



**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CRIMINAL DIVISION**

**CRIMINAL APPEAL CASE NO. 3 OF 2023  
(Being Criminal Case No. 300 of 2022)  
(In the First Grade Magistrate Court Sitting at Mwanza)**

**KELVIN KANDULU ..... 1<sup>ST</sup> APPELLANT  
KALIJO ANTONY ..... 2<sup>ND</sup> APPELLANT**

**AND**

**THE REPUBLIC ..... RESPONDENT**

**CORAM: HON. JUSTICE E. CHANZA**

Mr Fostino Maele, Counsel for the Appellants

Ms Longwe, State Advocate

F. Ngoma, Court Clerk

**JUDGMENT**

**1. Introduction and Background**

1.1. The two Appellants were jointly charged and 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**. The 1<sup>st</sup> Appellant (Kelvin Kandulu) was sentenced to 3 years imprisonment with hard labour and the 2<sup>nd</sup> Appellant (Kalijo Antony) was sentenced to 52 months imprisonment with hard labour.

1.2. The circumstances which led to the institution of the prosecution against the two Appellants were that the 1<sup>st</sup> Appellant (Kenneth Kandulu) a driver by profession, was asked by the 2<sup>nd</sup> Appellant (Kalijo Anthony) a transporter and owner of a Toyota Hiace Minibus registration number NE 9590 (“the minibus”) to drive the minibus from Mangochi to Mwanza border. He was requested to take ten people (men and women) on the said minibus who were to travel to South Africa from Mwanza border. They agreed that the 2<sup>nd</sup> Appellant would follow them later and meet them at Mwanza border where he would process the transportation of the ten people to South Africa, and that the 1<sup>st</sup> Appellant would thereafter return to Mangochi. On or about the evening of 18<sup>th</sup> December, 2022, the 1<sup>st</sup> Appellant left Mangochi for Mwanza border with the ten people on the minibus and they arrived in Mwanza in the early morning hours of 19<sup>th</sup> December, 2022. The 1<sup>st</sup> Appellant (Kenneth Kandulu) and the ten people spent a total of four days in Mwanza while waiting for the 2<sup>nd</sup> Appellant to arrive at Mwanza border to arrange the transportation of the ten people to South Africa as agreed. After their arrival at Mwanza, the 1<sup>st</sup> Appellant and the ten people spent the first two days in the minibus (spending their nights in the said minibus) along M6 road near Mwanza boarder. However, after the first two days they run out of food and they needed to take a bath as they had not done so for the two days. It was at this point that the 1<sup>st</sup> Appellant approached one Lotti Wilson, a trader at Mwanza border and residing near Mwanza border, who was also testified as Prosecution witness No. 5 to allow him and the ten people to go to his house so that they could take a bath and cook some food. Upon agreeing with Mr. Lotti Wilson the 1<sup>st</sup> Appellant and the ten people spent the next two days at Mr. Lotti Wilson’s house where they took a bath and cooked themselves some food. However, for the two days that they spent at Lotti Wilson’s place, the people were still sleeping in the minibus. It was at Mr Lotti Wilson’s house where the 1<sup>st</sup> Appellant and the occupants of the minibus were arrested by the Police. Upon being arrested, the 1<sup>st</sup> Appellant (Kevin Kandulu) called the 2<sup>nd</sup> Appellant and informed him of their arrest. It was at this point that the 2<sup>nd</sup> Appellant (Kalijo Anthony) went to Mwanza Police Station where he was also arrested by the Police.

## 2. THE APPEAL AND ARGUMENTS

### 2.1. Grounds of Appeal

The Appellants appealed against conviction, but in the event that the conviction is upheld they prayed that the sentences should reflect the mitigating factors. The Appellants advanced two grounds of appeal against the conviction as follows:

2.1.1. The first ground of appeal against conviction was that the lower court erred in law in convicting the Appellants of the offence of trafficking in persons contrary to **Section 14(1) of the Trafficking in Persons Act** when particulars of the charge were not sufficiently particular; and

2.1.2. The second ground of appeal against conviction was that the lower court erred in law in convicting the Appellants of the offence of Trafficking persons contrary to **Section 14(1) of the Trafficking in Persons Act** when there was no evidence proving the charge.

### 2.2. The Appellants' Arguments

2.2.1. In respect of the first ground appeal, the Appellants alleged that the particulars of charge did not capture all the essential elements of the offence that the appellants were charged with, in that they specifically failed to state the mode of the commission of the offence; and neither did the particulars of charge state that the appellants intended to exploit the ten people, and how the appellants intended to exploit them. It was therefore argued that the lack of these particulars in the charge sheet prejudiced the Appellants as they were not alerted of the mode of the commission of the offence with which they were charged, which made it difficult for the Appellants to know the specific allegations against. It was argued that this violated the Appellants' basic right to be informed with sufficient particularity the allegations against them.

