

IN THE COURT OF APPEAL FOR ZAMBIA CAZ APPEAL/NO.154/155/
HOLDEN AT LUSAKA 156/157/2018
(Criminal Jurisdiction)

BETWEEN:

NYASA NICOLE MULUMBILWA 1ST APPELLANT

HUSSIE SALIMO 2ND APPELLANT

JUSTINE MUFTAFELA 3RD APPELLANT

ABSWE SAMUEL IKENGELO 4TH APPELLANT

VS

THE PEOPLE RESPONDENT

Coram: Mchenga, DJP, Chishimba and Mulongoti, JJA

On 26th March 2019, 28th March 2019 and 28th June 2019

For the Appellant: V. Kachaka, ICN Legal Practitioners

For the Respondent: P. Mutale, Deputy Chief State Advocate,
National Prosecution Authority

J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1.Mwewa Muroño v The People [2004] Z.R. 207

2.Hamfuti v The People [1972] Z.R. 240

Legislation referred to:

1. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia

2. The Anti-Human Trafficking Act, Act No. 11 of 2008.

Introduction

1. This appeal emanates from the judgment of the Subordinate Court of the 1st Class, (Hon. K. Sebitwane), delivered on 24th January 2018. By that judgment, the appellants were each convicted of the offence of Trafficking in Persons.

2. Following their conviction, **section 217 of the Criminal Procedure Code** was invoked, and the appellants were committed to the High Court for sentencing. On 12 April 2018, the High Court (Mapani-Kawimbe J.) sentenced each one of them to 25 years imprisonment with hard labour.

Charges the appellants faced in the Subordinate Court

3. The appellants, were jointly charged with the offence of Trafficking in Persons contrary to **section 3(1) of the Anti- Human Trafficking Act**. The particulars of the offence alleged that on 19th May 2017, at Katima Mulilo

Border Control, in the Sesheke District of the Western Province of the Republic of Zambia, jointly and whist acting together, they intentionally and unlawfully trafficked Sumbelo Dominic, Almbe Ikengelo, Ester Dominic, Martinile Ikelengo, Maria Juma, Janet Juma, Fisto Jua, Mayani Ikelengo, Gift Ikelengo, Jua Ikelengo, Samuel Juma, Elizabeth Ikelengo, Isaac Ikelengo and Landlee Ikelengo.

4. They all denied the charge and the matter proceeded to trial.

Evidence before the trial magistrate

5. On 19th February 2017, Detective Inspector Musukwa, of Sesheke Police Station, received information of the presence, in the district, of a number of children who were speaking a strange language. In the company of other police officers, he made enquires that led them to the apprehension of the 3rd appellant. The 3rd appellant, in turn, led them to a guest house where they found 14 children in a room. The children were under the charge of the 4th appellant.

6. The 4th appellant told them that the 1st and 2nd appellants, had crossed into Namibia to prepare for their departure into that country. The police officers got in touch with the Namibian authorities and the 1st and 2nd appellant were apprehended and brought back to Zambia.
7. According to Owen Limpo Silumesi, an immigration officer, after interviewing the appellants and the children, he learnt that the appellants were trying to smuggle the 14 children into Namibia. He also discovered that only the 1st appellant had a valid travel document and that the 14 children were related to either the 1st appellant or the 4th appellant. Further, the children did not know where they were going.
8. In her defence, the 1st appellant told the trial magistrate that she ran away from the war in the Congo and that some of the children were her own. The remainder, were her nieces and nephews. When she reached Lusaka, she was informed that there was a refugee camp in Sesheke. She travelled to Sesheke and when she got

there, she decided to cross the border into Namibia, to sell some chitenje materials she had to raise money for food. She was apprehended in Namibia and brought back to Zambia. She admitted that her husband, the 4th appellant, and the 14 children had entered the country illegally because they did not have passports.

9. In the case of the 2nd appellant, he said he met the 1st appellant at the Namibian border. He started helping her because she was having difficulties communicating because she did not speak the local language. Whilst in Namibia, the 1st appellant received a phone call and he answered the phone because it was in English, which she could not speak. They were then apprehended and brought to Zambia. He denied being aware that she was travelling with the children or meeting the 3rd and 4th appellants.

10. The evidence of the 3rd appellant was that, he was an agent for bus operators stationed in Sesheke. He received a call from 1st appellant who asked him to help the 4th appellant and the children find shelter. He looked for a lodge and paid for them because they did

not have the local currency. He was apprehended while at the lodge.

11. As for the 4th appellant, he said the 1st appellant was his wife and they ran away from the Congo after his brother was killed. Some of the children were his, while the others were for his late brother. When they reached Lusaka, they were told that the refugee camp was in Sesheke. They travelled to Sesheke, and when they got there, they went to a lodge to eat. They were apprehended before they could surrender themselves to the police. He denied trafficking the children.

Findings of the trial magistrate

12. The trial magistrate found that the 1st and 4th appellants entered the country with the children and travelled to Sesheke. He found the appellant's evidence was contradictory on what they were doing at Katima Mulilo. While the 1st appellant claimed that she had travelled to Namibia to sell goods and that she met the 2nd appellant there. The 3rd appellant claimed that he was taking the children to the lodge for food before

taking them to the police. It did not make sense that they travelled all the way to Katima Mulilo, if they indeed intended to go to the police, because they could have gone to Sesheke Police Station before travelling to Katima Mulilo.

13. On the basis of their contradictory testimony, the trial magistrate found that the prosecution had proved the charges against all of them.

