



IN THE HIGH COURT OF MALAWI

ZOMBA REGISTRY

Criminal Division

Criminal Appeal Case No. 17 of 2022

**[Being Criminal Case No. 68 of 2022 Before the First Grade Magistrate's Court
Sitting at Monkey Bay]**

BETWEEN

JOHN MCHEKENI..... APPELLANT

AND

THE REPUBLIC..... RESPONDENT

CORAM: HONOURABLE JUSTICE D.H. SANKHULANI

Mr. G. Khonyongwa, of Counsel for the Appellant

Mr. S. Chisanga, of Counsel for the Respondent

Ms. A. Kazambwe, Court Clerk and Official Interpreter

Mrs. G. Chilombo, Court Reporter

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JUDGMENT

Sankhulani, J

Introduction

This judgment follows hearing that was held on the Appellant's appeal against his conviction and sentence as recorded and imposed, respectively, by the First Grade Magistrate's Court sitting at Monkey Bay.

Background

The Appellant was convicted of the offence of trafficking in persons, contrary to **Section 14** of the **Trafficking in Persons Act, 2015** (hereinafter referred to as 'the Act') by the First Grade Magistrate's Court sitting at Monkey Bay, after a full trial. Accordingly, he was sentenced to 10 years' imprisonment with hard labour.

Being dissatisfied, the Appellant appealed to this Court against both his conviction and sentence.

In addition to the notice and grounds of appeal, the Appellant filed skeleton arguments in support of the appeal. The Respondent did not file its skeleton arguments in response to the appeal. According to Counsel for the Respondent, they were unable to put in their skeleton arguments in response to the appeal because they had misplaced their file on the appeal herein. As such, at the hearing of the appeal, the Respondent sought, and was granted, permission to make oral arguments in response to the appeal, which they did.

The appeal was heard in the presence of both sides hereto. At the close of the hearing, Counsel for the Appellant indicated to this Court that they did not intend to file any submissions, expressing confidence that their skeleton arguments sufficed. On the other hand, Counsel for the Respondent indicated to this Court that they would file their written submissions in six days' time. Accordingly, this Court ordered the Respondent's side to file their submissions by close of business

on 15th August, 2022, and they did that. After the hearing, this Court adjourned this matter for judgment. Hence this judgment.

Grounds Of Appeal

There are two grounds of the appeal herein, which are as follows:

- (1) The lower court erred in law and in fact in convicting the Appellant of the offence of trafficking in persons when the element of the offence were not met; and
- (2) The lower court erred in law and in fact in not considering the mitigating factors and giving out an excessive sentence.

In order to properly guide ourselves and, also, for ease of following by the parties hereto, we shall deal with these grounds separately, when it comes to our determination. And we must add that we shall refer to the parties' arguments and/or submissions, when we get to tackling these grounds.

The Applicable Law On Appeals Before The High Court In Criminal Matters

Any person aggrieved by any final judgment or order or sentence of any subordinate court may appeal to the High Court (**Section 346(1)** of the **Criminal Procedure and Evidence Code**).

In terms of number of presiding judges, an appeal from a subordinate court is heard by a single judge of the High Court, except where the Chief Justice directs that an appeal be heard by two or more judges (**Section 347(1)** of the **Criminal Procedure and Evidence Code**).

When the High Court is considering an appeal from the subordinate court, it proceeds by way of rehearing (see **Mulewa vs. Rep** [1997] 2 MLR 60). By this is meant that the High Court considers the evidence that was in the court below, the findings of fact and the law applied to the facts and determines whether or not the court below directed itself to the relevant facts and the applicable law in

arriving at the verdict it came up with (see **Mulewa vs. Rep**, *supra*). However, an appellate court is to be slow to reject findings of a trial court because of the trial court's advantage of seeing and hearing witness, unless there is insufficient evidence to support those findings or there is cogent evidence to the contrary which has been misinterpreted or overlooked (**Chakufwa Thom Chihana vs. Republic**, MSCA Criminal Appeal No. 09 of 1992).

As regards sentence, an appellate tribunal may not alter a sentence passed by a subordinate court unless the sentence is manifestly excessive or grossly inadequate or wrong in principle, and not merely because it would itself have imposed a somewhat different sentence, if it were to have tried the case (**Esther Kathumba & 3 Others vs. Republic**, MSCA Criminal Appeal No. 21 of 2006). The reason for this is that it is a generally-accepted view that a convicting tribunal is the one better placed than any other to assess a punishment in any given case (**Esther Kathumba & 3 Others vs. Republic**, *supra*).

The Evidence

At this juncture, we shall outline the material evidence as was proffered before the court below. May it be noted, in this vein, that there were four prosecution witnesses and one defence witness.