2.2.2. In respect of the second ground of appeal, the Appellants argued that to prove the offence of trafficking in persons under **Section 14 of the Trafficking in persons Act**, the State must bring evidence that prove all the elements of this offence, and that there was no evidence before the lower court proving that the Appellants had committed the offence. In this respect, the Applicants stated that the lower court's analysis of the evidence before it and the law on the subject matter gave the impression that the view taken by the Court below was that the mere taking of people from Malawi to South Africa amounts to trafficking of persons. It was the Appellants argument that the law does not criminalise the transporting of any person within or beyond the borders of Malawi without any proof of the other elements that constitute the offence of trafficking in persons under **Section 14 of the Trafficking in Persons Act**.

2.2.3. The appellants further argued that although the lower court concluded that the means of trafficking the ten persons was through the use of fraud and deception; and abuse of the law or legal process for the purpose of exploitation, the particulars of the charge did not state that the trafficking was through these means. It was also contended for the Appellants that although the lower court concluded as such, it did not come out clearly as to how the law or the legal process was abused; or how the fraud or deception were perpetrated by the Appellants; and that the prosecution did not bring any evidence to prove these two modes of committing the crime. It was therefore the Appellants' contention that making such conclusions when the same were not specifically pleaded by the State, and no evidence had been proffered by the prosecution, is tantamount to the lower court taking over the prosecution by introducing elements of the offence not pleaded by the Prosecution which is contrary to the court's role of an impartial arbiter.

2.2.4. The Appellants further argued that the prosecution in the particulars of charge did not specifically state that the purpose for transporting the ten persons was for exploitation, but the lower court concluded that there was exploitation because the people were kept in the minibus for four days and had not had a bath for several

days. The Appellants contend that the exploitation envisaged by the legislature in **Section 14 of the Trafficking in Persons Act** is not of this kind. It was the Appellants' argument that the intention of transporting the ten persons was not for them to be sleeping in the mini bus.

2.2.5. The Appellants concluded their appeal by contending that their task was just to facilitate the travel of the ten people, who intended to travel to South Africa at the invitation of their relations who were already in South Africa to seek employment. It was the contention of the Appellants that it was clear from the evidence before the lower court that the Appellants were not going to be responsible for the ten persons once in South Africa. The people were going to be responsible for themselves, hence the issue of exploitation could not arise. In this respect the Appellants referred this Court to the contents and conclusions made by the enforcement officer in the three Screening Identification Forms ("Form A") in respect of three people who were on board the minibus, which Forms were part of the evidence before the lower court. Form A is contained in the **First Schedule of the Trafficking in Persons Act**) and is completed in accordance with **Section 27 (b) (v) and (vi) of the Trafficking in Persons Act** which mandates an enforcement officer to interview any person suspected of being trafficked in accordance with the Guiding Principles for Conducting Screening Interviews for the Identification of Trafficked Persons as contained in this Form, and to certify a person as a trafficked person if such person provides satisfactory information to that effect during the screening interview.

### **2.3. The Respondent's Arguments**

In response to the appeal, the Respondent filed its skeleton arguments and also made oral submissions. While the Respondent on the one hand argued that the Appellants having admitted the narration of the prosecution to the effect that they were transferring the victims from Malawi to South Africa for the purposes of exploiting them in that they were being taken there in order to work; and that this would be for the benefit of the victims; that this act met the definition of **Trafficking in Persons as per Section 2 of the**

**Trafficking in Persons Act** and that therefore the lower court was right in convicting the Appellants of the offence as charged. The Respondent on the other hand joined hands with the Counsel for Appellants in asking this Court to set aside the conviction, arguing that although some elements of the offence had been proven (i.e. the element of fraud and/ or deception), the other elements of the offence had not been satisfied. I must state that the submissions by the Respondent were to this extent confusing as they were contradictory.

### 3. **ISSUES FOR THE COURT’S DETERMINATION**

There two main issues for this Court’s determination are as follows:

- 3.1. Whether the particulars of the offence of Trafficking in Person as set out in the charge sheet are in such ordinary language so as to say that they gave the Appellants herein reasonable information as to the offence that they were alleged to have committed as required by **Section 42 (2) (f) (ii) of the Constitution as read with Section 128 (a) (iii) of the CP &EC.**
- 3.2. Whether on the totality of the evidence that was before the lower court, a conviction of the offence of trafficking in persons contrary to **Section 14 of the Trafficking in Persons Act** could be secured against the two Appellants herein.