Grounds of appeal

14. Four grounds of appeal have been advanced in support of the appeal. The thrust of which, is that the prosecution did not prove the charges against any of the appellants and that they were convicted because the trial magistrate did not believe their story. In effect, he shifted the burden of proof from the prosecution proving, beyond reasonable doubt, that they had trafficked the children, to them justifying why they were with all those children at the border town.

Arguments in support of the appeal

15. First of all, Mr. Kachaka submitted that Owen Limpos Silumesi's evidence that the appellants told him that were trying to smuggle the children into Namibia, which amounted to a confession, should not have been received without asking the appellants if they had any objection to it.

16. He then referred to the case of **Mwewa Murono v The People**¹ and argued that the prosecution having failed to prove that the appellants had either recruited, transported, transferred, harboured, received or obtained the 14 children, by one or more of the means set out in section 2 of the **Anti-Human Trafficking Act**, for the purpose of exploiting them, the trial magistrate should have acquitted them.

17. Mr. Kachaka then submitted that scrutiny of the judgment shows that the appellants were convicted because the trial magistrate did not believe their story. This was a misdirection because he was first required to consider whether the prosecution had proved

the charges against them, before considering whether their defences were plausible.

18. In response, Mr. Mutale submitted that the trial magistrate was entitled, on the evidence before him, to come to the conclusion that the children were being trafficked. He supported the convictions.

The offence of Trafficking in Persons

19. The offence of trafficking in persons is set out in **Section 3(1) of the Anti-Human Trafficking Act**. It provides as follows:

Subject to Subsection (2) to (11), a person who intentionally and unlawfully traffics another person commits an offence and is liable, upon conviction, to imprisonment for a term of not less than 25 years and not exceeding thirty years

The term "traffics", is defined as follows, in **section 2** of the same Act:

"Traffic means to recruit, transport, transfer, harbour, receive or obtain a person, within or across the territorial boundaries of Zambia, by means of:

- (a) Any threat or use of force or other forms of coercion;
- (b) Abduction;
- (c) Fraud or deception;
- (d) False or illegal adoption of a child contrary to the Adoption Act or any other written law;

- (e) The destruction, concealment, removal confiscation or possession of any passport, immigration document or other official identification document of a person;
 - (f) The abuse or threatened abuse of the law or other legal process or any other form of abuse of power or position of vulnerability; or
 - (g) the giving or receiving of payments or benefits to achieve the consent of the other person;
- for the purpose of exploitation."

20. From the forgoing, it is clear that in this case, for the prosecution to prove the charges against the appellants, it was not enough to only show that the children were brought into the country without documentation and that they did not know where they were going. Evidence pointing at their transportation into, and across the country, through either the use of threats or use of force or other forms of coercion, abduction, fraud or deception and so forth, should have been led. In addition, the prosecution should have placed before the court, evidence proving or at least on which an inference could have been drawn, that they were being transported for purposes of being exploited.

21. In the case of **Hamfuti v The People**², the Supreme Court dealt with the admissibility of confession statements and held as follows:

"Whether or not an accused person is represented, a trial court should always, when the point is reached at which a witness is about to depose as to the content of a statement, ask whether the defence has any objection to that evidence being led."

From the record of proceedings, it is apparent that the appellants were not asked whether they had any objection to Owen Limpo Silumesi's testimony that they told him that they were trying to smuggle the children to Namibia. We agree with Mr. Kachaka's submission that that evidence having been improperly admitted, should be discounted.

22. The exclusion of that evidence, only leaves evidence that the 1st and 4th appellant entered the country with 14 children, who had no travel or identification documents, of any kind and they travelled to Katima Mulilo, where with the help of the 2nd appellant, they ended up at a lodge. On apprehension, they told the police that the children were either their

own or related to them, and that they had fled from the war in the Congo. The only evidence against the 2nd appellant is that he was apprehended with the 1st appellant in Namibia.

23. Much as the trial magistrate was entitled to doubt the claim that the appellants intended to report to the police after having a meal at the lodge, that alone, could not have been a basis for convicting them on a charge of trafficking in persons. He should have first considered whether all the ingredients of the offence had been proved before considering their response to the charges against them.

24. The only ingredient of the offence that was proved was that the 1st and 2nd appellant transported the children into, and across the country, from Congo. There was also evidence that the 3rd appellant had facilitated their securing lodgings within Katima Mulilo. There is no evidence that force or other forms of coercion, abduction, fraud or deception, was used to bring the children into the country. Neither is there direct

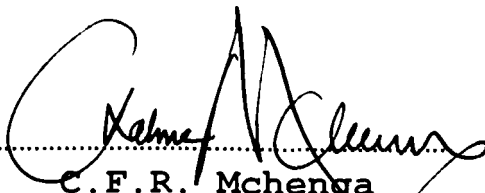
evidence or evidence on which an inference can be drawn, that the purpose of transporting the children was for their exploitation.


25. The 1st and 4th appellants' entry into the country, with 14 children without documentation, must be viewed in context. It is common cause, and we take judicial notice of the fact that at the time, there was civil strife in The Congo, and a number of Congolese nationals fled into this country, through undesignated entry points. In the circumstances, coming into the country with undocumented children, cannot, on its own, lead to a conclusion that the offence of trafficking in persons was committed. This is the case, despite the fact that the 1st and 2nd appellant did not report their presence, soon after entering the country.


26. Consequently, we agree with Mr. Kachaka, that the offence of trafficking in persons was not proved beyond all reasonable doubt.

Verdict

, 27. Having found that all the ingredients of the offence of trafficking in persons were not proved, the appeals by all the appellants are allowed. Their convictions are set aside and we direct that they be set at liberty forthwith.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL


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F.M. Chishimba
COURT OF APPEAL JUDGE


.....
J.Z. Mulongoti
COURT OF APPEAL JUDGE