IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 179 OF 2011

BETWEEN

JOHN ROBERT MAITLAND..... APPELLANT

AND

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

(Appeal from the Judgment of the High Court of Tanzania at Bukoba)

(Mjemmas, J.)

dated the 6th day of June, 2011
in
Criminal Appeal No. 9 of 2011

JUDGMENT OF THE COURT

31st May & 4th June, 2012

KILEO, J. A.

In Criminal case No 35 of 2010 of the Bukoba District Court sitting at Bukoba, the appellant John Robert Maitland was charged with and convicted of unlawful entering and presence in the United Republic of Tanzania contrary to section 31 (1) (i) and (2) of the Immigration Act no. 7 of 1995. It was alleged that being a citizen of Greece he was found, on 23rd day of February 2010, at Bukoba Police Station without having a passport or any other document authorizing him to do so. He was convicted as

charged and sentenced to a fine of 80,000 Tshs or two years jail term in default of payment of fine. In addition he was to suffer 10 strokes of the cane. He appealed to the High Court which affirmed the conviction which was entered against him. The High Court set aside the sentence of corporal punishment that was imposed but did not interfere with the sentence of fine or imprisonment in default thereof. The High Court also issued a deportation order against the appellant.

In the course of hearing the appeal, the High Court had directed the reception of additional evidence. When the additional witness was testifying, the appellant tore into pieces a document which was intended to be produced as an exhibit. The High Court judge there and then directed the framing of a charge for contempt of court against the appellant. The charge was accordingly drawn under section 114 (1) (f) of the Penal Code, Cap 16 R. E. 2002 of which the appellant was convicted and sentenced to six months imprisonment without the option of fine.

The appellant through the services of Mr. Mathias Rweyemamu, learned advocate filed the following 8 grounds of appeal.

1. *That the learned judge of the High Court grossly erred in law in assuming administrative power to act* ***ultravires*** *against the doctrine*

of separation of powers to issue the deportation order and not judicial order.

2. *That the learned Judge of the High Court grossly erred in law to issue* ***omnibus*** *sentence against the appellant of six month imprisonment which is not recognized by our statute and failure to give the appellant mandatory sentence of fine.*

3. *That the appellate learned Judge grossly erred in law for uphold illegal sentence and issue a deportation order without availing the* ***appellant the mitigation*** *of the sentence.*

4. *That the learned Judge of the High Court grossly erred in law and fact for breach of* ***fundamental principles of natural justice*** *in prosecuting his own case and denied the appellant a right of fair hearing.*

5. *That the appellate learned judge grossly erred in law for failure to nullify all proceedings of the trial court which convicted and sentenced the appellant to* ***the offence of non-citizenship*** *which he was not charged with.*

6. *That the appellate learned Judge after had found that the appellant was lawfully registered and granted with birth certificate by the United Republic of Tanzania erred in law to rule out that the appellant is a non-citizen while the court had no such power to assume administrative duty imposed by the law of the parliament.*

7. *That the appellate learned Judge failure to assess evidence, admissibility of the documents on the record and the appellant had defended his case* ***to the required standard.***

8. *That the appellate learned Judge after had convicted the appellant under contempt and cancellation of appellant bail and sentenced him accordingly grossly proceed with composing the Judgment while he had biases ness and breached the Principle of natural Justice.*

When the matter was called on for hearing, the appellant indicated that he was withdrawing the services of Mr. Rweyemamu and would defend himself. Mr. Rweyemamu in the circumstances asked for and was granted leave to withdraw from representing the appellant. When the appellant was

informed that the Court was ready to hear him he quickly changed and asked for an adjournment so that his advocate from Bukoba whom he had engaged could come and represent him. He was referred to Rule 32 of the Court of Appeal Rules which requires a party to give notice of change of advocate to the Court as soon as practicable and serve a copy of the notice on the other party, a thing that he did not do. He then asked for time to study the documents. He was given two hours and upon his return to the court room he informed the Court that he was restoring the services of Mr. Rweyemamu. So, Mr. Rweyemamu came back as learned counsel representing the appellant.