### 4. **ANALYSIS OF THE APPLICABLE LAW**

- 4.1. **Section 42 (2) (f) (ii) of the Constitution of the Republic of Malawi** provides that every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right as an accused person, to a fair trial, which shall include the right to be informed with sufficient particularity of the charge. The **Criminal Procedure and Evidence Code** operationalizes this right in **Section 126 as read with Section 128. Section 126 of the CP & EC** provides that:

*“Every charge shall contain, and shall be sufficient if it contains-*

- (a) *A statement of the specified offence or offences with which the accused is charged; and*
- (b) *Particulars of such offence or offences.*”

As regards the particulars of charge, **Section 128(a) (iii) of the CP & EC** provides that:

*“The following provisions shall apply to all charges notwithstanding any rule of law or practice, a charge shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code- after the statement of offence, particulars of such offence shall be set out in the ordinary language, giving reasonable information as to the commission of the offence and avoiding as far as possible the use of technical terms.”*

- 4.2. Chikopa J. (as he was then) in the case of **Gusto Daston Ndalahoma v The Republic Criminal Appeal No. 2 of 2008** stated the following in respect of an accused’s right to be informed with sufficient particularity of the charge against him:

*“... an accused person must in reasonable time before commencement of trial be given sufficient particulars of the charge against him. Such particulars as will enable him know the nature of the case against him and prepare his defence accordingly.... Talking specifically about particulars of an offence charged, it is essential that they give as accurate a picture of the allegations against an accused as possible. This is not just because you want to inform the accused of the allegations against him with sufficient particularity but because it is only on the proof of the particulars as stated that an accused is convicted. Where they are not proven an accused is entitled to an acquittal”.*

- 4.3. For the offence of trafficking in persons, **Section 14 of the Trafficking in Persons Act** provides as follows:

*(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.*

**Section 2 of the Trafficking in Persons Act** defines the terms **“Trafficking in Persons”** **“exploitation”** and **“trafficked person”** as follows:

*“trafficking in persons” means recruiting, transporting, transferring, harbouring, receiving or obtaining a person, within or beyond the territory of Malawi, 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;*

**“trafficked person”** means a person or child who has suffered harm, including mental and physical injury, emotional suffering, economic loss or substantial

*impairment of the persons fundamental human rights through acts that contravene sections 14 and 15.*

4.4. It is clear from the reading of the provisions of **Section 14 as read with Section 2 of the Trafficking in Persons Act** that for the offence of Trafficking in persons to be committed, the following key elements of the offence must be proven by the prosecution:

4.4.1. First element is **the action**, which should take the form of any of the following activities: recruiting, transporting, transferring, harbouring, receiving or obtaining a person, within or beyond the territory of Malawi. Proof of any of these actions suffices as proof of the first element.

4.4.2. The second element is **the mode** through which the first element is achieved, which may take any of the following modes: threats or use of force or coercion; abduction; fraud or deception; abuse or threats of abuse of power or position; abuse or threats of abuse of position of vulnerability; abuse or threats of abuse of the law or legal process. Proof of any of these modes suffices as proof of the second element.

4.4.3. The third element is **the purpose** for which the accused embarks on the first and second elements above i.e. the intention of the accused in embarking on the first and second elements. In the case of the offence of trafficking in persons, the intended purpose should be the exploitation of the person who is the subject in the first and second elements of the offence. The exploitation in this context should be in the form of forced labour or any extraction of work or services from the person; the forced participation of the person in all forms of commercial sexual activity such as prostitution, sexually-explicit performance, or in the production of pornography; the removal of body parts or the extraction of organs or tissue; or any other practice in terms of which it cannot be said that the person participated willingly.

- 4.5. Mtalimanja J summarised the elements of the offence of trafficking in persons in the case of **The Republic vs. Chinolo & Another, Confirmation Case No. 2038 of 2020, HC, Criminal Division, Lilongwe Registry** in the following words:

*"... the elements to be proved by the prosecution to sustain a conviction for the offence of trafficking in persons are  
the action: recruiting, transferring, harbouring, receiving or obtaining;  
the means: through the use of force or threats thereof, coercion, abduction, fraud, deception, abuse or threats of abuse of power or position, abuse or threats of abuse of position of vulnerability, abuse or threats of abuse of the law or legal process, or giving or receiving of payments to obtain consent of a person having control of the trafficked person; and  
the purpose: for the purpose of exploitation of that person".*

