IN THE HIGH COURT FOR ZAMBIA HWS/38/2017
HOLDEN AT KASAMA
(Criminal Jurisdiction)

20 DEC 2017

THE PEOPLE

V

MARTHA MUKWASA

Before the Hon. Mr. Justice Davies C. Mumba in Open Court on the 20th day of December, 2017

For the State : Mr. P. Mutale, Deputy Chief State Advocate
Mr. M. Chipawa, State Advocate
For the Defence : Mr. K. Katazo, Acting Senior Legal Aid Counsel

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SENTENCE

Cases referred to:

1. Muvama Kambanja Situna v The People (1982) Z.R. 115 (S.C.)
2. Ticky v The People (1968) Z.R. 21 (H.C.)
3. The Minister of Home Affairs and another v Lee Habasonde (2007) Z.R. 207
4. Kambarange Kaunda v The People (1990/1992) Z.R.215
5. Joseph Nkole v The People (1977) Z.R. 351 (S.C.)

Legislation referred to:

1. The Anti- Human Trafficking Act No.11 of 2008 of the Laws of Zambia- ss. 3(1), 3(2) and 21.

2. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia- ss. 169(1), 217(1) and 273.

Before the Nakonde Subordinate Court of the first class, **MARTHA MUKWASA**, the convict herein, was charged with the offence of **TRAFFICKING IN PERSONS** contrary to section 3(1) of the Anti-Human Trafficking Act No. 11 of 2008. The

particulars of the offence were that the convict on an unknown date but in the month of April, 2016, at Nakonde in the Nakonde district of the Muchinga Province of the Republic of Zambia unlawfully and intentionally did traffic a child namely **IVY BWALYA.**

The convict pleaded not guilty to the charge. She was tried, found guilty and convicted of the subject offence.

As the trial Magistrate lacked jurisdiction to impose the mandatory minimum sentence of 25 years that the offence carries, the convict was committed to the High Court for sentence pursuant to section 217(1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia.

In support of their charge, the prosecution called three witnesses. The convict elected to give evidence on oath and did not call any other witness. The evidence in this case is to be found in the record of proceedings and the judgment of the lower Court.

Before the matter came up for sentencing, the defence filed into Court written submissions on 6th December, 2017. The written submissions were to the effect that section 3(1) of the Anti-Human Trafficking Act under which the convict was convicted is not a stand-alone section. It was contended that, for an offence of trafficking to be committed, one of the subsections of section 3 being subsections (2) to (11) must be proved beyond

reasonable doubt. It was submitted that the record and judgment from the trial Court did not show which subsection of section 3 was relied upon by the prosecution.

It was further submitted by the learned defence Counsel that intentional and unlawful trafficking were not proved against the convict by the prosecution as the record of proceedings shows that the convict did not tell PW1 not to inform her parents that she was going to Tanzania to work, as the convict had found a job for her. It was contended that the judgment of the trial Court did not take into consideration the evidence of the convict to the effect that PW1 had informed her that she had no parents. The case of **Muvama Kambanja Situna v The People**[1] was cited. In that case it was held, *inter alia,* that:

> **"The judgment of the trial court must show on its face that adequate consideration has been given to all relevant materials otherwise an acquittal may result where it is not merited."**

In addition, the defence also cited the case of **Ticky v The People**[2] where it was held that:

> **"The magistrate must consider the accused's defence, and it must be evident from his judgment that he did so."**

It was submitted that the trial Court made a finding to the effect that there was unlawful trafficking because no authority was obtained from PW1's parents. It was contended that contrary to that finding, the convict testified that PW1 had informed her that she had no parents. Hence the trial court should have stated

whether it believed the testimony of the accused or not. In support of this, learned defence Counsel cited the case of **The Minister of Home Affairs, The Attorney General v Lee Habasonde (suing on his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes)**[3] where it was held that:

> **"A judgment which only contains verbatim reproduction and recitals is no judgment."**

The defence prayed that there was no judgment in this matter hence the convict should be set at liberty forthwith.

In response to the submissions by the defence, the State filed submissions into Court on 8th December, 2017. They submitted that they agreed with the submission by the defence on the issue raised regarding section 3(1) of the Anti-Human Trafficking Act No. 11 of 2008, however, only to the extent that it was not a stand-alone section. They submitted that the indictment was defective to that effect as it only showed that the convict was charged under section 3(1) of the said Act. However, the State argued that the judgment of the trial Court at page J1 in the first sentence shows that the Court cured the defect by indicating that the convict was facing a charge under sections 3(1) and (2) of the Anti-Human Trafficking Act No. 11 of 2008.

