

**IN THE SUBORDINATE COURT OF THE FIRST**

**2PG/014/17**

**CLASS FOR THE LUSAKA DISTRICT**

**HOLDEN AT LUSAKA**

*(Criminal Jurisdiction)*

**THE PEOPLE**

**V**

**FREDRICK KALAKI**

**For the state: KAKOMA AND MUKOMBWE, N**

**For defence: IN PERSON**

**Coram: HON MWANSA R**

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**JUDGEMENT**

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The Accused in this matter stands charged with smuggling of persons Contrary to Section 9 (1) of the Anti-Human Trafficking Act No.11 of 2008 of the Laws of Zambia.

The Particulars of offence are that Fredrick Kalaki on unknown dates but in April, 2016 at Lusaka in the Lusaka District of the Lusaka province of the Republic of Zambia did smuggle a child namely Solomon Kalaki out of Zambia.

When called upon to take plea, he pleaded guilty to the charge but the court entered unequivocal plea of not guilty having not satisfied itself with all elements of the offence charged and trial moved forward.

It is trite law in criminal proceedings that the burden of proof lies on the prosecution to prove its case against the accused beyond all reasonable doubt and that there is no onus on the accused to prove his innocence. The accused is entitled to call evidence, either sworn or unsworn or may indeed choose to remain silent. He is also entitled to call witnesses. Suffice to state that whichever option the accused chooses to launch his defence, the prosecution must still prove the case against him beyond all reasonable doubt.

Turning to the count Section 9 (1) of Anti- Human Trafficking Act No. 11 of 2008 (hereinafter called the act) provides that;

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

Section 2, the interpretation section of the same Act defines smuggling to mean ***“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.”***

Therefore, in order to establish the guilt of the accused, the prosecution must prove each and every ingredient of the offence above. It must be proved that;

1. That accused smuggled the victim into or outside Zambia
2. That the accused procured the victim in order to obtain a financial gain or material directly or indirectly
3. That he facilitated the illegal entry of the victim outside or into Zambia
4. That the accused had no lawful justification for his action.

The prosecution called only two witnesses and I shall not belabor to reproduce verbatim the testimonies suffice to state that I shall only dwell on the evidence which, in my considered view, is relevant to the determination of this matter.

PW1 was Memory Kalaki Mwaba who testified that she is the spouse to the accused Fredrick Kalaki James who she married in 2014. She recounted that on unknown dates in 2016, she was cohabiting with him

and that he said he wanted to make their son Solomon Kaliki a 1<sup>st</sup> Birthday. Solomon was born on 12<sup>th</sup> May 2015.

PW1 told the court that after the accused said he waited to make the said party he went to town with their son and said he had gone to buy him clothes but decided to go for good, four days passed without showing up and PW1 then got worried and started looking for the accused to no avail and PW1 only started crying and was helpless.

PW1 didn't have his contacts hence couldn't communicate with him hence decided to get in touch with his relatives and after some time the accused communicated through PW1's sister Mulenga Mwaba that she should inform her that he has gone with the child to his country of origin whilst using the Zambian line.

PW1 and the sister then managed to trace him through his Zambian number and found him in town around 22:00hrs and he kept on mentioning two countries that the child is in Nigeria and Uganda that is when PW1 reported the matter to City Market Police Post and he was later transferred to Matero Police station and the police said they will



trace the way-about of the child and the child was found in Uganda with the accused's father and the child had stayed there for 9 months.

PW1 told the court that she didn't allow the accused to take the child to Uganda. She brought the Under-five card, the birth record together with the child in court and the court had an opportunity to see the child who is still an infant under the age of two years old.

In XXN she told the court that she didn't report the matter as she was confused because the child is too young and the matter was only reported in January 2017 and that she never agreed with the accused that she takes the baby however at the time he took the child they were still married. She was not aware why he took the child and that he was not the one who collected the birth record.

In REXN she said she never consented.

PW2 was John Miyelenge who told the court that he was the arresting officer in this matter and he received a complaint from PW1 that her husband had taken the child from home with a view of buying him clothes but went for good. The child's name is Solomon Kalaki. PW2

upon that receipt instituted investigation and the accused who was already in custody was interviewed as why he took the child from the mother PW1 and he said that he took the child to Uganda using under hand methods that is by taking the child through bribing people to help move the child across the borders. After the interview the officer was unsatisfied hence this prompted him to charge the accused with the subject offence and under warn and caution statement administered in English the accused admitted the charge and he was detained pending court process.

PW2 as the person in custody produced the under-five clinic and birth record as evidence and this was admitted as P1 and P2 respectively.

At the close of the state's case the mother to the child PW1 came to have the matter withdrawn against the accused for the reason that she didn't want the husband to go to prison and that she only reported the matter because the child was taken.

The court however disallowed the application as this was a serious offence which didn't fall in the perimeters of personal nature as espoused



by Section 8 of the criminal procedures code, Chapter 88 of the laws of Zambia.

The prosecution rested their case and the accused was put on his defence and he elected to give sworn evidence and called 1 witness.