- 4.6. In order for a given criminal offence to be proved, all the elements thereof must be proved. Where any of the elements of that offence has not been proved, then a conviction is out of question. Chatsika J emphasized the importance of the prosecution proving all the elements of an offence and the consequences that follow if the prosecution fails to prove any one of the elements in the case of **The Republic vs. Msosa [1993] 16(2) MLR 734** in the following words:

*"... It must be emphasized that at the end of the trial the court must subject the entire evidence to such scrutiny as to be satisfied, beyond reasonable doubt, that all the important elements placed on the Prosecution by the substantive law are proved. If it is not so satisfied, the accused person must be acquitted."*

This legal position was also confirmed and followed by the Court in the cases of **The Republic vs. Chimbelenga ([2012] MLR 342** and **Mchekeni v The Republic Criminal Appeal No. 17 of 2022 (Unreported)**).

4.7. As is always the case with any other criminal matter, the burden of proof is on the Prosecution to prove the Appellant's guilt as per **Section 187(1) of the Criminal Procedure and Evidence Code**; and the standard of proof placed on the Prosecution is proof beyond reasonable doubt (See **Republic vs. Joyce John [2012] MLR 329**). Therefore in the present matter, the duty was on the prosecution to prove beyond reasonable doubt, all the elements of the offence of trafficking in persons.

## 5. THE EVIDENCE

5.1. This Court is mindful that when the High court is considering an appeal from the subordinate court, it proceeds by way of rehearing. This means that the court has to consider the evidence that was in the court below, the findings of fact and the law applied to the facts, and determine whether or not the court below directed itself to the relevant facts and the applicable law in arriving at the verdict it came up with (See **Mulewa vs. Rep (1997) 2 MLR 60**). However **Section 5(1) of the CP & EC** provides that subject to Section 3 and to other provisions of this Code, no finding arrived at, sentence or order passed by a court of a competent jurisdiction shall be reversed or altered on appeal of complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or any inquiry or other proceedings under this Code unless such error or omission or irregularity has in fact occasioned failure of justice.

It is therefore the duty of this Court to review the record of the evidence that was before the lower court in the present matter, weigh it in the light of the applicable law and draw its own inferences and conclusions without disregarding the judgment appealed against, but carefully weighing and considering it. This duty has to be carried out by this Court notwithstanding that the Respondent is in agreement with the Appellants on an appeal or some aspects of it.

5.2. The Prosecution paraded a total of six witnesses whose testimony as follows:

5.2.1. The first prosecution witness was Fatima Issa, a business lady from Zomba who buys clothes, wrappers and handbags in Lilongwe and sells them at her home in Zomba

("PW1"). She was one of the ten persons on board the minibus. Her evidence was that she has never been to South Africa, and she did not know the owner of the minibus which took them from Mangochi to Mwanza but that it was her uncle who stays in South Africa who knows the owner of the minibus. She told the lower court that she was called by her uncle from South Africa and that she travelled to Mangochi where she met the 2<sup>nd</sup> Appellant (Kalijo Anthony) and paid him K165,000.00 on her first visit. She went again and paid the 2<sup>nd</sup> Appellant (Kalijo Anthony) another K15,000.00; in total paying K180,000.00. She testified that she together with the other persons on board the minibus left Mangochi to Mwanza border after the 2<sup>nd</sup> Appellant had assigned the 1<sup>st</sup> Appellant to drive them to Mwanza where the 2<sup>nd</sup> Appellant was to meet them to arrange the continuation of their journey to South Africa. She stated that she together with those that were on board the minibus stayed at Mwanza border for two days; and that when they had run out of money, the 1<sup>st</sup> Appellant took them to a certain house where they were well received, were given food and were able to take a bus.

5.2.2. The second prosecution witness was Mike Kazembe, a farmer who was also one of the persons on board the minibus ("PW2"). He testified that he has an elder brother in South Africa by the name of Moses, and that it was this elder brother of his who arranged that he should go to South Africa. He told the lower court that he saw a transporter, the 2<sup>nd</sup> Appellant who came to his home to pick him up and that they agreed on the sum of K200,000.00 for the trip to South Africa from Mangochi. He told the lower court that it was the transporter who was responsible for their travel, and that he had paid him the fare accordingly. He further told the lower court that he together with the other persons on board the minibus stayed at Mwanza border for four days, two of which they slept at the Mwanza border before being taken to a certain house where they were looked after well as they were given food and water to bath. He further testified that it was while at this house that the Police came to pick them up. He stated that he did not know what was happening for him to travel outside Malawi, stating that he has a passport and hoped that they will reach their final destination. He further stated that he was grounded by what was happening as he had not been able to reach his destination as he wanted to work in South Africa. He stated that he was a tailor but did not know where he was going to work.