It was further submitted by the State that going by section 273(2) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia and the case of **Kambarange Kaunda v The People**[4],

the Court can on its own motion amend a defective indictment at any time during trial. The overriding consideration is that no injustice or prejudice is occasioned by such amendment to the accused. It was the State's submission that the amendment in the judgment of the trial Court, however late it was, did not prejudice the convict herein in anyway whatsoever. The convict had an opportunity to defend herself in that regard. The evidence on record by the prosecution and the convict clearly showed that the section creating the offence of trafficking children was addressed.

The State further submitted that the submission by the defence to the effect that the prosecutrix in her statement, informed the trial Court that she did not inform her parents about the arrangement the convict made to have her taken to Tanzania was irrelevant. The ingredient creating the offence of trafficking in children is that the convict took the prosecutrix into another country without seeking the consent of her parents or guardians. The State contended that any reasonable, prudent and honest person would have sought the necessary authority personally from the child's parents or guardians and not merely relying on the purported utterances of a child.

The State submitted that the record from the trial Court showed at page J5 of the judgment that it considered the convict's evidence in her defence. The State contended that to state that, by the Court not restating verbatim that the prosecutrix told the convict that her parents were dead, and invoking the authority

set in ***Situna***[1] case cited by the defence, was a misapprehension of the law especially considering the undisputed facts in this case. The undisputed fact was that the convict took the prosecutrix out of Zambia and left her in the hands of other people without the required consent. Had the convict honestly taken prudent steps to get authority from the prosecutrix's guardians, she would have found out that the prosecutrix's parents were alive.

With regard to the authority set on what amounts to judgments in the ***Habasonde***[3] case which has been cited by the defence, the State contended that, that was a civil cause that has no jurisdictional application in criminal matters and should not be entertained. The State prayed that the conviction should be upheld as it is sound and the Court should proceed to sentence the convict.

I am highly indebted to both learned Counsel for the defence and learned Counsels for the State for their submissions. I have considered the submissions, the evidence on record and the judgment of the lower Court.

Section 3(1) of the Anti-Human Trafficking Act No.11 of 2008 provides that:

> **"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."**

In his submissions, Mr Katazo raised two issues for the consideration of the Court.

The first issue being that section 3(1) of the Anti- Human Trafficking Act No. 11 of 2008 was not a stand-alone section, and that for an offence to be committed, one of the subsections from subsection (2) to (11) of section 3 had to be proved beyond all reasonable doubt. The State conceded this position. I do not take such a view. I find that section 3(1) is self-contained. Inescapably one cannot read section 3(1) without reading subsections (2) to (11) which have been expressly referred to in section 3(1) unless he does it out of wilful neglect. It is evident that the relevant authorities are required in the same section 3(1) to have recourse to subsections (2) to (11) depending on the circumstances of each particular case. Therefore, I do not accept learned defence Counsel's submission that for an offence to be committed under section 3(1), one of the subsections from (2) to (11) has to be proved beyond all reasonable doubt. In my own opinion, the correct position should be that in any case where reference is made to subsection (2) to (11) the alleged circumstances under any of those subsections must be proved beyond all reasonable doubt affecting only the circumstances of that particular case, which is the standard of proof in all criminal cases. Therefore, it is not a condition precedent that an offence can only be committed under section 3(1) upon proof of any of the circumstances specified in subsections (2) to (11). The reading of section 3(1) of the Anti- Human Trafficking Act No. 11 of 2008 shows that the said section 3(1) is self-contained

in that the section creates the offence of trafficking, and provides for the punishment for committing an offence under the said section 3(1). Even without resorting to subsections (2) to (11), a person can still be convicted of the offence of trafficking in persons and punished according to the provisions of section 3(1).

Further, it emerges from section 3(1) of the Anti- Human Trafficking Act No. 11 of 2008, that subsection (1) of section 3 has provided for the general punishment for committing the offence of trafficking in persons; whereas subsections (2) to (11), to which section 3(1) makes reference, have provided for the specific punishments for trafficking in persons depending on the age of the victim; purpose of trafficking; circumstances under which the offence has been committed; the results of such trafficking; the type of the offender; and the frequency of the offences committed. Consequently, it is my considered view that if the general punishment is not applicable to the particular facts of a case, recourse is to be had to subsections (2) to (11) to find the appropriate specific punishment owing to the special circumstances of a particular case.

In the instant case, the prosecution proved that the victim who was trafficked was a child, and therefore, subsection (2) of section 3 would be invoked for the appropriate sentence. Subsection (2) of section 3 of the Anti- Human Trafficking Act No.11 of 2008 referred to in the judgment of the trial Court at page J1 provides as follows:

> "3. (2) Where the victim of an offence under subsection (1) is a child, the offender is liable to imprisonment for a term of not less than twenty-five years and not exceeding thirty-five years...."

