MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY: CRIMINAL DIVISION
Criminal Appeal Case No 107 of 2016
(Being Criminal Case No. 196 of 2016 before the First Grade Magistrate Court sitting at Chitipa)

Between

Enos Mwafenga
v
The Republic

CORAM:
HONOURABLE JUSTICE D. A. DEGABRIELE

Mr. W. Nkosi	Counsel for the State
Mr. C. Ghambi	Counsel for the appellant
Zimba Bondo	Official Interpreter
Mrs Msimuko	Court Reporter

DeGabriele, J

ORDER ON APPEAL AGAINST SENTENCE

Introduction

The appellant was charged and convicted on 6 counts of trafficking in persons. According to the summons/charge sheet, the 1st and 2nd counts were charged under section 14(1)(2) of the Trafficking in Persons Act and the appellant was sentenced to 10 years IHL on each of the counts. The 2nd and 3rd counts were charged under section 16(1)(c) of the Trafficking in Person Act, and the appellant was sentenced to 10 years IHL on each of the counts. The 5th and 6th counts were under section15(1)(c) of the Trafficking in Persons Act, and the appellant was sentenced to 14 years IHL on each of the counts. All the sentences were to run

concurrently with effect from 8th October 2016. The appellant is appealing against the sentence only.

The appellant filed 2 grounds of appeal which are that the lower court erred in convicting the appellant to 10 years IHL on the 1st, 2nd, 3rd and 4th counts each as the sentences imposed were closer to the maximum prescribed by the law; and that the lower court erred in giving maximum sentence for the 5th and 6th counts which he convicted under section 14 of the Trafficking in Persons Act.

The Law and analysis of evidence

After hearing the evidence at trial the lower court found the appellant guilty of the offences under the Trafficking in Persons Act and convicted him for the 1st, 2nd, 3rd, and 4th counts as charged. The lower court, having satisfied itself of the requirements of the law, acquitted the appellant on the 5th and 6th counts which were charged under section 15(1)(2) of the Trafficking in Persons Act, and substituting the charging section, charged and convicted the appellant under section 14 of the Trafficking in Persons Act

Sentencing is done at the discretion of the sentencing court as long as the discretion is exercised judicially, and the sentencing court hands down a sentence in accordance to its jurisdiction. The High Court will only interfere with a sentence if it is proved that the sentence was wrong in law and it was manifestly excessive, ***see Rep v Makanjila [1997] 2MLR 150 HC***

According to section 14 of the Trafficking in Persons Act, any person convicted of the general offence of trafficking in person is liable to a prison term of 14 years. Under section 15 of the Trafficking in Persons Act the sentence is enhanced to 21 years' imprisonment of the trafficked person is a child who at law is any person under the age of 18 years. Section 16 of the Trafficking in Persons Act states that if the offence is committed in an aggravated manner the convict will be liable to life imprisonment. There is nothing in these sections that shows that there is an option of a non- custodial sentence. The lower court therefore was right in imposing custodial sentences for the counts herein. The question for this Court to consider is whether or not the sentences were right in these circumstances.

Counsel for the appellant is arguing that the sentences for counts 1, 2, 3 and 4 were manifestly excessive and unconscionable having regard to the maximum penalty prescribed by the law. The lower court imposed a sentence of 10 years IHL on each of these 4 counts. Was the lower court wrong in so imposing such 10 year sentences?

The maximum sentences are from 14 years, 21 years and life imprisonment. For general trafficking the maximum penalty is a prison term of years. However, where the victims are children as in this case, the law automatically escalates the sentence to a prison term of 21 years. In the case herein, this means that the imposed sentence of 10 years was no longer close to the general sentence for trafficking which is 14 years, but to the sentenced imposed when the victims are children which is 21 years. In light of this, I find that the sentences of 10 years IHL were not manifestly excessive at all, having regard to the fact that the maximum sentence was 21 years' imprisonment.

As I was going through the record it became clear that the lower court placed itself in a pickle by referring to the counts of offences without having due regard to the persons these counts were referring to. Had the lower court paid a closer attention to the names and ages of the victims, the sentences imposed would have been clearly recorded and represented. Since there is no appeal with the conviction, I confirm the same and proceed to clarify the sentence. The clarification is just in the presentation as the sentences and reasons for imposing the same remain the same.