5.2.3. The third prosecution witness was Saidi Shaibu, a businessman from Malekano Village in T/A Jalasi in Mangochi District (“PW3”). It was his evidence that his parents paid the 2<sup>nd</sup> Appellant K180,000.00 as transport costs for him to be taken to South Africa. That he with others boarded the minibus from Mangochi to Mwanza where they stayed for four days waiting for the 2<sup>nd</sup> Appellant to meet them there so that he could make the arrangements for their travel to South Africa when the Police arrested them. He stated that after sleeping in a minibus at the Mwanza border, a well-wisher took them to his house where they took a bath and also had food. He further told the lower court that in South Africa he was going to work in a shop for his brother.

5.2.4. The fourth prosecution witness was S/Ins Andrew Namboya of Mwanza Police Station (“PW4”) who testified that while on duty at Mwanza border post he saw the minibus which had about eleven passengers on board, and that upon inquiry on the driver of the minibus he was informed that those on board were in transit to South Africa and that they were waiting for a bus to take them to South Africa. He said he saw the same minibus with the same occupants on the following day outside the gate at main border and that thereafter he did not see the minibus again but instead he got information that there were certain people camping at a certain house at Masokosa village at Mr. Lotti Wilson’s house. It was upon receiving this information that he, together with other police officers went to this house where they found the same minibus he had been seeing at Mwanza border in the previous days, but this time with six people and the driver on board, while the others were outside. It was his testimony that some of the people that were there wanted to run away upon seeing him and his colleagues. He further told the lower court that when he met the people, they told him that they were waiting for Kalijo the transporter (i.e. the 2<sup>nd</sup> Appellant) to take them to South Africa. He said that he therefore took them to their office where the people told him that they had paid money to the 2<sup>nd</sup> Appellant for transport to South Africa. He further testified that they had been there for four days and some had been staying there for eight days and one person had been there for twelve days without being taken to South Africa. He did not however elaborate on how the people had spent different days at Mwanza, when all had travelled from Mangochi to Mwanza on the same date and in the

same minibus as stated by PW1, PW2 and PW3. He told the lower court that the Police managed to get in touch with the 2<sup>nd</sup> Appellant who came to their offices upon being contacted by the Police, and that he admitted to have gathered and organized all those that were on board the minibus, and that he was to take them to South Africa. He further stated that the people on board had travel documents which were all in the possession of the 1<sup>st</sup> Appellant, and that it was their view that the 1<sup>st</sup> Appellant had the knowledge on the trafficking of these people to South Africa. He tendered the eleven passports for the people that were on board the minibus, which he said he found in the cabin of the minibus by the passenger's side; and the keys of the minibus which had been seized by the Police as evidence.

5.2.5. The fifth prosecution witness was Mr. Lotti Wilson, a businessman from Masokosa Village T/A Nthache in Mwanza district plying his trade at Mwanza border ("PW 5"). He told the lower court that he knew the 1<sup>st</sup> Appellant as a fellow businessman and he came to know the 2<sup>nd</sup> Appellant through the 1<sup>st</sup> Appellant. He stated that he was approached by the 1<sup>st</sup> Appellant who told him that he was on his way to South Africa, and that he had people in a minibus who were heading to South Africa. He further stated that the 1<sup>st</sup> Appellant told him that he had been with the people in the minibus at Mwanza border for two days waiting for the arrival of the owner of the minibus, and that he all he wanted was to have the people on the minibus fed as he had run out of food, and for them to take a bath. He told the lower court that he allowed the people to come to his house for the food and a bath as requested; and that it was while the people were at his house that the police came and took him together with the people on-board the minibus to the police station.

5.2.6. The sixth prosecution witness was Sub Inspector Mwale of Mwanza Police Station ("PW6"). It was his evidence that he is the one who contacted the 2<sup>nd</sup> Appellant through a phone call when the 1<sup>st</sup> Appellant and the occupants of the minibus were taken from Mr. Lotti's house to Mwanza Police Station; and that he recorded Form A in respect of Kazembe, Shaibu and Fatima. He accordingly tendered the recorded statements and the forms as part of his evidence.

At the close of the Prosecution's case, the court below found both Appellants with a case to answer and so, they were called upon enter upon their defences.

