IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 126 OF 2020

CHRISTOPHER STEVEN KIKWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Dar es Salaam at Kisutu)

(Magutu, SRM – Ext. Juris.)

dated the 24th day of January, 2020
in
DC Criminal Appeal No. 146 of 2019

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JUDGMENT OF THE COURT

9th & 24th February, 2022

NDIKA, J.A.:

On 11th October, 2017, the Resident Magistrate's Court of Dar es Salaam at Kisutu convicted thirty-one Ethiopian citizens, upon their own pleas of guilty on the first and second counts, of unlawful entering and unlawful presence in the United Republic of Tanzania contrary to section 45 (1) (i) of the Immigration Act, Cap. 54 R.E. 2016 ("the Act"). Accordingly, each of them was sentenced to pay a fine of TZS. 500,000.00 or serve one month's imprisonment in default. On the other hand, the appellant, Christopher Steven Kikwa and another person not a party to this appeal, namely, Ibrahim Abdallah Dikani, went on trial for three counts of

smuggling immigrants after they had pleaded not guilty to the charges in connection with the said Ethiopians. The trial court convicted both of them as charged and sentenced each of them, on each count, to pay a fine of TZS. 20,000,000.00 or, in default, serve twenty years' imprisonment. The appellant's first appeal against conviction and sentence went unrewarded, hence this second and final appeal.

The prosecution relied upon the evidence adduced by two immigration officers (PW1 Joseph Mkika and PW2 Inspector Hilda Pesi) and one police officer (PW3 No. 8556 Detective Constable Ismail) to prove the following charges against the appellant and his co-accused (the said Dikani). On the third count, it was alleged that the appellant and Dikani were, on 25th September, 2017 at Tuangoma area in Temeke District within the City of Dar es Salaam, found smuggling thirty-one illegal immigrants who happened to be Ethiopian citizens contrary to section 46 (1) (a) of the Act. As regards the fourth count, the appellant and Dikani were accused to have been found on the date and at the place stated in respect of the third count transporting the aforesaid thirty-one illegal immigrants in a minibus Nissan Civilian with registration number T.669 DJH in transit to the Republic of South Africa contrary to section 46 (1) (c) of the Act. Finally, on the fifth count, the appellant and Dikani were indicted for facilitating the smuggling of the aforesaid thirty-one illegal

immigrants on the date and at the place stated above contrary to section 46 (1) (e) of the Act.

The prosecution's narrative was that on 25th September, 2019, PW3 along with three other police officers, all of whom based at Chang'ombe Police Station, went to Tuangoma to track down a minibus which, based on information received from a secret informer, was ferrying illegal immigrants. While there, they pulled over a white Nissan Civilian minibus with registration number T.669 DJH (Exhibit P3) carrying thirty-one passengers who could not speak Swahili and that they were subsequently established to be undocumented immigrants from Ethiopia. The said Dikani was found at the wheel while the appellant was identified as the minibus conductor. There and then, the minibus was seized and taken to Mbagala Police Station along with the driver, the conductor and passengers. Thereafter, all of them were taken to the Central Police Station, Dar es Salaam. PW3 tendered the certificate of seizure of the minibus (Exhibit P4), which he filled out and had it signed by Dikani and the three police officers that accompanied him. It was undisputed that the minibus was a commuter bus licensed to ply between Kigamboni and Mkuranga but on the material day it diverted from that route.

Both PW1 and PW2 were not at the scene when the appellant and Dikani were arrested but they interrogated them subsequently while they were under police custody. PW1 tendered Dikani's cautioned statement (Exhibit P1) by which the latter admitted being found at the scene transporting the said undocumented Ethiopians in the minibus he was driving and that the agreed fare for the trip was TZS. 90,000.00. On her part, PW2 tendered a cautioned statement made by the appellant (Exhibit P2) which she recorded. In that statement, the appellant, too, admitted to being found at the scene transporting the immigrants but that he was unaware of their immigration status as he was made to believe that they were male Muslim teachers (*ustadhs*).

We wish to remark at this point that the said Dikani absconded from the trial after the trial court had rendered its ruling that a prima facie case had been made out against him and the appellant following the closure of the prosecution case on 13th March, 2019. The trial court proceeded with the defence hearing in the absence of Dikani pursuant to section 226 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) ("the CPA").

