (Cap.80). This being a criminal case, the standard of proof is beyond any reasonable doubt see *Sawe =Versus= Republic* (2003) eKLR.
  9. In proving their case, the prosecution called four (4) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional evidence.
  10. From the evidence on record both for the prosecution and the defence, the complainant PW1 Gaudencia Wambugha Mwakuro and the appellant Jackson Kinoti got into a social love relationship (affair) at Voi and then relocated to Machakos.
  11. At Machakos, the complainant was restricted by the appellant in movement and her mobile phone also confiscated by him. The complainant, who thought that the appellant would marry her, also discovered that the appellant had a wife by the name Juliana. The relatives of the complainant looked for her and involved the police, thus the arrest and trial of the appellant.
  12. In those circumstances, in my view, none of the two charges was proved. With respect to abduction with intent to confine, there was no proof of abduction. As regards trafficking in persons, there was also no act of trafficking testified to and proved.
  13. The mere fact of restriction of the complainant in Machakos after the two voluntarily relocated there, and restriction of her movement and phone communication by the appellant, did not amount to abduction. It might constitute another illegality which the appellant was not charged with and could not thus defend himself. Trafficking of human person was also not supported by any evidence, as there is no evidence of an intention to move the complainant to any destination.
  14. I thus find that the Prosecuting Counsel was correct in conceding to the appeal. I will thus allow the appeal, quash the conviction and set aside the sentences imposed.



15. Consequently and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence imposed on both counts. I order that the appellant be set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED THIS 30<sup>TH</sup> DAY OF APRIL 2024 IN OPEN COURT AT VOL.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Alfred – Court Assistant

Appellant in person

Mr. Sirima for State