PW1 stated that he was a police officer based at Monkey Bay Police Station. On 14th April, 2022, he, together with other colleagues, was on night duty at Mtakataka Roadblock. At round 19:00hours, there came from Mangochi side a motor vehicle Registration Number BZ6862, which they stopped. They checked the inside of the vehicle, and saw that it had, on board, five boys of similar size and age. Because the driver gave an unsatisfactory answer as to where he was coming from with the boys, he ordered him to drop the boys. He separately consulted the boys, and their answers were not satisfactory. One of the boys gave him his parents' phone number. He phoned the parent whose response was that his boy was going to South Africa. The driver failed to tell him where he took the boys. Upon enquiring from the boys about their home of origins, he learnt that

one was a Mozambican and other four were from Namwera, Chiponde and Chowe area. The boys had travelling bags with a 2 litre Sobo squash each.

PW2 stated that he was 18 years old and from Mangochi. On 14th April, 2022, he was called by his brother to go to Dedza. He met the Accused and told him to pick him to Dedza. He was arrested at Mtakataka Roadblock on suspicion that he was going to South Africa. He was going to Dedza. He was not together with the other boys. He carried a bag and a bottle of Sobo and bread belonging to his friends who were going to South Africa. He had never visited Dedza before. He was not going to South Africa.

PW 3 stated that he was 22 years old. He knew the Accused, who took him from the depot to drop him at Dedza. He was called by Cassim to go to Namwera Depot. He went to Namwera Depot. He later got a text reading “ndikupeza pomwepo. .ndikusiya ku Dedza”. Around 7p.m., they were arrested at Mtakataka Roadblock. They told the Police that they were going to Dedza. They all carried Sobo and bread. The police searched the bags and found Sobo and bread. It’s true that they were going to South Africa. They had no documents and everything was in the transporter’s control. He did not pay anything. It was his relative who was in South Africa who had made the payment. He did not see any other transporter than the Accused. The Accused was the one who drove them from Namwera. He was called to board the vehicle by the Accused.

PW4 stated that he was a police officer based at Monkey Bay Police Station under CID. He knew the Accused. On 14th April, 2022, a named police officer reported a case of human trafficking against the Accused. Upon receipt of the complaint, the victims were arrested, and they were one Mozambican and four Malawians. At Monkey Bay Police Station, the boys disclosed that they were travelling to South Africa. They had no travelling documents. The boys had groundnuts, bread and 2 litres of Sobo. The boys said that they had paid K250,000.00 to a man known as Shehe who was the travelling agent. The police gave the Accused enough time to approach the man called Shehe he was mentioning. The police gave the Accused a phone to call Shehe but he failed to call. That made the Police think that the Accused was the one involved in human trafficking.

At the close of the Prosecution's case, the court below found the Appellant with a case to answer and, so, called upon him to enter upon his defence.

DW 1 was the Appellant himself, and he was the only defence witness. He stated that he is a driver. He stays at Golomoti in Dedza. On this day, he carried people to Mangochi, and he slept there. In the morning, he received a call whereby he was told that he should carry people from Chiponde to Dedza. He went to Chiponde. He carried the passengers. When he arrived at Mtakataka Roadblock, he was stopped and arrested by the Police. The passengers were privately interrogated. He heard at the Roadblock that the people were going to South Africa. One of the passengers had his parent's phone number. When the parent was called, he said that his child was going to South Africa. Shehe is the one who gave him business to carry the people. It's true that Shehe came at the Police but he told him (the Appellant) not to reveal his coming and then ran away.

The foregoing marks the end of the material evidence as was proffered before the court below.

This Court's Determination

Ground (1) – Absence of Essential Elements of Offence

The Appellant's first ground of the appeal herein is that the lower court erred in law and in fact in convicting the Appellant of the offence of trafficking in persons when the elements of the offence were not met.

Both Counsel for the Appellant and Counsel for the Respondent argued that the elements of the offence of trafficking in persons were not present. Accordingly, they both submitted that the Appellant's conviction should be quashed and his sentence set aside.

The offence with which the Appellant stood charged, and was convicted of, in the court below, as we have already said, was trafficking in persons, contrary to **Section 14** of the **Act**. The particulars of the offence, as per the charge sheet, read as follows:

“John Mchekeni on the 14th day of April 2022 at Mtakataka road block in the village of Nanigona in the district of Mangochi was found trafficking 5 people who was driving a motor vehicle registration number BZ6268 Mazda Familiar, from Chiponde via Dedza boarder to Republic of South Africa”

We shall not comment on how the charge was drafted, as that is not in issue in this appeal.

Section 14 of the **Act** provides as follows:

“(1) A person who trafficks another person commits the offence termed trafficking in persons and shall, upon conviction, be liable to imprisonment for fourteen years without the option of a fine.

(2) The consent of a trafficked person is immaterial, where any of the means set out in section 2 have been used.”

Section 2 of the **Act** has defined “trafficking in persons” as follows:

“trafficking in persons” means recruiting, transporting, transferring, harbouring, receiving or obtaining a person, within or beyond the territory of MalaWi, through—

(a) threats or use of force or coercion;

(b) abduction;

(c) fraud or deception;

(d) abuse or threats of abuse of power or position;

(e) abuse or threats of abuse of position of vulnerability;

(f) abuse or threats of abuse of the law or legal process; or

(g) giving or receiving of payments to obtain consent of a person having control of the trafficked person, for the purpose of exploitation of that person.”

And the same **Section 2** of the **Act** defines “exploitation” as follows:

“exploitation” includes—

(a) forced labour or any extraction of work or services from a person;

(b) the forced participation of a person in all forms of commercial sexual activity such as prostitution, sexually-explicit performance, or in the production of pornography;

(c) the removal of body parts or the extraction of organs or tissue; or

(d) any other practice in terms of which it cannot be said that the person participated willingly...”

In the present matter, as is always the case with any other criminal matter, the burden of proof was on the prosecution to prove the Appellant's guilt (see **Section 187(1)** of the **Criminal Procedure and Evidence Code**). Indeed, there was no duty on the Appellant to prove his innocence. Again, as is always the case with any other criminal matter, the standard of proof in the matter at hand was proof beyond reasonable doubt (see **Republic vs. Joyce John** [2012] MLR 329). Further, in order for a given criminal offence to be proved, all the elements thereof must be proved. Where any of the elements of that offence has not been proved, then a conviction is out of question. The case on point is that of **Republic vs. Chimbelenga** ([2012] MLR 342. In that case, Chimasula J., at Page 345, quoted with approval the following words of Justice Chatsika in the case of **Republic vs. Msosa** [1993] 16(2) MLR 734, which we also quote here with approval:

"..It must be emphasized that at the end of the trial the court must subject the entire evidence to such scrutiny as to be satisfied, beyond reasonable doubt, that all the important elements placed on the prosecution by the substantive law are proved. If it is not so satisfied, the accused person must be acquitted."

Therefore, in the present matter, the duty was on the prosecution to prove, beyond reasonable doubt, all the elements of the offence of trafficking in persons. The question that, then, arises is: what are the elements of the offence of trafficking in persons, as created under **Section 14** of the **Act**? In the case of **The Republic vs. Chinolo & Another** (Confirmation Case No. 2038 of 2020, HC, Criminal Division, Lilongwe Registry), Mtalimanja J. had the following to say, from Page 6 to Page 7:

"In other words, the elements to be proved by the prosecution to sustain a conviction for the offence of trafficking in persons are the **action**: recruiting, transferring, harbouring, receiving or obtaining; the **means**: through the use of force or threats thereof, coercion, abduction, fraud, deception, abuse or threats of abuse of power or position, abuse or threats of abuse of position of vulnerability, abuse or threats of abuse of the law or legal process, or giving or receiving of payments to obtain consent of a person having control of the trafficked person; and the **purpose**: for the purpose of exploitation of that person."

From the provisions of **Section 2** of the **Act** reproduced above and from the above quoted passage in the **Chinolo Case** (*supra*), it is clear that the offence of trafficking in persons, as created under **Section 14** of the **Act**, has got three

elements. The first element is that there must have been done any of the following actions: recruiting or transporting or transferring or harbouring or receiving or obtaining of the alleged trafficked person. These actions, it is clear from the wording of **Section 2** of the **Act**, must be read disjunctively. Therefore, existence of any one of these actions will suffice as the first element of the offence. The second element is that any one of the actions outlined above must have been done through the use of force or threats thereof or coercion or abduction or fraud or deception or abuse of power/position or threats thereof, or abuse of position of vulnerability or threats thereof or abuse of the law/legal process or threats thereof or giving/receiving of payments to obtain consent of a person having control of the alleged trafficked person. These means, it is clear from the wording of **Section 2** of the **Act**, must, also, be read disjunctively. Therefore, existence of any one of these means will suffice as the second element of the offence. The third element is that there must have been the purpose of exploitation of the alleged trafficked person. So, putting it simply, the three elements of the offence are as follows: the first is that there must have been done any one of the actions outlined above; the second is that the action done must have been so done through any one of the proscribed means outlined above; and the third is that there must have been the purpose of exploitation of the alleged trafficked person. These, therefore, are the elements of the offence of trafficking in persons, as created under **Section 14** of the **Act**.