The trial Magistrate properly referred to the said subsection (2) of section 3. In a nutshell, had it not been proved that the victim was a child and without any of the circumstances specified under subsections (2) to (11) applying, the offender could properly be punished under the said section 3(1) of the Anti-Human Trafficking Act.

Having considered the proper manner of arraignment, I am settled on the fact that the prosecution having known that the victim was a child, reference to subsection (2) of section 3 should have been made in the statement of offence. The omission only resulted in the statement of offence being defective. That notwithstanding, the particulars of the offence made it sufficiently clear that the person who was trafficked was a child.

The particulars of the offence to which the convict answered were that:

> "MUKWASA MARTHA on unknown date but in the month of April, 2016 at Nakonde in the Nakonde district of the Muchinga Province of the Republic of Zambia unlawfully and intentionally did traffic a child namely IVY BWALYA."

The perusal of the accused's defence shows that she fully addressed her mind to the fact of the allegations contained in the particulars of the offence. Although, there was an omission to refer to subsection (2) of section 3 of the Anti- Human

Trafficking Act, I am satisfied that the convict was not prejudiced in any way and that there was no miscarriage of justice. I am satisfied that the particulars of the offence clearly disclosed that the victim of trafficking was a child. I am fortified by the decision in the case of **Joseph Nkole v The People**[5] where it was held that:

> **"(i) The statement of offence was clear and so were the particulars of the offence; what was wrong was the inaccurate reference to the section of the enactment that created the offence.**
> **(ii) This error did not make the charge bad but simply defective, and in the absence of embarrassment or prejudice to the accused the court shall amend the charge accordingly**
> **(iii) The question of whether or not the accused is prejudiced by the defect must be considered on the facts of each particular case."**

In the present case, the particulars of offence were clear and the accused appropriately defended herself. The omission did not make the charge bad but simply defective. In the absence of embarrassment or prejudice to the accused, the trial Court was entitled to proceed in the manner that it did on the evidence available in this case. On the evidence, I do not think that there was any miscarriage of justice in this case.

Let me conclude on the first issue by addressing my mind to section 273 of the Criminal Procedure Code, Cap 88 and its subsections. I do not agree with the State's submission that the said section 273 and any of its subsections apply to this case. This is because the said section 273 falls under part IX of the Criminal Procedure Code which provides for, 'the procedure in trials before the High Court'. This case was tried before the

Subordinate Court. However, it is trite that where there has been an omission with reference to a section of any statute under which a person is charged for an offence, the critical consideration is whether by such omission the accused is embarrassed or prejudiced and/or there has been any substantial miscarriage of justice occasioned to the accused.

The second issue raised by the learned defence Counsel is that the judgment of the trial Court did not take into consideration the evidence of the accused particularly to the effect that PW1 had informed her that she had no parents. Learned defence Counsel cited the case of ***Situna***[1] and the case of ***Ticky***[2] in support of the fact that the consideration of the accused's evidence must have been evident from the judgment. Further, that the conflict in the evidence between PW1 and the accused regarding parental consent ought to have been resolved by the trial Court. Learned defence Counsel submitted that the trial Court found that there was unlawful trafficking because there was no authority from the parents, while on the other hand the accused testified that PW1 had informed her that she had no parents. Learned defence Counsel contended that the trial Court should have stated whether it believed the testimony of the accused or not. Further, learned defence Counsel also contended that there was no judgment in this case as the evidence of the accused was not taken into consideration by the Court, apart from reciting it. He relied on the case of ***Habasonde***[3] in support of his submission.

In my view, the summary of the submission by the learned defence Counsel is that there was no judgment of the trial Court because the evidence of the accused was not taken into account. I will also consider the issue of parental or the victim's consent to the commission of the offence later.

The second issue appears to me to be the most crucial one which may bring the current proceedings to an end; and/or on a proper consideration of the evidence entice this Court to exercise its powers to order a re-trial.

Section 169(1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia provides that:

> **"169. (1) The judgment in every trial in any court shall, except as otherwise expressly provided by this Code, be prepared by the presiding officer of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."**

Further in the ***Habasonde***[3] case it was held that:-

> **"We must, however, stress for the benefit of the trial courts that every judgment must reveal a review of evidence where applicable, a summary of the arguments and submissions if made, findings of fact and application of the law and authorities, if any, to the facts. Finally a judgment must show the conclusion"**

I find that there is a valid judgment that was written by the trial Court. In that judgment of the trial Court, it is shown at pages J5 to J7 that a summary of the accused's evidence was done; the findings of fact made; the application of the law to the facts done, and its conclusion(verdict) made.

