

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

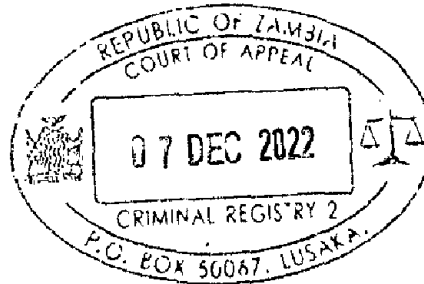
Appeal No 66/2022

BETWEEN:

WINA LUBINDA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Chishimba and Muzenga JJA

ON: 15th November 2022 and 7th December 2022

For the Appellant: S. Chibuye-Lukwesa, Acting Chief Legal Aid
Counsel, Legal Aid Board

For the Respondent: V. Nsingo, 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. Mwalimu Mohamed Baraka v. The People, CAZ Appeal No. 215
of 2020

Legislation referred to:

1. The Anti-Human Trafficking Act No. 11 of 2008

2. INTRODUCTION

2.1. The appellant appeared before the Subordinate Court (Hon. Liyungu), charged with the offence of Trafficking in Persons, contrary to **Section 3(1) of The Anti-Human Trafficking Act.**

2.2. He denied the charge and the matter proceeded to trial.

2.3. At the end of the trial, he was convicted for committing the offence and was committed to the High Court for sentencing.

2.4. In the High Court (M. Chanda, J.), he was sentenced to 20 years imprisonment, with hard labour.

2.5. He has appealed against the conviction.

3. CASE BEFORE THE TRIAL COURT

3.1. The evidence before the trial Magistrate was that on the 21st of April 2015, the appellant approached Charles Chishiko, a taxi driver, who was parked at the Shalom Bus Stop taxi rank, in Sesheke.

- 3.2. The appellant, who was in the company of three foreigners, namely Felix Ndubuisi Usah, Abdoui Ghadiri Diallo and Alassane Ba, requested to be taken to the border. Charles Chishiko agreed and the quartet jumped into his taxi.
- 3.3. As they drove to the border, the appellant collected US\$ 50 from each one of the foreigners. They did not reach the border because they were intercepted by the police.
- 3.4. The appellant managed to flee from the scene, but was subsequently apprehended by the police officers who saw him run away.
- 3.5. Felix Ndubuisi Usah gave evidence in court.
- 3.6. He told the trial Magistrate that he flew into Lusaka from Nigeria. It was in Lusaka that he met the other two foreigners and a woman whom they paid to facilitate their travel Angola.
- 3.7. He said he could not travel directly to Angola, because getting a visa for that country was expensive.

3.8. He also told the trial Magistrate that the woman they met in Lusaka gave them the appellant's phone number. She told them that he would help them cross the border.

3.9. They got on to a bus and travelled to Sesheke. When they got there, they called the number and the appellant turned up. He collected US\$ 50 from each of them.

3.10. In his defence, the appellant said a lady he met at COMESA Market in Lusaka, phoned him and requested him to receive the foreigners. When they arrived, he hired Charles Chishiko's taxi and showed them where the Namibian border was. He then returned to the bus stop, and proceeded to Senanga.

3.11. The trial magistrate found that the appellant hired a taxi to take the foreigners to the border knowing that they had fake documents.

3.12. He also found that the charge of trafficking in persons had been proved because he received payment from each one of them, to facilitate their crossing of the border.

4. GROUND OF APPEAL AND ARGUMENT IN SUPPORT/AGAINST
APPEAL

4.1. The sole ground of appeal is that the essential ingredients of the offence of trafficking in persons, were not proved.

4.2. In support of the sole ground of appeal, Mrs. Chibuye-Lukwesa referred to the case of **Mwalimu Mohamed Baraka v The People¹**, and submitted that the essential ingredients of the charge of trafficking in persons, as set out in **section 3(1) of The Anti-Human Trafficking Act**, were not proved.

4.3. She pointed out that the term to "traffic", as is defined in **section 2 of The Anti-Human Trafficking Act**, requires proof of elements, including the transportation of the victim for purposes of exploitation. None of those elements were proved.

4.4. Mrs. Chibuye-Lukwesa also submitted that even the lesser offence of Smuggling of Persons, under **section 9 of The Anti-Human Trafficking Act**, was not proved.

4.5. She prayed that we allow the appeal, and acquit the appellant.

4.6. In her brief response, Ms. Nsingo conceded that the evidence before the trial Magistrate, did not prove the charge of trafficking in persons.