5.2.7. The 1<sup>st</sup> Appellant, Kenneth Kandulu (“DW1”) who told the lower court that sometime around December, 2022 he was requested by the 2<sup>nd</sup> Appellant, Kalijo Antony to drive his minibus which would carry people from Mangochi to Mwanza border, where they would board a bus to South Africa and that the 2<sup>nd</sup> Appellant would join them in Mwanza the following day. He stated that he drove the people to Mwanza, and that while at Mwanza five police officers inquired from him what he was doing. He told the Court that he told them that he was waiting for the 2<sup>nd</sup> Appellant who would travel with the people on board the minibus. He further stated that when he called the 2<sup>nd</sup> Appellant the following day, he told him that he had lost his uncle. He further stated that he parked the minibus outside just before the main gate, and that it was on the advice of some police officers that he entered the premises of the Malawi Revenue premises and parked the minibus next to the Immigration Offices with the ten people on board. That it was while he was parked there that Mr. Namboya (“PW4”) asked him what he was doing there, and that he told him what he was doing as already stated above. He further testified that after spending two days there waiting for the 2<sup>nd</sup> Appellant who had not yet arrived at the place as agreed, the people ran out of food. He therefore called the 2<sup>nd</sup> Appellant who talked to the people who complained to him about the food situation. He stated that it was after this that he approached Mr. Lotti Wilson (“PW5”) to allow him to use his place so that the people on board the minibus could have food and take a bath. It was his evidence that he used his money to provide the ten persons with food while at Mr. Lotti Wilson’s place. He told the lower court that it was while they were at Mr. Lotti Wilson’s house that the police came and took them to Mwanza Police station. He further stated that while at the Police Station he was told that he was trafficking people to South Africa which he denied. It was further his evidence that he had intended to return to Mangochi with the ten people when the 2<sup>nd</sup> Appellant delayed in joining them at Mwanza border; and that when he talked to the 2<sup>nd</sup> Appellant about this he was requested by the 2<sup>nd</sup> Appellant to pay anybody who could assist with the processing the passports. He told the lower court that it was after this request from the 2<sup>nd</sup> Appellant, when he spoke to Mr. Msowoya of Immigration Office to

assist in processing the passports for the ten people and that he accepted that he could be paid when the 2<sup>nd</sup> Appellant arrives in Mwanza.

5.2.8. The 2<sup>nd</sup> Appellant (“DW2”) testified that he is a businessman and a transporter who transports goods from South Africa to Mwanza. He stated that he sent the 1<sup>st</sup> Appellant to take ten people in the minibus from Mangochi to Mwanza where he would join them and process their travel to South Africa. He stated that he remained behind in Mangochi because he had to wait for another person who he was to take to South Africa as well. He told the lower court that he stayed in Mangochi for three days after the 1<sup>st</sup> Appellant left Mangochi with the ten people before joining them in Mwanza, because he had lost his uncle. He told the court below that it was on the fourth day when he got a phone call from the 1<sup>st</sup> Appellant informing him that they had been arrested. It was upon being informed of this that he came to Mwanza where he was also arrested. It was his evidence in the lower court that he came to find the ten people that he was to take to South Africa through their relations in South Africa; and that some of them paid him while others were to pay him in South Africa. He further told the lower court that he was responsible for transporting the people to South Africa though he was not travelling, and that he is the one who asked the 1<sup>st</sup> Appellant to find someone at the Immigration Office who could assist in processing the passports in advance, so that upon his arrival he could take all the passports to that person.

## 6. THE COURT’S DETERMINATION

6.1. The first ground of appeal against conviction is that the lower court erred in law in convicting the Appellants of the offence of Trafficking in persons contrary to **Section 14(1) of the Trafficking in Persons Act** when particulars of the charge were not sufficiently particular. The particulars of the offence as contained in the Charge Sheet read as follows:

*“Kelvin Kandulu and Kalijo Anthony on the 21<sup>st</sup> December 2022 at Masokosa village in the district of Mwanza were found transporting ten people to South Africa on Minibus registration number NE 9590”.*

As pointed earlier in the ruling, the offence of trafficking in persons comprises three key elements which are categorized as:

- **Action:** recruitment, transporting, transferring, harbouring or receipt or obtaining of persons
- **Means/ Mode:** through threat or use of force or coercion; abduction; fraud and deception; abuse of power or position; abuse of position of vulnerability; abuse of law or legal process; giving or receiving payments or benefits to obtain consent of person having control of victim.
- **Purpose/ End Result:** exploitation - forcing victim into sexual exploitation, forced labour services, removal of body parts, or slavery

With each of these key elements having multiple possibilities, which on their own can constitute the key element disjunctively, it is only reasonable that the particulars of the offence should at least highlight which of the multiple possibilities of a particular key element is an accused person alleged to have been engaged in for the commission of the offence of trafficking in persons. That way the accused person would be aware of the exact factual and legal accusations that are being made against him, so as to be able to challenge the accusations where necessary, and prepare for his or her defence. Looking at the particulars of the offence as contained in the Charge Sheet proffered against the Appellants herein, it is the finding of this Court that the particulars of offence as stated therein did not contain sufficient particulars that would give reasonable information to the Appellants as required by **Section 42 (2) (f) (ii) of the Constitution** as read with **Sections 126 and 128(a) (iii) of the CP & EC**. They by far fall short of the requirements in these provisions.