After summarising the accused's evidence, the trial Magistrate in the last paragraph, at pages J5 to J6 had this to say:

> **"Having considered all the evidence, I now state my findings of fact. I am quite satisfied that sometime in April, 2016 PW1 was looking for employment. I find that the accused later informed PW1 that she had found her a job as a house maid. I find that the accused took PW1 to her sister in Tunduma, Tanzania where she was to start work. I find that upon receiving PW1 the accused's sister transferred her to a woman in Sumbuwanga and I find accordingly."**

I am satisfied that the above were findings of fact by the trial Magistrate and, therefore, he cannot be faulted.

The trial Magistrate further went on to apply the law to the facts at page J6 of the judgment. In satisfying himself whether the elements of the offence had been proved, the trial Magistrate found that:

(i) The accused had made prior arrangements with her sister to have the victim trafficked to someone in Sumbuwanga. To him that constituted 'intention' to traffic the victim;

(ii) The trafficking was unlawful because PW1's parents (which include guardians) did not authorise the accused to transfer their daughter to Tanzania;

(iii) The offence against the victim occurred when she was aged 15 years, 5 months. The victim's age was based on the testimony by PW2, the mother whose evidence was that the victim was

> born on 22nd November, 2000; and that section 2 of the Anti-Human Trafficking Act defines a child as a person under the age of eighteen years.

At the conclusion of his findings of fact and applying the law to the facts, the trial Magistrate was satisfied that the prosecution had proved its case beyond any doubt. He found the accused guilty of the offence charged namely trafficking in persons contrary to section 3(1) and (2) of the Anti-Human Trafficking Act No. 11 of 2008 and convicted her accordingly.

I cannot fault the trial Magistrate in any way, except as to the 'consent' which was an irrelevant consideration. Had the trial Magistrate properly directed himself on the law, he would have found that 'consent' was immaterial in the commission of the subject offence. Therefore, consent or the lack of it was immaterial in this case as it is not a defence to the offence of trafficking in persons. Further, had the trial Magistrate also properly directed himself on the available evidence, he would have found that the purpose of trafficking the victim was for child labour, an unlawful act.

I am satisfied that there was a valid judgment in this case, as stated above. Further, I do not agree with the submissions by the State that the guidelines in the ***Habasonde***[3] case, which is a civil case, on how to write a proper judgment, do not apply to a criminal matter. It is my view that, the manner and style of

writing judgments be it in a civil case or criminal is the same. There is no difference at all. Section 169 of the Criminal Procedure Code, Cap.88 has provided enough guidance which all Courts need to follow in writing what may constitute a good judgment whether be it in civil or criminal cases *mutatis mutandis.*

I now wish to revert to the issue of consent by a parent, guardian or the victim of the trafficking offence.

In his submissions, learned defence Counsel submitted that PW1 did not inform her parents on her own as to the place where she was going to find the job; and that the record showed that it was not the accused who stopped PW1 from informing her parents. He urged the Court to set the convict at liberty.

I must state that whether or not the child victim informed her parents or guardians as to where she was being taken and/or obtained her parents' consent, that would not help the defence's case. The consent of either the child victim, or of that of parents, is immaterial as a defence to the offence of trafficking in persons. I am fortified by the provisions of section 21 of the Anti-Human Trafficking Act No. 11 of 2008. The said section 21 enacts as follows:

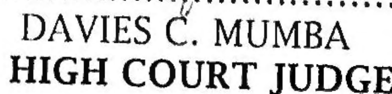
> **"21. It shall not be a defence to a charge for an offence under this Act to prove-**
> **(a) that a victim consented to the act constituting the offence;**
> **(b) ....(irrelevant)**
> **(c) where the victim is a child, that the victim, the parent, guardian or other person who has parental responsibilities**

and rights in respect of the child consented to the act constituting the offence;
(d) **that the exploitation of the victim did not occur;..."**

In view of the above legal provisions, whether the victim could have informed the convict that her parents were dead thereby making it impossible to obtain their consent or whether the victim could have consented by herself or whether the guardian would have given consent to her being taken out of Zambia to Tanzania to work as a maid, being a child, it would have made no difference to the offence committed. Therefore, the submission to that effect by the learned defence Counsel is of no consequence to the defence's case.

I have considered the evidence before the trial Magistrate and the judgment of the Court. I am satisfied that the conviction is supported by the evidence. Therefore, I uphold the conviction and I will proceed to sentence the convict.

Delivered at Kasama in Open Court this 20th day of December, 2017.



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DAVIES C. MUMBA
HIGH COURT JUDGE