DW1 was Fredrick Kalaki who told the court that he was a business man and a Ugandan national, he said the child who is alleged to have been smuggled to Uganda Solomo Kalaki his son, who he bore with PW1 and that the said child stopped breast feeding at five months when PW1 said she wanted to start work and after that the child started getting sickly and malnourished.

DW1 told the court that his family requested that he takes his wife to Uganda to have her introduced as well the baby so that the baby could be given a traditional name and undergo certain African rituals which are done to the first born male child but PW1 refused to go with him that she was scared to go to his country because he could kill her. DW1 then went to the PW1's mother and she agreed that the child could be taken and she allowed DW1 to go with the child, the said PW1's mother is Memory Mwaba. The child was two months and DW1 started arranging

for the movements of the child and he first travelled alone to Uganda. DW1 was in shock when the officers come to testify in court that he used underhand methods because he visited Chawama Police and he used a proper traveling document. DW1 said the traveling documents had his names Fredrick James Kalaki, the name of his child, date stamp from Chawama Police, immigration stamps for Zambia, Tanzania and Uganda and it was dated 12<sup>th</sup> April 2016.

DW1 identified the document positively and wished to tender it in as part of evidence and there was no objection from the state consequently it was admitted in evidence as D1.

DW1 went on to say that on the day the child was going PW1 even dressed the child and escorted DW1 to the bus station and when DW1 reached Uganda he communicated to PW1's sister to tell her they arrived safely at that time PW1 had no cell phone and hence continued communicating on PW1's sisters phone.

DW1 whilst in Uganda was asked by his relatives why he left the wife behind in that they needed to do some cultural practices which involved introducing PW1 to the family, the umbilical code for the child was also



needed so that the child can be cleansed and named by the grandfather and at that time PW1 never complained anywhere until this year in January 2017.

DW1 then come back to Zambia to pick the wife PW1 and he found that she had shifted to another place and DW1 communicated through PW1's sister and agreed how they could meet and they met so that they could discuss in town the issue concerning the child's umbilical code and PW1 going with DW1 to Uganda but to DW1's surprise he was apprehended and they almost charged him with killing his child at matero but the charge was reduced to smuggling.

DW1 got emotional in court and said that he was at pains that he is accused of smuggling his own child as there was nothing he wanted to gain and that there was nothing sinister of him taking his child to his country in that even when the child was away the child was safe with his family and he was even the one providing mealie meal and all the basic needs for PW1 and her family as he was sending money through out the month.

In Cross Examination DW1 was laid by the state to look at D1 and he confirmed that it was the travel document for the child which was gotten for him after DW1 was robbed of his passport including that of the baby.

He agreed to have travelled with the child to Uganda and denied using any under hand methods and that the purpose as stated was only for tradition and there was nothing sinister or any financial gain, the child needed to be baptised traditionally and given a middle name that is Musowa the name which is for the grandfather.

The child was brought back to Zambia by DW1's sister after he was arrested and that it come as a shock that the wife reported him to the police when the family sat down and allowed him.

DW1 concluded by saying he didn't smuggle his own child he was duly authorised by Zambia, Tanzania and Uganda.

In REXN DW1 told the court that no underhand method where used. DW2 was Ninakayi Ireen Nangai, who told the court on oath that she was a Ugandan national and that she worked as a secretary in Uganda and that DW1 was the young brother. She recounted that somewhere in 2015



DW1 went to visit Uganda with the baby so that the baby can be named and undergo cultural practices that included circumcision and cleansing the child in medicine, however the family observed that DW1 came alone hence they told him to go back to Zambia so that he could also introduce his wife PW1 to them and the tradition required the wife to be present and DW1 came to Zambia but the family in Uganda just heard that he was arrested for smuggling the child hence DW2 and the father Mr. Solomon Musowa Kaliki Senior come with the baby.

In Cross Examination DW2 told the court the baby was not taken to Uganda for sell and that she saw the travelling document which was used to take the child to Uganda and no money was paid to obtain it. The child only went to Uganda to undergo cultural practices which included circumcising him.

This was the evidence before me. Having considered the evidence in this case, I must state my findings of fact. Facts are that the accused and PW1 are husband and wife, they are both parents to Solomon Kaliki the child herein alleged to have been smuggled by the accused. The child is currently 1 year ten months, he was taken to Uganda and lived there for

9 months using a traveling document, PW1 didn't consent for the child to travel abroad, the child was brought back to Zambia by DW2 and the child was safe and sound and the court had an opportunity to see the healthy baby.

The following are the disputed facts, whether under hand methods were used to smuggle the child, whether the child was only taken for Ugandan cultural practices that is cleansing, naming and circumcision as first born.