6.2. In the second ground of appeal against conviction, it has been argued for the Appellants that the lower court erred in law in convicting the Appellants of the offence of trafficking in persons contrary to Section 14(1) of the Trafficking in persons Act when there was no evidence proving the charge.

From the evidence as adduced and contained in the lower court record, it is evident that the prosecution adduced evidence that satisfies the first element of the offence of trafficking in

person i.e. the action required as per the definition of trafficking under **Section 2 of the Trafficking in Persons Act**. However this Court finds that the evidence on record falls short of proving the other two key elements of the offence of trafficking in persons namely the means of committing the offence; and the and purpose or intention, which constitutes the mental element of the offence.

The lower court on pages 7 and 8 of its judgment stated as follows:

*“It is our considered view, having gone through all evidence in totality, the two accused persons have not raised any reasonable doubt over the prosecution’s evidence. All evidence we have so far received in the present case points at the two accused to have worked in conjunction with each other to traffick ten people from Mangochi to Mwanza on their way to South Africa. **The means of trafficking the ten persons was through abuse of the law or legal process for the purpose of exploitation because there is no way you would expect someone who has never been to South before to survive or secure employment after being taken there for the first time and he or she has no any known means for his upkeep.** Apart from paying the money to the second accused person, it is on record none of them had any monies for upkeep be it on the way or upon their arrival but all was dependent on the two accused persons to provide for their daily needs. Actually it has come out clearly in the course of trial that the ten people had been subjected to inhuman or degrading treatment while here at Mwanza for four consecutive days.” [Emphasis supplied]*

The Lower Court went further to state as follows on page 8 of its judgment:

*“While the first accused was waiting for the arrival of the second accused person in Mwanza, he had already made arrangements with a Mr. Mswoya of Mwanza Immigration office to facilitate the travel processing of the ten people. **To us, this is a typical example of fraud, deception and abuse of law or legal process.** All of the ten persons who were being taken to South Africa have no formal employment in Malawi and hence they are easily taken by any offer or prospects of employment elsewhere within or beyond our borders. This again can be abuse of*

*position of vulnerability as it cannot be said the people participated willingly in this whole exercise of travelling out of their nation if they were made aware of what was awaiting them on arrival at their last destination.*” [Emphasis supplied]

*Lastly, looking at the caution statements the second accused gave at Mwanza Police, he has given a detailed account of the trip and that ten people comprised of men and women were recruited by him. He had received some payments from them so that he can facilitate their travel to South Africa. It is on record the ten people were to look for employment while in South Africa. While some paid him money, some only paid him half of the amount and he was to recover the balances while in South Africa”.*

- 6.3. It is evident from these excerpts quoted above that the lower court drew its conclusion that there was deception or fraud, as well as abuse of law or a legal process based on the testimony of the 1<sup>st</sup> Appellant, Kenneth Kandulu who stated that on the request of 2<sup>nd</sup> Appellant he had talked to a Mr. Msowoya to assist in the processing of the passports for the ten persons. While this piece of evidence may point to a commission of some offence under other statutes, it would not be safe to conclude that what transpired between the 1<sup>st</sup> Appellant and one Msowoya amounted to fraud or deception; or indeed abuse of law or legal process without any evidence being brought before the court to prove what actually transpired in the conversation between these two. As earlier observed by this Court in its earlier finding on the first ground of appeal against conviction that in the allegations as contained in the Charge Sheet the Appellants were never provided the particulars regarding the other two key elements of the offence of trafficking in person i.e. “the means and the purpose”, in the same vein the prosecution never adduced any evidence proving which law or legal process that had been abused by the Appellants; and neither was evidence adduced on how the law or the legal process was abused by the Appellants. Furthermore, there was no evidence on the lower court’s record on the format of the fraud or deception that the two Appellants committed as concluded by the lower Court. It was incumbent upon the prosecution to first specifically allege the issue of abuse of law or

legal process or indeed fraud or deception on the part of the Appellants; and thereafter adduce the evidence proving the format that the fraud or deception had taken; which law or legal process had been abused by the Appellants; and indeed how the abuse of law or legal process had been committed by the Appellants. It was not the duty of the lower court to fill in the gaps in the Prosecution's case.

