

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

Appeal No. 215/2020

BETWEEN:

MWAIMU MOHAMED BARAKA

APPELLANT

VS

THE PEOPLE

RESPONDENT

CORAM: Mchenga DJP, Majula and Muzenga JJA
On 22nd September 2021 and 19th November, 2021

*For the Appellant : Ms. Z. Ponde with Ms. S.F. Bwalya both Legal Aid Counsel-
Legal Aid Board*

*For the Respondent : Mr. B. Mwewa, Senior State Advocate — National
Prosecution Authority*

J U D G M E N T

MAJULA, JA delivered the Judgment of the Court.

Cases referred to:

- 1. Sikota Wina and Princess Nakatindi Wina vs The People (1996) S.J. (S.C.).*
- 2. Edson Chisenga vs The People (CAZ Appeal No. 193/2017).*
- 3. Ian Hamalambo vs The People (CAZ Appeal No. 12/2019).*

Legislation referred to

Anti-Human Trafficking Act No. 11 of 2008 of the Laws of Zambia.

1.0 INTRODUCTION

- 1.1 The appellant herein was charged with one count of smuggling of persons contrary to section 9(1) of the Anti-Human Trafficking Act. It was alleged in the particulars that the appellant, on 7th June 2019 at Chinsali in the Chinsali district of Muchinga Province of the Republic of Zambia, did smuggle a person from Somalia without lawful authority.
- 1.2 We have been confronted with an appeal which raises issues in relation to the provisions of the Anti-Human Trafficking Act. In this appeal we shall address what ought to be contained in a statement of facts as well as the distinction between smuggling of persons and human trafficking as embodied in the Act. The reasons for this shall be evident in the latter part of this judgment.

2.0 BACKGROUND

- 2.1 The prosecution initially called one witness, Inspector Mubita Kwalela who is a police officer stationed at Nambuliuma Police Station. His brief evidence was that on 7th June 2019, around 11.30 hours, they engaged in an operation to apprehend prohibited immigrants. Acting on information they searched a particular truck which was being driven by the appellant. Upon conducting a search, they discovered a prohibited immigrant hidden in the cabin namely Abudulahi Muhammed. At the conclusion of this testimony, the appellant elected to change his plea from not guilty, to guilty.

- 2.2 A statement of facts was subsequently prepared and after it was read to him, he indicated that he understood the facts and had nothing to add or subtract. It was upon his admission of guilt that he was convicted and sentenced to 15 years with hard labour by Justice K. Limbani.

3.0 GROUND OF APPEAL

- 3.1 Dissatisfied with the conviction and sentence of the court below the appellant has appealed to this court fronting one ground of appeal as follows:

“The learned trial court erred in law and fact when it convicted the appellant on facts not disclosing the offence and different from the particulars of the offence.”

4.0 APPELLANT’S ARGUMENTS

- 4.1 In the heads of arguments, the appellant’s counsel argued that the statement of facts did not disclose the offence of smuggling but instead indicated that he had trafficked a human being. It was observed that the two offences are different as they are set out in two different sections of the Anti-Human Trafficking Act.
- 4.2 The learned counsel went on to note that the appellant was not represented by counsel at trial hence he wouldn’t have known the difference between the two offences. It was therefore contended that since the statement of facts did not

disclose the essential elements of the offence, the court should have recorded a plea of not guilty as it was equivocal.

- 4.3 With these submissions, we were called upon to allow the appeal and quash the conviction

5.0 RESPONDENT'S ARGUMENTS

- 5.1 On behalf of the state, there were no heads of argument filed. Mr. Mwewa in his oral arguments conceded that there was what he called a 'technical defect' on the statement of facts. He accordingly called upon the court to order a re-trial of the matter on the authority of ***Sikota Wina and Princess Nakatindi Wina vs The People***¹ where it was held:

"A re-trial could be ordered if the first trial was flawed on a technical defect or if there were good reasons for subjecting the accused to a second trial in the interests of justice".

6.0 CONSIDERATION AND DECISION OF THE COURT

- 6.1 It is imperative for us to reproduce the statement of facts that was presented in the court below in order to effectively discuss what should be contained in a statement of facts.

7.0 Statement of facts

- 7.1 *"The accused persons stands charged as per indictment on 7th June 2019 did traffic a human being namely Abdulan Muhudin Ahmeda a Somali national where he was intercepted by a team of police officers led by chief inspector Kainini at Nambulula*

check point along great north road. The matter was reported at Chinsali police station where investigations were launched and it was discovered that the accused committed the said offence as per indictment. He was put in lawful custody pending further probe into the matter on 12th June 2019, the accused was officially charged and arrested, under a warn and caution statement read to him in Swahili language, he seems to understand better, he gave a free and voluntary reply admitting the charges. Later he was put back in police custody pending court proceedings. Your Honour, the accused had no lawful justification to do what he did whatsoever”

- 7.2. Having scrutinized this statement of facts it immediately becomes clear to us that it is defective. From our stand point, the statement of facts reveals 2 offences; trafficking as well as smuggling. In the second line it states: “on 7th June the accused did traffic a human being namely..” The subsequent part of the statement of facts states that: “investigations were launched and it was discovered that the accused committed the alleged offence as per indictment”.
- 7.3 This is problematic for the simple reason that in one breath the prosecutor has indicated that he trafficked a human being. And in another breath, he has attested that the appellant committed the offence as per indictment and when one cross references the offence he is charged with it states smuggling of persons contrary to section 9(1) of the Anti-Human Trafficking

Act. In our considered view, this statement of facts does not disclose the ingredients of the offence. It would appear that there was some confusion with regards what actual offence the appellant was admitting to. The lack of clarity in the offence or failure to disclose ingredients of offence is what renders the statement of facts defective.

