



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 16 OF 2021

(Being Criminal Case No. 87 of 2021 before the First Grade Magistrate Court sitting at Mwanza)

CHIFUNDO KAMKWAMBA

V

THE REPUBLIC

**Coram: Justice Vikochi Chima
Mr Msume, State Advocate
Mr Fostino Maele, for the appellant
Mrs Moyo, Court Clerk**

JUDGMENT

Chima J

1. The appellant was convicted by the First Grade Magistrate Court sitting at Mwanza for the offence of trafficking in persons contrary to section 14 of the Trafficking in Persons Act and was sentenced to twenty-four months' imprisonment. It was alleged that the appellant on or about the 16th day of March 2021 at Mwanza Boarder was found trafficking six persons from Malawi to South Africa without authority. There are two grounds of appeal:
 - i. That the lower court erred in law in convicting the appellant of the offence when the particulars of the charge were not sufficiently particular.
 - ii. That the lower court erred in law and in fact in convicting the appellant of the offence when there was no evidence to prove the charge.
2. The appellant's prayer was for the conviction to be quashed, but, in the event that it is upheld, that the conviction was to reflect the mitigating factors. Counsel for the appellant argues that the particulars of the charge were insufficient in that the allegation was that the

appellant “trafficked” when trafficking has many modes. He argues that the appellant was thereby prejudiced. Section 14 of the Trafficking in Persons Act states:

‘(1) A person who trafficks another person commits the offence termed trafficking in persons and shall, upon conviction, be liable to imprisonment for fourteen years without the option of a fine.

(2) The consent of a trafficked person is immaterial, where any of the means set out in section 2 have been used.’

3. Section 2 of the Trafficking in Persons Act states:

“trafficking in persons” means recruiting, transporting, transferring, harbouring, receiving or obtaining a person, within or beyond the territory of Malaŵi, through—

- (a) threats or use of force or coercion;
- (b) abduction;
- (c) fraud or deception;
- (d) abuse or threats of abuse of power or position;
- (e) abuse or threats of abuse of position of vulnerability;
- (f) abuse or threats of abuse of the law or legal process; or
- (g) giving or receiving of payments to obtain consent of a person having control of the trafficked person, for the purpose of exploitation of that person.

“exploitation” includes—

- (a) forced labour or any extraction of work or services from a person;
- (b) the forced participation of a person in all forms of commercial sexual activity such as prostitution, sexually-explicit performance, or in the production of pornography;
- (c) the removal of body parts or the extraction of organs or tissue; or
- (d) any other practice in terms of which it cannot be said that the person participated willingly...’

4. The particulars of the charge had read:

‘Chifundo Kamkwamba on or about the 16th day of March 2021 at Mwanza Border Post in the district of Mwanza was found trafficking six persons from Malawi to South Africa without authority.’

- 5. I would agree that the charge was not particular enough to pinpoint the component of the trafficking that the appellant was alleged to have been involved in. That in itself would never be fatal to the conviction if the evidence had supported the charge.
- 6. The facts of the case were that on 16 March 2021, the appellant was driving a minibus that had no chairs and he carried six people who sat on the floor. When he came to the barrier at Mwanza Border Post where he was supposed to present himself and his passengers to immigration for security checks, he just sped past. The police at the border chased him and arrested him at the last barrier. It was around six or seven p.m. One of the six passengers, Shuaib Nudia Ntonda, testified that he often carries goods from South Africa to Malawi and that on 16 March 2021, he was at Wenela wanting to go to South Africa. He met a Mr Kanthalo who asked him to pay the sum of K160, 000 to travel to South Africa and he

indeed paid the money to Mr Kanthalo. He also surrendered his passport to him. Mr Kanthalo then handed him to a Mr Chirimba. PW1 and five others then got on a Mitsubishi saloon vehicle and they started off for South Africa from Blantyre. They stopped at Michiru in Mwanza where they met the appellant. The appellant was driving a minibus that had no seats. PW1 had wanted to sit in the passenger seat next to the driver but the appellant had refused him and told him to sit on the floor. The appellant had agreed with Mr Chirimba to take the passengers to Zobue.