In its judgement, the lower court surmised that 1st and 2nd Charge should have come under section 15. The lower court rightly observed that the accused had been undercharged because the victim referred to in count 1 and count 2 was a child at 17 years of age. The lower court stated that it would not correct the mistake as the mistake was to the favour and benefit of the accused. I do not agree with the conclusion of the lower court. Clearly the law states that if a person who is a victim of trafficking is a child, the sentence is different and is much stiffer. The offence becomes aggravated once a child is involved. The law clearly sets the maximum sentence. Therefore, the lower court should have substituted the charge and

convict the appellant on the right charge under section 15 of the Trafficking in Persons Act and sentenced him accordingly bearing in mind that the appellant had already been convicted of the offence of trafficking in persons. As regards the 1st and 2nd counts, I substituting the charge under section 14 of the Trafficking in Persons Act with a charge under section 15 of the Trafficking in Persons Act and convicting the appellant on the same as the victim Hard Simfukwe was a child of 17 years. I therefore confirm the sentence of 10 years IHL on each of the two counts and the sentences will run concurrently.

I have noticed that the victim who was of unsound mind was the victim referred to counts 3 and 4 of the original charge sheet, if there was to be a substitution of the sentence because the unsoundness of the mind was not proven, it should have been under counts 3 and 4. The victim Isaac Mtambo aged 21 was presented as being of unsound mind and the lower court found that he was not of unsound mind. Under the original charge sheet, the 3rd and 4th counts were offences under section 16(1)(c) of the Trafficking in Persons Act, which states that if the trafficked child is trafficked under aggravated circumstances, e.g. being a child of unsound mind, the convict shall be liable to life. The victim Isaac Mtambo was not a child and he was not of unsound mind. I take liberty therefore to correct the record of the lower court in that the appellant should have been acquitted under counts 3 and 4 which had been charged under section 16(1)(c). The lower court should have substituted the charge with a charge under section 14 of the Trafficking of Persons Act, convicted and sentenced the appellant accordingly. As regards the Third and Fourth Counts, I therefore substitute the charge under section 16(1)(c) of the Trafficking in Persons Act with section 14 of the Trafficking in Persons Act as the victim Isaac Mtambo was aged 21 and was held by the lower court not to be a person of unsound mind. I quash the sentence of 10 years IHL and substitute it with a sentence of 8 years IHL for each of these two counts and the two sentences will run concurrently.

Counsel has argued that the lower court gave maximum sentences on the 5th and 6th counts. The lower court had convicted the appellant on these counts and sentenced the appellant to a prison term of 14 years. A conviction under general trafficking under section 14 of the Trafficking in Persons Act would have meant that the lower court had passed a maximum sentence. This would be going against the

grain of numerous decided cases that states that the maximum sentence has been reserved for the worst offences, ***see Lawe v The Republic [1997] 2 MLR 25***. I would then have to agree with counsel for the appellant that such a maximum sentence was uncalled for. However, a closer examination of the court record shows a different story. Under the original charge sheet, the 5th and 6th counts were offences under section 15(1)(c) of the Trafficking in Persons Act, which applies to children and the perpetrator is liable to life imprisonment. At this point it is clear that the lower court substituted the charge under count 5 and count 6 under the impression that the count referred to the victim Isaac Mtambo who was alleged to be of unsound mind and was aged 21 years old. Had the court made reference to the actual victim under the count 5 and count 6 the substitution would not have happened. Having clarified thus, the 5th count and 6th counts concerns a child victim Webster Simfukwe who was 14 years old. I therefore set aside the conviction under these 2 counts on the general charge of trafficking under section 14 of Trafficking in Persons Act. I maintain the original charge under section 15 of the Trafficking in Persons Act. For the reasons given above, and the fact that the maximum sentence applicable under section 15 of the Trafficking in persons Act is 21 years' imprisonment, I confirm the sentence as passed by the lower court and the appellant will serve 10 years IHL for count 5 and count 6 and the two sentences will run concurrently.

Made in Chambers at Mzuzu Registry this 12th day of June 2017

D.A. DeGabriele

JUDGE