The learned counsel abandoned all grounds except grounds 1, 2 and 7. He made no submission on ground 5 leaving it to the Court to decide.

On ground 1 which was conceded by Mr. Aloyce Mbunito, learned State Attorney, Mr. Rweyemamu made reference to the provisions of section 14 (1) of the Immigration Act, Cap 54 R. E. 2002 in support of his contention that the learned judge exceeded his powers in issuing the deportation

order. We agree with both learned counsel on this aspect. The provision states:

14. Deportation

(1) Any person, other than a citizen of Tanzania, whose deportation is recommended by the Director consequent upon his conviction for an offence against any of the provisions of this Act may be deported from Tanzania pursuant to an order under the hand of the Minister.

"Minister" under the Act means the Minister for the time being responsible for matters relating to immigration. Since the High Court judge was not the minister responsible for immigration matters he was not vested with the powers to issue a deportation order as he did. At most what the learned judge could have done was to direct that the conviction of the appellant be brought to the attention of the Director of Immigration for necessary action as he deemed fit. Without much ado we allow ground 1 of appeal. The order of deportation issued by the learned judge is quashed and set aside.

As ground 2 concerns sentence we will deal with it last.

Mr. Rweyemamu did not address us on ground 5 leaving it to the wisdom of the Court for determination. The complaint in this ground is that the appellant was convicted of the offence of **non-citizen** which he was not charged with. We need not labor ourselves on this ground. The appellant was neither charged with the offence of "non-citizen" nor convicted of it. The ground is a misconception and we will leave it there.

Submitting on ground 7 Mr. Rweyemamu argued that the production of the appellant's birth certificate in evidence was proof that the appellant is a Tanzanian citizen and therefore not liable for the offence of unlawful entering and presence in the United Republic of Tanzania. This argument was strongly resisted by Mr. Mbunito who maintained that a certificate of birth alone does not confer one with citizenship. The learned State Attorney also pointed out that the appellant possessed passports of other countries and bearing in mind that the United Republic of Tanzania does not allow for dual citizenship as per section 6 (4) (a) of the Tanzania Citizenship Act, then the appellant could not be a citizen of this country. Mr. Mbunito is right. There is on record undisputed evidence showing that

the appellant is a British citizen as well as a citizen of the Republic of South Africa. Certified copies of his passports of these countries and various visa stamps appear at pages 52 to 57 of the Court record. Tanzanian citizens having citizenship rights do not require visas to enter their own country. To cap it all, we have on record the appellant's own affidavit regarding a 'resident permit of Tanzania.' In this affidavit which was tendered in court during trial (exhibit P4) he stated under oath that he had good intention of processing his Tanzania citizenship if the law and authorities allow. There was evidence that he was not given the residence permit he was applying for because there was confusion in his names as between the affidavit he had sworn and the various documents that were given to the immigration officials in respect of the application for the permit.

If the appellant's visa had expired and he had failed to get a residence permit then he ought to have left the country.

Moreover, the burden to prove lawful presence in Tanzania on 23rd February 2010 was upon the appellant as per section 30 of the Immigration Act which states:

30. Burden of proof

Where in any proceedings under or for any of the purposes of this Act, any of the following questions is in issue, namely–

(a) whether any person is or is not a citizen of Tanzania; or

(b) whether any person's presence within Tanzania is lawful, the burden to prove that that person is a citizen of Tanzania or that his presence in Tanzania is lawful shall lie upon the party contending that that person is a citizen of Tanzania or, as the case may be, that his presence in Tanzania is lawful.

In view of our discourse above, we are satisfied that the appellant miserably failed to discharge that burden.

We have noted that the appellant was charged with both entering and unlawful presence in the United Republic of Tanzania. Under section 31 (1) (1) of the Immigration Act entering and presence are two distinct offences. This is so because entry may initially be lawful but presence subsequently

becomes unlawful. Ideally, separate counts, one of unlawful entry and the other of unlawful presence ought to have been preferred against the appellant. We are however of the settled mind that this anomaly did not prejudice the appellant, if anything it was in his favor as he ended up being convicted and sentenced for only one offence instead of two.