In his sworn defence, the appellant did not dispute the tale that he was arrested ferrying the immigrants in the minibus for which he was the

conductor. However, he denied liability averring that he was picked up by Dikani on the fateful day around noon to serve as his conductor for the day in the place of the regular conductor who did not turn up. He agreed and served as such until 19:00 hours when Dikani informed him that the minibus had been hired by three individuals to transport certain *ustadhs* from Mwembe Mtengu at Tuangoma to Vikindu. At the appointed time, they picked the said three individuals and proceeded to Mwembe Mtengu where a group of *"ustadhs"* got into the minibus. After travelling a short distance, the minibus was intercepted and pulled over by four police officers who claimed that it was ferrying illegal immigrants. The three individuals fled the scene leaving the rest under arrest. The appellant pleaded his innocence, insisting that he was completely unaware that their passengers were illegal immigrants because he was told by his co-accused that they were Muslim teachers.

On being cross-examined, the appellant averred that when the passengers were boarding the minibus at Mwembe Mtengu he sensed that something was amiss. The passengers came from a nearby bush looking dirty and that none of them had a typical look of a Muslim teacher. Rather inexplicably, they were not talking to each other. But he only confirmed that they were illegal aliens after the arresting police officers had alleged so. He further stated that he did not issue any ticket to any of the

passengers because the driver (Dikani) informed him that a prior arrangement for payment had been made and agreed upon. Such an understanding was normal for a commuter bus hired for a particular trip off its usual licensed route.

In his considered judgment, the learned trial Magistrate (H.S. Ally – Senior Resident Magistrate) rightly observed that it was undisputed that the appellant and his co-accused were found at the scene transporting the thirty-one passengers in their minibus (Exhibit P3) and that the said passengers were undocumented aliens from Ethiopia. Then, he properly directed himself that the sticking point in the case was whether the appellant and his co-accused had knowledge or reasonable grounds to believe that their passengers were illegal immigrants. In resolving this question, the learned trial Magistrate heavily relied upon the two cautioned statements (Exhibits P1 and P2). He thus held in his judgment, as shown at page 94 of the record of appeal, that since the appellant and his co-accused realized that the passengers boarding their minibus were coming from a nearby bush seeming like a hideout, that they were dirty and that it was at night around 19:00 hours as stated by the appellant in his cautioned statement (Exhibit P2), they had grounds to believe that the said passengers were not *ustadhs* and that they should have refused to carry them in their minibus. In the premises, the learned trial Magistrate

took the view that the appellant and the said Dikani knew or had reasonable grounds to believe that they were transporting illegal immigrants. He considered the appellant's defence but rejected it on the ground that it was an afterthought "intended to evade the sting of the law." As hinted earlier, the trial court convicted the two accused as charged and sentenced them accordingly.

On appeal against both conviction and sentence, Hon. A.A. Magutu, Senior Resident Magistrate with Extended Jurisdiction, upheld the appellant's complaint that the cautioned statements were illegal and unreliable on two grounds: one, that they were recorded out of time contrary to sections 50 and 51 of the CPA as elaborated by this Court in **Said Bakari v. Republic**, Criminal Appeal No. 422 of 2013 (unreported). Two, that they were not read out in court after being admitted in evidence contrary to the procedure as expounded by this Court in **Robinson Mwanjisi & Three Others v. Republic** [2003] T.L.R. 218 at 226. Besides, she sustained a further complaint that the certificate of seizure (Exhibit P4) was not read out following its admission in evidence.

Despite discounting the aforesaid documents, the first appellate court endorsed the appellant's conviction on the ground that he was caught in the very act of smuggling illegal immigrants using the minibus

(Exhibit P3). Reliance was placed on this Court's decisions in **Abdallah Ramadhani v. Republic**, Criminal Appeal No. 141 of 2013 and **Daffa Mbwana Kedi v. Republic**, Criminal Appeal No. 67 of 2017 (both unreported) explicating that evidence of being found in the very act of wrongdoing is conclusive proof of wrongdoing. That is what is known in legal parlance as being caught *in flagrante delicto*. Accordingly, the appeal failed.