Having determined the elements of the offence which the Appellant was convicted of in the court below, we now must determine whether all these elements were met, to justify the conviction. This, precisely, is because the ground of appeal presently under consideration is that the lower court erred in law and in fact in convicting the Appellant of the offence of trafficking in persons when the elements of the offence were not met. As it has already been determined, the first element of the offence is that there must have been done any one of the following actions: recruiting or transporting or transferring or harbouring or receiving or obtaining of the alleged trafficked person. Was there any of these actions in the matter at hand? We answer in the affirmative. The Appellant was intercepted and arrested whilst transporting the five boys. There was, therefore, the act of transporting. As such, the first element of the offence

had been met or proved. We so find. It is noteworthy that the court below expressed the view that there was an act of recruiting. However, whether that view was in tandem with the weight of the evidence is neither here nor there, since the ground of appeal presently under consideration is all about absence of the elements of the offence in issue. Accordingly, we leave it there and proceed to consider whether the second element of the offence of trafficking in persons had been met herein. The second element of the offence, as it has already been determined, is that any one of the actions outlined above must have been done through the use of force or threats thereof or coercion or abduction or fraud or deception or abuse of power/position or threats thereof, or abuse of position of vulnerability or threats thereof or abuse of the law/legal process or threats thereof or giving/receiving of payments to obtain consent of a person having control of the alleged trafficked person. Since we have above found that there was an act of transporting, the question now is: was the transportation of the five boys done or achieved through the proscribed means outlined above? We answer in the negative. Having carefully examined all the evidence that was proffered before the court below, we find that no single piece thereof tended to show that any of the five boys had been transported through the use of force or threats thereof or coercion or abduction or fraud or deception or abuse of power/position or threats thereof, or abuse of position of vulnerability or threats thereof or abuse of the law/legal process or threats thereof or giving/receiving of payments to obtain consent of a person having control of any of them. As such, we find that the second element of the offence had not been met or proved. As regards the third element of the offence, it is, as we have already mentioned, that there must have been the purpose of exploitation of the alleged trafficked person. Again, having carefully examined all the evidence that was proffered before the court below, we find that no single piece thereof tended to show existence of the purpose of exploitation of any of the five boys. As such, we find that the third element of the offence had not been met or proved, as well. Therefore, due to the absence of the second and third elements of the offence of trafficking in persons determined above, the court below should not have convicted the Appellant. In our opinion, with all due respect, the court below convicted the Appellant because it had not considered all the elements of the

offence of trafficking in persons. This comes out clearly from a simple look at the relevant part of the judgment of the court below. After summarizing the evidence and after referring to **Section 2** of the **Act**, the court below, from Page 6 to Page 7 of its judgment, wrote as follows:

“In accordance with the law, it is not wrong or prohibited for people to go anywhere within Malawi or beyond Malawi. What is prohibited is the act of recruiting people through unlawful means for the purpose of exploitation.

The first question for the Court is, were these people really going to South Africa? In accordance with the available evidence, it is true that the people were going to South Africa. It is therefore clear that this was a trip to South Africa.

The Court is of the view that these people were recruited and they were in transit to South Africa. They had no travelling documents like Visas or Passports or boarder pass and everything was already transacted by the Agent. According to the definition of Trafficking in Persons as defined by section 2 of the Trafficking in Persons Act, the offence of Trafficking in Persons was committed.

The next question is, did the Accused Person commit the offence?...”

The court below then proceeded to discuss the necessary *mens rea* of the offence, found the Appellant guilty and convicted him. From the above-reproduced relevant part of the judgment of the court below, it is clear that the court below omitted to separately consider each and every element of the offence, in concluding that the offence had been committed. Had the court below separately considered each and every element of the offence, it would have found that the second and third elements of the offence of trafficking in persons, as above determined, had not been met. The court below would, accordingly, have acquitted the Appellant herein, who was then an accused person.

Therefore, in view of the foregoing findings that that the second and third elements of the offence of trafficking in persons had not been met or proved, we ultimately find that the Appellant’s conviction, as recorded by the court below, cannot stand.

The first ground of appeal succeeds.

Ground (2) – Excessive Sentence

The Appellant's second ground of the appeal herein is that the lower court erred in law and in fact in not considering the mitigating factors and giving out an excessive sentence.

This ground, however, has naturally fallen away, in view of the immediately foregoing finding that the Appellant's conviction, as recorded by the court below, cannot stand.

Conclusion

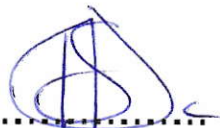
In view of the foregoing finding that the Appellant's conviction, as recorded by the court below, cannot stand, we finally find that the Appellant's conviction herein ought to be quashed.

Accordingly, the Appellant's conviction is hereby quashed, and, consequently, his sentence is hereby set aside.

Finally, unless the Appellant is held for other lawful reason, we hereby order that he be set at liberty forthwith.

The appeal herein succeeds in its entirety.

Delivered in Open Court at Zomba this 30th day of August 2022



Dick Harry Sankhulani

JUDGE