4.7. However, she submitted that the evidence proved the lesser charge of smuggling of persons.

5. CONSIDERATION OF APPEAL AND DECISION OF THE COURT

5.1. In section 2 of The Anti-Human Trafficking Act, the term to "traffic" is defined as follows:

"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 legal process or any other form of abuse or 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"

- 5.2. As we pointed out in the case of **Mwalimu Mohamed Baraka v The People¹**, to prove a charge of trafficking in persons, the prosecution evidence must go beyond showing that the offender transported a person across the border.
- 5.3. The evidence must show that the person was transported by the offender who either used threats or force or other forms of coercion; or after an abduction; or through fraud or deception; or after a false or illegal adoption of a child, or after the destruction, concealment, removal, confiscation or possession of any passport, immigration document or other official identification document of a person.
- 5.4. The charge can still be proved where the victim was transported after the offender abused or threatened to abuse the law or legal process; or where there was any other form of abuse of power or

of a position of vulnerability; or through the giving or receiving of payments or benefits to achieve the consent of the person.

5.5. In addition to the situations set out in the last two preceding paragraphs, the prosecution must also lead evidence that the purpose of the transportation, was for the exploitation of the victim.

5.6. In this case, all there is, is evidence that the foreigners were made to pay the woman in Lusaka and the appellant, to facilitate their illegal entry into Angola.

5.7. But there is no evidence of the situations set out in paragraphs 4.4. and 4.6. of this judgement. Neither is there evidence that the appellant or the woman in Lusaka, intended to exploit the foreigners.

5.8. This being the case, we are persuaded by Mrs. Chibuye-Lukwesa's argument that the essential ingredients of a charge of trafficking in persons, under **section 3(1) of The Anti-Human Trafficking Act**, where not proved.

5.9. Ms. Nsingo submitted that even if the charge of trafficking in persons was not proved, the evidence proved the lesser charge of smuggling of persons.

5.10. The offence of smuggling of persons is provided for by **section 9 of The Anti-Human Trafficking Act.**

It reads as follows:

(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. (2) Where the smuggling results in the death of the person being smuggled, the offender may be liable to imprisonment for life

(3) A person who produces, provides, procures or possesses a fraudulent travel or identity documents in furtherance of the offence of smuggling commits an offence and is liable, upon conviction, to imprisonment for a term of not less than ten years and not exceeding fifteen years.

5.11. In **section 2 of The Anti-Human Trafficking Act**, smuggling is defined as being:

"the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a country of which the person is not a national or permanent resident"

5.12. The two main elements of a charge of smuggling of persons, is the illegal bringing into or taking out of the country, of a person, for financial gain.

5.13. In this case, although there is evidence that the appellant received US\$ 50 from each of the foreigners, which is direct financial gain, the evidence shows that the foreigners did not manage to leave the country.

5.14. This being the case, the charge of smuggling of persons was not proved.

5.15. However, **Section 12 of The Anti-Human Trafficking Act**, proscribes the attempt to commit any offence in that Act. It reads as follows:

"A person who attempts to commit an offence under this Act commits an offence and is liable, upon conviction, to imprisonment for a term of not less than ten years and not exceeding twenty years"

5.16. We are satisfied that the evidence that was before the trial Magistrate, proved that the appellant attempted to smuggle the three foreigners out of the country. He received money from them to transport them to the border. He also hired a taxi

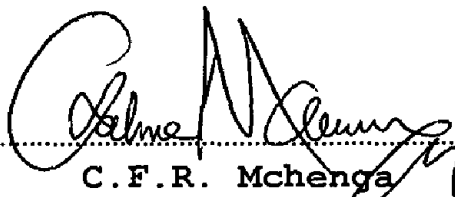
to the border and only failed because they were intercepted by the police.


6. **VERDICT**

6.1. We allow the appeal against the conviction and we set aside the appellant's conviction for the offence of Trafficking in Persons contrary to **Section 3(1) of The Anti-Human Trafficking Act.**

6.2. In its place, we convict him for the lessor offence of Attempting to Smuggle Persons, contrary to **Sections 12 and 9(1) of The Anti-Human Trafficking Act.**

6.3. We sentence him to 10 years imprisonment, with hard labour. The sentence will run from the 21st of April 2016, the day he was apprehended.


C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


F.M. Chishimba
COURT OF APPEAL JUDGE


K. Muzenga
COURT OF APPEAL JUDGE