7. PW2 was Detective Inspector Namboya of Mwanza Police Station. He testified that he was on duty on 15 March 2021 at Mwanza Border and that as a routine, they check all vehicles passing through the middle gate/ barrier to find out what they are carrying. At around 5p.m., he saw the minibus the appellant was driving speed past the middle gate. He had expected the minibus to stop since this gate is a security check. Since the appellant is well-known at the border post, Detective Namboya instructed the other detectives to follow up on the appellant. The appellant was arrested before he could pass through the last barrier and he was brought back to the middle gate.
8. It was then found out that he had carried six people who all said they were travelling to South Africa. In his caution statement, the appellant stated that he was to be paid K30, 000 for ferrying the six people from Michiru to Zobue in Mozambique for their onward journey to South Africa.
9. He stated that he carries sand, maize and other things using the minibus that he drives. He had received a call from Mr Chirimba to go and carry some people from the transmitter/ Michiru to Zobue. He went and carried six people and was arrested because it was found that the people he had carried were on their way to South Africa. He said he did not know that they were going to South Africa and that if he had known, he would not have passed through the border without subjecting himself and his passengers to the necessary security checks. He also had not stopped because he was running out of time. He said his passengers did not tell him that they had passports that needed to be stamped at the border. Since the minibus had no chairs, the six people sat on the floor. He said he thought his passengers were vendors. He admitted to have refused PW1 to sit on the passenger seat next to him.
10. The magistrate writes:

‘In the matter before this court, there is no dispute all the six persons the accused had carried in the minibus he was driving without chairs were on their way to South Africa and that they were recruited by one Mr Kanthalo who handed them over to Mr Chirimba. We are further told it is Mr Chirimba who had engaged the accused person to take or carry the six people from transmitter or a place called Michiru here in Mwanza to Zobue in Mozambique. The transport fare from Michiru to Zobue using *bodaboda* public transport is less than K1000 per person. We are told in the present case the accused person was to get K30, 000 for carrying the six people. Again, when the accused reached Mwanza Border Post, he did not stop for security checks but he instead sped off with the six people. It took the police manning the security checks to chase him and finally found him before he could pass through the last Malawi barrier or security check at Mwanza Border Post. In view of what the accused person did, should we say he did not know these six people were being trafficked to South Africa...It is also on record that the accused person even refused PW1 to sit in the front seat after he realized the cab had no chairs to sit on. This coupled with the accused person speeding off with the six people is enough testimony that the accused person had the requisite knowledge the people were going out of the country and had to avoid security checks. It was also said by the accused

person that he was told by the six people that they were going to South Africa before they reached Mwanza Border Post. It is on evidence all their passports were taken by Mr Chiramba who had engaged the accused person to take the people across Mwanza Border Post. This means at the time of their arrest, none of them had a passport as is normally the practice for those travelling outside the country...Again we are in the Covid 19 era where all travelers have to present Covid 19 results test at border posts before they can travel out. None of the six the accused was taking out had a Covid 19 negative result test. Looking at the above, we are of the considered view that the accused person had assisted or aided the trafficking of the six people and this has been strengthened with the undisputed fact that he refused PW1 to sit in front of the minibus. He had to refuse a 52-year-old person a seat and forced him to sit on the floor of the minibus without chairs as if he had boarded a cargo plane, which is degrading looking at his age. The reason he did not want anyone to sit in front of the minibus with him was that the police operating the border post should not know he had carried people in the minibus.'

11. This being the evidence that was before the magistrate, it does not pinpoint the mental element with which the appellant transported the six people: whether it was just so that the six should avoid the border without detection (which in itself is an offence, failure to complete an exit declaration)¹ or it was because the appellant knew that he was assisting in taking the people out of Malawi for the purpose of exploitation. Since the evidence does not show that the appellant transported the people with the idea that they will be exploited, the conviction cannot stand. It is therefore quashed and the sentence is set aside. Even though the evidence discloses an offence under the Immigration Act, I will not order a retrial, for the convict has been in prison since May 2021 and the envisaged offence's maximum prison term is twelve months.

Made this day the 6 April 2022


Chiramba J

¹ Regulation 31 of the Immigration Regulations and Section 40 of the Immigration Act