We will now turn to ground 2 of appeal.

Though this ground is very poorly drafted, however we gathered from Mr. Rweyemamu that the appellant is aggrieved by the sentence of six months imprisonment without the option of fine that was imposed for the offence of contempt of court. Mr. Rweyemamu informed us that the appeal on this ground was being argued for the sake of the record as the appellant had already served his term.

Before we consider whether or not to interfere with the sentence imposed by the High Court for the contempt of court charge we have found it necessary, first to satisfy ourselves whether the charge that was framed against the appellant was the proper one in the circumstances of the case and whether the learned High Court judge acted within the confines of the law in the manner he did.

It is on record that when additional evidence was being given in court the appellant deliberately tore into pieces a document which was intended to be tendered in evidence. This was done in the course of court proceedings. The judge directed that a charge of contempt of court be framed. This took place on 28/4/2011. At the end of that day's proceedings the matter was adjourned and it came up again on 2/5/2011. The following is what transpired on this day and on 4/5/2011:

"2.5.2011

Coram: G.J.K. Mjemmas, J.

Appellant: Absent

Respondent: Absent

B/C; Jane Kasenene

Order: *Removal order to be issued to bring the appellant before this court to answer charges of contempt of court on 4th May, 2011.*

Order accordingly.

G.J.K. Mjemmas
JUDGE
2.5.2011

4.5.2011

Coram: G.J.K. Mjemmas, J.

Appellant: Present

Respondent: Mr. Luoga (SSA)

B/C: Agnes

Mr. Luoga: *Hon. Judge, the matter is coming up for reading the charge to the accused for contempt of court.*

Court: *On 28.4.2011 when this court was receiving additional evidence in respect of the appeal by the appellant John S/o Robert Maitland, the said appellant deliberately tore into pieces a document which was intended to be produced an exhibit by the witness who had just given evidence and was under examination by the State Attorney. I made an order that a charge be framed against the appellant for contempt of court. I now proceed to do the same.*

Offence: *Contempt of Court c/s 114(1)(f) of the Penal Code Cap. 15, R.E. 2002.*

Particulars of the Offence:

That you John s/o Robert Maitland on 28th day of April, 2011 within the premises of the High Court of Tanzania, Bukoba Registry, within Bukoba District in Kagera Region did attempt wrongfully to interfere with a witness who had just given evidence by tearing into pieces an intended exhibit (document) which was to be produced by the witness during the court proceedings.

Court: *Charge read over to the appellant/accused person John s/o Robert Maitland in his own language (English) and asked why he should not be convicted and punished for contempt of court.*

Appellant/Accused's reply:

Your honour the document was mine and I was tearing it as my own property. I tore it in my own privacy. I apologise your honour. I don't have court experience.

Court: *I have considered the appellant's/accused person's defence but it has no merit. The document was produced by Mr.*

Luoga, learned Senior State Attorney and issued it to the witness. The appellant/accused was objecting for the document to be admitted as exhibit. He took the document and deliberately tore it. I therefore find him guilty as charged and convict him for contempt of court c/s 114(1)(f) of the Penal Code, Cap. 16 R.E. 2002.

G.J.K. Mjemmas

JUDGE

4.5.2011

SENTENCE

The accused/appellant is hereby sentenced to serve six months imprisonment from today. Having/given imposed this sentence, I cancel the accused's/appellant's bail.

G.J.K. Mjemmas

JUDGE

4.5.2011."

Section 114 (1) (f) of the Penal Code under which the charge was preferred states:

114. Contempt of court.

(1) Any person who-

.....

(f) attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he has given evidence, in connection with the judicial proceeding .....is guilty of an offence, and is liable to imprisonment for six months or to a fine not exceeding five hundred shillings."

We are of the settled view that this provision envisages a situation where a person interferes or influences a witness either before or after the witness has testified. The provision would not apply if the interference takes place while the witness is testifying in court as did happen in this case. The circumstances of the case fall squarely under section 114 (1) (k) which states:

".....commits any other act of intentional disrespect to any judicial proceeding or to any person before whom the proceeding is being heard or taken,....is guilty of an offence, and is liable to imprisonment for six months or to a fine not exceeding five hundred shillings."

We observe that in the circumstances of the case the appellant could also, as well have been charged under section 109 of the Penal Code for destroying evidence.

However, having perused the law on contempt of court we are of the settled mind that the learned High Court judge seriously misdirected himself in taking it upon himself to hear the contempt charge on 4.5.2011. It is only where the matter is dealt with summarily that a trial judge or magistrate has powers to convict and sentence an accused who has committed a contempt of court in his presence. The relevant provision states:

> **"Section 114 (2). (2) When any offence against paragraphs (a), (b), (c), (d), or (k) of subsection (1) is committed in view of the court, the court may cause the offender to be detained in custody and, at any time before the rising of the court on the same day may take cognisance of the offence and sentence the offender to a fine of four hundred shillings or in default of payment to imprisonment for one month."** (Underlying supplied)

The High Court, Chipeta J, as he then was, in **Masumbuko Rashid v. Republic** (1986) TLR 212 correctly explained the procedure to be applied in cases of contempt committed in the course of judicial proceedings. He held:

> *"(i) When a court takes cognisance of an offence of contempt of court, it is essential that the court should frame and record the substance of the charge, read such charge to the accused who should then be called upon to show cause why he should not be convicted on the charge; and the accused should be given a fair opportunity to reply. Besides, the record of the court should contain an adequate note of the accused person's reply, if any, as well as the court's decision*
>
> *(ii) the accused persons were condemned unheard; and, that violated the principle of natural justice that a man should not be condemned unheard;*
>
> *(iii) failure to follow the procedure amounted to a fundamental, incurable irregularity."*

In the record it has been shown that the judge himself dealt with the matter a few days after the contempt had been committed. As we have already indicated above, this was misdirection and a fundamental incurable irregularity as the learned judge acted as a complainant, prosecutor and judge in his own cause. What the learned judge ought to have done after having failed to summarily deal with the matter before the court had risen on the day the contempt was committed was to have directed that charges for contempt and destruction of evidence be preferred against the appellant and let the law take its own course.

Much as we sympathize with the learned judge in the predicament that he found himself in view of the prevailing circumstances of this case, we are however obliged to intervene. In the circumstance, we hold that all the proceedings and orders emanating from the contempt charge that was laid against the appellant were a nullity and we accordingly quash and set them aside. What we have just stated was actually the subject of ground 4 in the memorandum of appeal. It baffles us as to why Mr. Rweyemamu abandoned it. Having said that we must hasten to say however, that by quashing those proceedings we are not ruling that the appellant did not

commit contempt of court; he might as well have done it but what we are saying is that proper procedure was not followed in dealing with the matter.

In the end, grounds 1 and 2 in the grounds of appeal are allowed. As already ruled herein before, all the proceedings before the High Court with regard to the contempt of court charge are nullified and sentence emanating there from is set aside. Apart from that the appeal is otherwise dismissed.

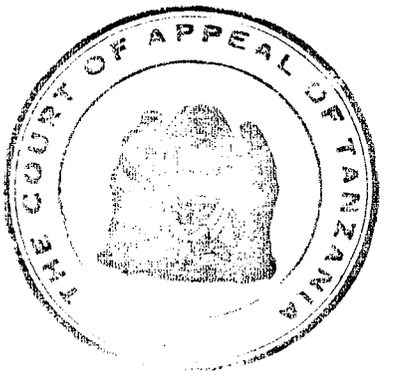
DATED at **MWANZA** this 4th day of June 2012

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

K.K.ORIYO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E.Y. MKWIZU
DEPUTY REGISTRAR