Having found the facts in this case I must apply the law to these facts. I ask myself if on these facts, whether the accused has in law committed the offence charged. If the accused had committed the said offence as charged then he would be guilty as charged. But has the prosecution established beyond reasonable doubt that the accused committed the said serious offence? What evidence is there? There was direct evidence from the state witnesses particularly PW1 that her husband the accused herein took their child with a lie that he was going to make a birthday party for him as well as going to town to buy him clothes in April 2016, but the accused went for good and only communicated



through Mable Mwaba (PW1's sister) that he was in Nigeria or Uganda due to the fact PW1 at that moment didn't have a cell phone, upon that discovery PW1 become distressed and helpless therefore she decided to report the matter to the police in January, 2017 and the baby was then brought back by the accused's father and his sister. PW2 the last witness also told the court that the accused used under-hand methods to transport the child to Uganda that is by bribing people to help me transport the child on the borders.

If the accused story is to go by, he told me that he didn't smuggle the child but only took the child legally with a travelling document to Uganda he passed through the Zambian Immigration, Tanzanian Immigration and Ugandan Immigration legally and who all affixed their visa stamps on the said document.

The accused tendered in the travelling document as part of his evidence and it was readily admitted as part of defence case.

The accused went on to say that there was no financial gain earned from his child travelling with him to Uganda to undergo traditional practices of naming, cleansing and he needed to also take the umbilical code which

remained with PW1 in Zambia, his family needed the said umbilical code for cultural practices done with their first sons.

The accused told the court further that he is still married to PW1 and that he even asked her to accompany him to Uganda but she refused and said she was scared to go with him to his country with fear of been killed and that PW1 never reported the matter to the police for almost a year until this year and PW1 and her family continued getting support from the accused until this year when he came back to get her after his family requested for her to his surprise he got arrested and was almost charged with murder.

After coming back to Zambia the child remained with the accused family and DW2 confirmed in court that yes she was the one who even brought the baby and they are the ones who told the accused to come and pick PW1 so that she meets them and so that the child could be circumcised.

At this point I shall apply the law to the above evidence, first and foremost, PW1 is the spouse as a result she is competent but not compellable henceforth I need to satisfy myself on whether she met the requirements of Section 151 (b) of the criminal Procedures Code, Chapter



88 of the laws of Zambia, which provides that *"in any inquiry or trial, the wife or husband of the person charged shall be a competent witness for the state or defence without consent of such person in any case where the wife or husband of a person charged may under any law in force for the time being, be called as a witness without the consent of such person in any case where such person in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them.*

The court had an opportunity to invoke the above law in **Nalumino Nalungwana and Another v The people (1986) ZR 28 S.C** that *"it is a misdirection for the trial court to admit the appellant's evidence as it didn't meet the requirements of Section 151."*

Indeed contrary to the above case, this instant case is a proper one which qualifies PW1 as a witness and as such the state was on *firm ground* to have called her as a witness, therefore her evidence has two legs to stand on.

Coming to the essential elements, it is not in dispute that the accused facilitated the entry of his son without the consent of the other parent PW1, however from the evidence at hand, I am not satisfied that there was any procurement of the child from the accused to obtain any material benefit or financial gain in that there was no pecuniary advantage earned which was demonstrated by the state that the accused gained from letting his own child stay with his grandparents in Uganda, indeed the state has alleged he used under-hand methods but it is their word against his as no witness was called to confirm PW2's evidence that under-hand methods was indeed used, in fact the accused produced an original travelling document which was used to fiery the child to Uganda nonetheless the issue raised of cultural practices at defence has left questions unanswered as I am not privy to the Ugandan tradition thus, I needed some independent testimony to confirm the alleged cultural practices other than from DW2 as I have taken into consideration that she is the sister hence prone to fabricate a story favourable to the brother.



Furthermore on the prosecution's case I am having a lot of doubts in that they even attempted to withdraw the matter by invoking Section 8 of the Criminal Procedures Code, Chapter 88 of Laws of Zambia, but I disallowed the application as this is a serious offence which is not of personal nature and as earlier alluded they never called any other independent witness to confirm that indeed under-hand methods were used to fiery the child therefore this is raising doubts as to whether the child was taken to Uganda for mischievous purposes which needed to satisfy the elements of the offence at hand.


I am persuaded by the judgement of the learned judge Baron JP in **Phiri and others v The People (1973) ZR 47** that *"the courts are required to act on the evidence placed before them. If there are gaps in the evidence the courts are not permitted to fill them by making assumptions adverse to the accused. If there is insufficient evidence to justify a conviction the courts have no alternate but to acquit the accused..."*

In this event I am guided by the above principle that there are so many lingering doubts which are automatically resolved in the accused favour.

I further seek refuge in **Woolmington V the DPP (1935) AC 462** that *"Throughout the web of criminal law one golden thread is always to be seen that it is the duty of the prosecution to prove the*

*accused guilt .... If at the end if and on the whole case, there is a reasonable doubt, created by the evidence given by either the prosecution or the accused. If the prosecution has not made out the case the accused is entitled to an acquittal.*

Invoking the above land marks I am not satisfied that the state has proved the case beyond reasonable doubt as they are still lingering doubts in evidence which are resolved in the accused favour as stated above, consequently I find the accused NOT GUILTY for the offence of Smuggling of persons Contrary to Section 9 (1) of Anti- Human Trafficking Act No. 11 of 2008, I forthwith acquit and set him to his liberty.



Racheal Mwansa

**MAGISTRATE CLASS II**