8.0 Smuggling of persons

8.1 This offence is a creature born out of section 9 of the Anti-Human Trafficking Act. The provisions which states as follows:

“9. (1) Subject to subsection (2), a person who smuggles another person into or out of Zambia, participates in smuggling or who consents to being smuggled commits an offence and is liable upon conviction, to imprisonment for a term not less than fifteen years and not exceeding twenty years.”

8.2 It is clear from the foregoing provision that if a party participates in smuggling another human being into or out of Zambia, he may be found guilty of the offence of smuggling of persons. The person or persons that are smuggled by the smuggler and the act being done with their consent equally commit an offence. Long and short of this offence is that both the smuggler and the smuggled have committed an offence.

8.3 The offence of smuggling is comprised of the following elements:

- procuring the illegal entry of another person

- into another state for the purposes of financial or material gain.

9.0 Trafficking

9.1 Pertaining to the offence of trafficking, this is provided for under section 3(1) of the Anti-Human Trafficking Act. This section provides as follows:

“3. (1) Subject to subsections (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 twenty years and not exceeding thirty-years.”

9.2 What emerges from the above offence is that a person who is trafficked does not commit an offence whereas the trafficker is the one who commits an offence. The crime is orchestrated by the trafficker.

9.3 It should be noted that there are various forms of human trafficking, however, the three most common types are; sex trafficking, debt bondage and forced labour which is also known as involuntary servitude. The perpetrators of the trafficking are considered to be the criminals as in those various forms of trafficking there is absence of consent on the part of the victim. Traffic defined in the Act means to recruit, transport, transfer, harbor, 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 legal process or any other form of abuse of power or of a position of vulnerability; or*
- (g) the giving or receiving of payments or benefits to achieve the consent of the person, for the purpose of exploitation;”*

9.4 This definition is very broad and having looked at the statement of offence it does not disclose the type of human trafficking that the appellant may have been involved in. On this score it fails the test of what should be contained in a statement of facts if at all he had been charged with human trafficking which he was not but the offence only appeared or reared its head in the statement of facts.

9.5 The key differences between trafficking, a situation where a person has been trafficked and a situation where a person has been smuggled, can be summarized as being that in the former case there is usually lack of consent whereas smuggled persons consent to being smuggled. In trafficking, lack of consent or the consent is rendered meaningless by the

traffickers. Smuggling involves entry into a country to which the smuggled is not a national or permanent resident, whereas trafficking on the other hand can happen even within the country without crossing borders. In the case of smuggling both the smuggler and the smuggled commit an offence. Whereas pertaining to trafficking, it is only the trafficker that commits an offence.

- 9.6 The other element of distinction is that of exploitation. In the case of a relationship between the smuggler and the smuggled, it is normally a commercial transaction which usually ends after the border crossing.
- 9.7 Turning to the relationship between traffickers and their victims, this entails an on-going exploitation to generate profit for the trafficker.
- 9.8 Overall it is crystal clear that between these two offences there are some key distinguishing elements. It is therefore the role of the prosecutor to examine the facts of the case and make a decision as to which crime has been committed as mistakenly treating an offence to be trafficking as opposed to smuggling or vice versa can have severe consequences. It is therefore important to understand the key differences between trafficking and smuggling by distinguishing the elements that are peculiar to each crime.

- 9.9 In Zambia smuggling of person under section 9(1) attracts a term of imprisonment of between 15 to 20 years whereas human trafficking under section 3(1) has a more severe term of imprisonment of between 20 to 30 years. The offence of smuggling is defined in the interpretation section of the Act. It means the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, if the illegal entry of a person into a Country of which the person is not a national or permanent resident.
- 9.10 Therefore, it must be shown that the accused person facilitated or procured the illegal entry of the Somalian National into a Country, in this particular instance, Zambia.
- 9.11 The statement of facts merely states that the accused person did traffic a human being. The difficulty presented by the statement of facts is that it brings in trafficking, which the accused person was not charged with.
- 9.12 It is a totally different charge, unrelated to the offence of smuggling. When you look at the definition of traffic, it has a lot of elements, but was not the charge that was preferred against him, so the statement of facts does not disclose the elements or ingredients of the offence of smuggling. Trafficking should not have been brought in at all.

10.0 THE CONSEQUENCES OF A DEFECTIVE STATEMENT OF FACTS

10.1 A statement of facts must disclose the ingredients of the offence for it to be properly admitted by the court otherwise the plea will be rendered equivocal. This is what we said in the case of ***Edson Chisenga vs The People***², in a judgment delivered by Mr. Justice Sichinga JA, when we held:

“...we hold that the plea was not properly taken because the ingredients of the offence were not disclosed in the statement of facts.”

10.2 Further in another insightful case of ***Ian Hamalambo vs The People***³ we observed thus:

“It is well established that for a plea of guilty to be unequivocal, the charge must be clearly explained to the accused who must, not only plead guilty, but also admit the facts as correct. The facts should encompass all the essential ingredients of the offence as set out in the particulars of the offence.


It follows therefore, that if the statement of facts admitted as correct does not contain an essential element of the offence, the plea stands equivocal and a plea of not guilty ought to be recorded.”

10.3 Flowing from the two cited cases we hold that the statement of facts in this case was highly defective as it did not disclose the ingredients of the offence.

10.4 In light of what we have stated in the preceding paragraphs, we hold the view that the conviction was unsafe and should be

set aside and we order that the matter be sent back to the Subordinate Court for retrial before a different magistrate.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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B.M. Majula
COURT OF APPEAL JUDGE

..........
K. Muzenga
COURT OF APPEAL JUDGE