It is also evident from the excerpts above that the lower court makes a conclusion on the vulnerability of the ten persons to be susceptible to abuse by the Appellants on the mere fact that the persons had no formal employment in Malawi. However, the only evidence on record as regards to the occupation or employment status of those that were on board the minibus is in respect of the three out of the ten people that were on board the minibus; and the mere fact that a person is not in a formal employment cannot be conclusive evidence of the vulnerability of that individual without looking at other circumstances surrounding the individual. The evidence on record was that of PW1 Fatima Issa who stated that she is a business lady; PW2 Mike Kazembe who stated that he is a farmer and PW3 who stated that he is a businessman. There is no evidence on file as to the occupation or employment status of the other seven persons that were on board the minibus. This Court therefore finds that the lower court erred in making a finding of the vulnerability of the ten persons in the absence of any evidence in respect of the seven; and on the mere fact that the three whose evidence was on file were not in any formal employment without actual evidence that this made them vulnerable despite the other economic activities that the three were involved in. Again this aspect of the offence was never alleged by the prosecution in the charge proffered against the Appellants.

- 6.4. Furthermore, although the lower court observes that “...*it cannot be said the people participated willingly in this whole exercise of travelling out of their nation if they were made aware of what was awaiting them on arrival at their last destination*”, no evidence was adduced before it as to what actually awaited the ten persons aboard the minibus on their arrival at their final destination other than what PW1, PW2 and PW3 believed to be what awaited them at their final destination; and indeed what the 2<sup>nd</sup> Appellant stated as the purpose of taking the ten persons to South Africa.

The only evidence available on record of the lower court as to the purpose for the people on board the minibus to South Africa is the evidence of PW1, PW2, PW3 and the Appellants themselves which in no way fits in the definition of exploitation as provided in **Section 2 of the Trafficking in Persons Act**.

Although PW1 in her oral evidence as recorded in the lower court record did not state her purpose for going to South Africa, she stated in the Form A that she was going to South Africa to work. The details of the work that she was going to do were however not recorded.

PW 2 on the other hand stated that he was a tailor and that although he did not know where he was going to work, but he was going to South Africa to work.

Similarly PW 3 told the lower court that he was going to work in a shop for his brother who was already in South Africa.

The 2<sup>nd</sup> Appellant stated both in his Caution Statement that he gave to the Police and in his oral testimony in the lower court that for some of the people on board he had been contacted by their relatives to take them to South Africa, while others were going there to seek employment.

There is no other evidence to prove to the contrary what PW1, PW2, PW3 and the 2<sup>nd</sup> Appellant testified in the lower court as regards the purpose for which they were going to South Africa. This Court observes that the term “**Exploitation**” is a legal technical term which has been specifically defined by the law under **Section 2 of the Trafficking in Persons Act**. It was therefore incumbent upon the prosecution to bring evidence before the lower court to prove the actual purpose that awaited the ten persons upon their arrival at the final destination to contradict what the Appellants had stated in their caution statements, and further demonstrate to the court how the activity or activities as alleged fell within the definition of “**Exploitation**” as defined under **Section 2 of the Trafficking in Persons Act**.

- 6.5. This Court therefore makes a further finding that third element i.e. the purpose or the intention of the offence of trafficking in persons as defined by **Section 2 of the Trafficking in Persons Act** was not proved by the evidence that was before the lower court. The lower court therefore erred in making a finding that the purpose for transporting the ten people that were onboard the minibus to South Africa was exploitation when in fact there was no evidence to that effect before it.
- 6.6. Looking at the totality of the evidence that was before the lower court in this case in view of the key elements of the offence of trafficking in persons under **Section 14 of the Trafficking in Persons Act**, it is a finding of this Court that a conviction cannot be secured against the two Appellants herein.
- 6.7. Thus, the appeal against conviction on the two grounds as advanced by the two Appellants must therefore succeed.

## 7. COURT'S ORDERS

In the light of the foregoing findings, this Court therefore makes the following orders:

- 7.1. That the conviction against the Appellants herein be and is hereby quashed.
- 7.2. That following the quashing of the convictions, that the two Appellants must be released from custody forthwith, unless if they are being held for other lawful reasons.
- 7.3. That the minibus Toyota Hiace Registration No. NE 9590 which was confiscated to the Malawi Government following the order by the lower court be released forthwith to the rightful legal owner of the same.

Made in open court this 18<sup>th</sup> day of July, 2023



**ETNESS CHANZA**

**JUDGE**