The appellant initially assailed the appellate court's decision on four grounds raised in his memorandum of appeal dated 16th June, 2020. In his supplementary memorandum lodged on 13 July, 2020, he raised four additional grounds.

At the hearing of the appeal, the appellant was self-represented whereas Ms. Hilda Kato Mkuna, learned Senior State Attorney, assisted by Ms. Ashura Mnzava, learned State Attorney, appeared for the respondent.

Having heard the appellant and considered his written arguments in support of the appeal and having taken account of the learned submissions by Ms. Mkuna in opposition to the appeal, we are of the view that the crisp issue for our determination is whether the charges against the appellant were proven to the required threshold.

As indicated earlier, the charges against the appellant were laid under section 46 of the Act. That section creates the offence of "smuggling immigrants" by proscribing the following conduct:

> *"**46**.-(1) A person who-*
>
> ***(a) smuggles immigrants;***
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> *(b) hosts illegal immigrants;*
>
> ***(c) transports iliegai immigrants;***
>
> *(d) finances, organizes or, aids the smuggling of immigrants;*
>
> ***(e) facilitates in any way the smuggling of immigrants into the United Republic or to a foreign country;***
>
> *(f) commits any fraudulent act or makes any false representation by conduct, statement or otherwise, for the purpose of entering into, remaining in or departing from, or facilitating or assisting the entrance into, reside (sic) in or departing from the United Republic; or*
>
> *(g) transports any prohibited immigrants within the United Republic of Tanzania,*
>
> *commits an offence and on conviction, is liable to a fine not less than twenty million shillings or imprisonment for a term of twenty years."*
> [Emphasis added]

In creating the offence of smuggling immigrants, the above provision captures the entire smuggling continuum such that any engagement in one of the stages of smuggling is sufficient to spring up criminal liability. Accordingly, a person or group of persons may be held liable for different aspects of smuggling aliens. These facets range from illegal entry into or illegal exit from the United Republic, hosting, financing or organizing smuggling, facilitating smuggling, transportation of illegal or prohibited immigrants, and commission of any fraudulent acts to facilitate illegal entry into or illegal exit from the United Republic.

So far as it relates to the case at hand, the offence of "smuggling immigrants" under section 46 (1) (a) above, in its natural and ordinary meaning, would, in our view, mean bringing an illegal immigrant into or taking him out of the United Republic. In this sense, smuggling, therefore, involves an illegal immigrant going across the United Republic's borders. Under section 46 (1) (c) above, the gravamen of the offence of smuggling immigrants is the act by any person of transporting an illegal immigrant within the United Republic, whether for facilitating such immigrant's transit to another country or not. On its part, smuggling under section 46 (1) (e) is rather general as it proscribes any form of facilitating smuggling of illegal immigrants into or out of the United Republic.

It is noteworthy that the Act does not define the expression "illegal immigrant" for the purpose of section 46 of the Act. However, we think the said phrase must be construed to mean an alien immigrant who has violated any of the conditions of entry or residence in the United Republic specified by Part V of the Act, of which section 28 (1) of the Act prohibits entry without passport, permit or pass as follows:

> *"**28**.-(1) Subject to subsections (2) and (3), no person to whom this section applies shall enter Tanzania from any place outside Tanzania or remain in Tanzania unless-*
>
> *(a) he is in possession of a passport with a visa;*
> *(b) he is the holder of or his name is endorsed upon, a residence permit issued under the provisions of this Act;*
> *(c) he is the holder of, or his name is endorsed upon, a pass issued under the provisions of this Act."*

Guided by the foregoing exposition of the law, we wish to determine, at first, whether the third and fifth counts against the appellant, alleging smuggling under section 46 (1) (a) and (e) of the Act, were established in the evidence on record. On her part, Ms. Mkuna reviewed the evidence and submitted that the two counts were proven. She maintained her stance even when we drew her attention to the fact that following the

discounting by the first appellate court of the two cautioned statements (Exhibits P1 and P2) along with the corresponding testimonies of PW1 and PW2, the prosecution case rested so thinly upon the testimony of the arresting police officer (PW3).

With respect, we do not go along with Ms. Mkuna's submission. While it was common ground that the thirty-one passengers in the seized minibus were illegal aliens from Ethiopia, the prosecution led not even a shred of evidence to establish how and where the aliens gained entry into the country as well as how the appellant smuggled them or facilitated their smuggling into the United Republic to trigger the application of section 46 (1) (a) and (e) of the Act. We hold without demur that the third and fifth counts against the appellant were not proven as the key ingredient of smuggling across the border into the United Republic was not established.

The position regarding the fourth count, which, as stated earlier, accused the appellant and the said Dikani to have transported illegal immigrants contrary to section 46 (1) (c) of the Act, is equally unsettling. Here, again, we do not share Ms. Mkuna's unyielding submission that PW3's testimony sufficiently proved that offence. Granted that it was certain that the thirty-one passengers in the minibus were undocumented aliens and that the appellant was the conductor in the minibus ferrying the

aliens, the prosecution still had the onus to establish that the appellant engaged in transporting the aliens knowing or having reason to believe that they were illegal immigrants.

Unlike the courts below, we do not think that it could reasonably be inferred from the circumstances of this case that the appellant had actual or constructive or imputed knowledge of the immigration status of the immigrants. For all its worth, PW3's evidence offered no clue if the appellant was aware of his passengers' status. It did not go beyond explaining how the arrest of the suspects and the seizure of the minibus were effected on the fateful day. His claim that the passengers vividly looked like immigrants because they could not speak Swahili cannot on its own lead one to the conclusion that they were illegally residing in the country. His further testimony that the appellant and the said Dikani did not disclose to him who hired the minibus for the trip to Vikindu did not advance the prosecution case. For the prosecution failed to produce the motor vehicle's owner, one Faisal Hassan, to explain at the trial on the manner in which the minibus was hired.

In his written argument in support of the appeal, the appellant bemoaned that he was convicted based on the perceived weakness of his defence as opposed to the strength of the prosecution case. There is clear

merit in this grievance. With the cautioned statements having been expunged, the appellant's version of what happened at the scene before the arrest and seizure is what remains on record. This evidence was not rebutted. To be sure, the trip and payment arrangements were all made by Dikani without the appellant's involvement. His role was that of a substitute conductor for the day. When the aliens were boarding the minibus at Mwembe Mtengu he sensed that something was amiss because they came from a nearby bush looking dirty, that none of them had a distinctive look of a Muslim teacher and that they were not talking to each other. Despite all this, it only came to his knowledge that the passengers were illegal aliens after the arresting police officers had alleged so. The fact that the minibus was a commuter bus licensed to ply between Kigamboni and Mkuranga but that on the material day it diverted from that route is arguably inconsequential. The appellant said that it was normal practice for a commuter bus to be hired for a particular trip off its usual licensed route.

In our considered opinion, the courts below superficially inferred that the appellant had knowledge of the immigration status of the aliens upon rejecting his version of the fateful events. The inference was not drawn from the facts as led by the prosecution, all of which supposedly came from PW3's testimony. All told, we have no doubt that the appellant's

version deserved credence and should not have been rejected off-hand. In the premises, we find that the offence on the fourth count was, likewise, unproven.

In the final analysis, we find merit in the appeal, which we hereby allow. Accordingly, we quash the appellant's convictions on the third, fourth and fifth counts and set aside the corresponding sentences imposed. We, therefore, order that the appellant, Christopher Steven Kikwa, be released from prison unless he is detained there for other lawful cause.

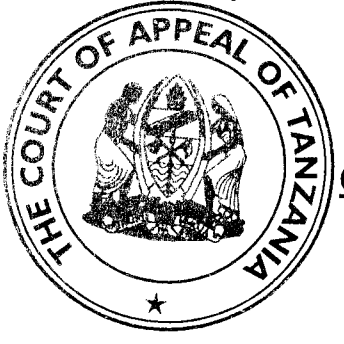
DATED at **DAR ES SALAAM** this 24th day of February, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 24th presence of Appellant in person linked via video conference at Ukonga Prison and Ms. Dhamiri Masinde, State Attorney for the Respondents is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL