

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IRINGA DISTRICT REGISTRY)**

AT IRINGA

APPELLANT JURISDICTION

**RM. CRIMINAL APPEAL NO.13 OF 2020
(Originating from Njombe Resident Magistrate
Criminal Case No. 38 of 2020)**

MOHAMED JUMA NANIYE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of Last Order: 04/09/2020

Date of Judgment 25/09/2020

JUDGMENT

MATOGOLO, J.

Mohamed Juma Naniye was charged before the Court of Resident Magistrate Njombe with the offence of Transportation of illegal immigrants contrary to Section 46(1) (g) and (2) of the Immigration Act No. 4 [Cap. 54 R.E.2016].

It was alleged in the particulars of offence that on 16th February, 2020 at Makambako area within the District and Region of Njombe while driving the motor vehicle with Chassis Number SNC 11-102113 Make Nissan Tiida Mohamed Juma Naniye did transport prohibited Immigrants namely Mwajam s/o Sonole, Wendim s/o Ayela, Simon s/o Regesa Degeva s/o Weljaim, Mitiku s/o Mololo, Nassor s/o Abdalah, Samwel s/o Abdalah

and Tafesa s/o Waldei within the United Republic of Tanzania without permit. He pleaded not guilty, he was tried and at the end he was convicted and sentenced to pay fine Tshs. 20,000,000/= or to serve (20) twenty years imprisonment in default.

The trial court ordered that the motor vehicle in question to be returned to the owner on the ground that the accused carried the illegal immigrants without the knowledge of the owner of the motor vehicle. The appellant was aggrieved with both conviction and sentence and has appealed to this court. At the same time the DPP was also aggrieved with the order by the trial court for the motor vehicle involved in the commission of offence to be restored to the owner, he also appealed to this court. For that case there are two different appeals filed to this court which emanate from the same decision. The appeal by Mohamed Juma Naniye was registered as (RM) Criminal Appeal No. 13 of 2020, while that by the DPP was registered as (RM) Criminal Appeal No. 23 of 2020.

For convenience and quick disposition of the two appeals, the same were consolidated and heard as one in the record of RM Criminal Appeal No. 13 of 2020. For purpose of convenience and to avoid confusion Mohamed Juma Naniye will be referred as the appellant and the DDP will be referred as the Respondent.

The appellant filed a petition of appeal with four grounds as follows:-

1. **THAT** the trial court grossly erred in law and in fact by entertaining the case basing on Equivocal plea as the appellant

was forced to plead guilty to the charge saying that he was given Tsh. 150,000/=.

2. **THAT**, the trial magistrate wrongly admitted the appellant's cautioned statement as the appellant was severely tortured when he was at Makambako police custody and later on forced to sign the document which was not known to him.
3. **THAT**, the trial learned magistrate erred in law and fact by not considered (sic) the defence of the appellant that he was not aware that he was transporting the prohibited immigrants *mens rea* was not proved.
4. **THAT**, the prosecution did not prove the case against the appellant beyond reasonable doubt.

He therefore prayed for the decision of the trial court to be quashed and the sentence be set aside.

On his part the DPP preferred only one ground in his petition of appeal as follows;-

1. That, the trial magistrate erred in law and facts by giving the order that a motor vehicle which was used in committing the criminal offence to be returned to the owner of that motor vehicle.

At the hearing of this appeal the appellant fended by himself while Blandina Manyanda learned State Attorney and Kasana Maziku learned Senior State Attorney appeared for the Respondent Republic.

The appellant just asked this court to consider his grounds of appeal, he had nothing to add nor did he expound his grounds of appeal. On her part Ms. Blandina Manyanda learned State Attorney resisted the appellant's appeal. She replied to each ground of appeal as filed by the appellant.

Regarding the 1st ground of appeal the learned State Attorney submitted that there is contradiction in this ground, as the appellant first alleged that he did not plead unequivocally. But he also alleged that he was compelled to plead guilty. She said the court record shows that the first day appellant was brought before the trial court the charge was read to him who pleaded not guilty. Again on 18/03/2020 as shown in the trial proceedings at page 3 and 4 the case was for preliminary hearing, where the charge was again read to the appellant who pleaded not guilty. It is when the prosecution called witnesses, and after the prosecution has closed its case the appellant was given opportunity to defend himself. The learned State Attorney contended that there was no any problem with the appellant's plea.

Regarding the second ground of appeal on the improper admission of the appellant's cautioned statement, and allegation of torture at Makambako police station and compelled to sign the cautioned statement, Ms. Blandina Manyanda referred this court to the trial court proceedings from page 10-11 while Sgt Godfrey Mtewe (PW1) testifying, prayed to tender in court the appellant's cautioned statement. But the record does not show if appellant was given opportunity to say anything before the cautioned statement is admitted in evidence. But also in the trial court judgment at page 7 paragraph 3 the trial court magistrate recorded that

the cautioned statement was admitted without any objection. She said this is not reflected in the proceedings thus the law on admission of documentary evidence was violated per the decision of ***Robinson Mwanjisi and 3 Others vs. Republic (2003) TLR 218*** which provides guidance on the procedure to admit documentary evidence. She said as the appellant did not get opportunity to say anything with regard to the tendered exhibit, the same was illegally admitted in court which may be expunged from the court record. But she said even if the cautioned statement is expunged still there is sufficient evidence to prove the charge against the appellant. She said there is the evidence of PW2 who recorded the statement and gave evidence that appellant had carried Ethiopians in the motor vehicle he was driving, who were also charged with unlawful entry in Tanzania and were convicted. But also in his defence the appellant corroborated the prosecution case by admitting that he carried eight passengers in the motor vehicle which had capacity to carry four passengers who were later discovered to be prohibited immigrants. With regard to the third ground of appeal that the trial court erred for not considering his defence, Ms Blandina Manyanda submitted that the trial court judgment at pages 2 to 5 the trial magistrate summarized the evidence from both sides then raised issues for determination. But in answering the issues did not analyze the defence evidence. The trial court analyzed more the prosecution evidence which is irregular. But she said the 1st appellate court has the right to step in the shoes of the trial court and re-evaluate the evidence. To that she cited the case of ***Prince Charles***

Junior vs. Republic Criminal Appeal No. 25 of 2014 CAT (unreported) and the case of ***DP Pandya vs. Republic (1957) EA 335***.

She therefore prayed to this court to do the same and come with its own conclusion.

In the fourth ground of appeal that the prosecution did not prove the charge beyond reasonable doubt, Ms. Blandina Manyanda submitted that in Criminal cases it is the duty of the prosecution to prove the charge against the accused beyond reasonable doubt. With regard to this case she confidently submitted that the charge against the appellant was proved beyond reasonable doubt. She said according to the evidence received the arresting officer PW1 he arrested the appellant transporting prohibited immigrants in the motor vehicle No. SNG 11-10 2113 Nissan Tiida. The eight prohibited immigrants were arrested, charged and convicted for unlawful entry in Tanzania. The appellant had no permit authorizing him to transport those Ethiopians. The learned State Attorney submitted that the learned trial magistrate was correct to convict him. She therefore prayed for the appeal to be dismissed and the conviction and sentence by the trial court be upheld.

Regarding the appeal by the DPP that he was aggrieved with the trial court decision to return the motor vehicle which was involved in the commission of the offence without confiscating the same, she said the motor vehicle in question was tendered in court by PW1 without objection. After the appellant was convicted the trial magistrate ordered that the motor vehicle should be returned to the proprietor a Zambian and the

same should be returned to Ridder Company Limited to proceed with the journey.

But the prosecution has applied for the confiscation of the same under Section 351(1)(a) of the Criminal Procedure Act as revealed at page 17 of the trial court proceedings. She said the provision permits confiscation of an item used in the commission of offence but the trial court in its decision was of the view that as the motor vehicle did not belong to the appellant and the owner was not aware of the motor vehicle being used in the commission of offence. The trial magistrate was satisfied and did not order for forfeiture of the motor vehicle. She submitted further that the trial court was supposed to summon the proprietor of the motor vehicle and give him opportunity to be heard before any order is made in respect of the motor vehicle. But the record is silent if the proprietor was summoned and heard. She said the trial court neither summoned the proprietor nor Ridder Company Limited to hear them whether or not they had knowledge of the motor vehicle being involved in the commission of offence. Ms. Blandina Manyanda prayed to this court to issue an appropriate order in respect of the said motor vehicle.

On his part the appellant did not respond to the submission by the learned State Attorney. But he insisted this court to consider his grounds of appeal as presented and acquit him. The appellant also informed this court that he was employed by the company known as Siame Muliga Transit, a Zambian Company.

I have carefully read the grounds of appeal filed by the appellant, the submission by the learned State Attorney in reply to the grounds of appeal and the record of the trial court.

As pointed out above, the appellant was convicted for the offence of transportation of illegal immigrants contrary to Section 46 (1) (g) and (2) of the Immigration Act No. 4 (Cap. 54. R. E. 2016].

The appellant appeared before the trial court for the first time on 2nd March, 2020 when the charge was read to him and he pleaded not guilty. On 16th March, 2020 the appellant appeared before the trial court when the matter was for preliminary hearing, the appellant was reminded of the charge against him but again he pleaded not guilty. The trial commenced on 25th March, 2020. The record is therefore crystal clear that appellant pleaded not guilty to the charge. There is no where indicated that he pleaded guilty for him to allege that he was forced to plead guilty to the charge after he was given Tshs. 150,000. This allegation is not supported by the trial court proceeding, the same therefore appears to be an afterthought such that this grounds of appeal is baseless.

In the second ground of appeal, the complaint is that his cautioned statement was wrongly admitted as he was severely tortured when he was at Makambako police station and then was forced to sign a document not known to him. However, as pointed out by the learned State Attorney before the cautioned statement was tendered in court and admitted, the appellant was not given opportunity to say anything with a view for him to admit or object admission of the same. Although the trial magistrate in his

judgment at page 7 paragraph 3 recorded that the cautioned statement was admitted without objection, but that is not reflected in the trial court proceedings.

In admission of documentary exhibits, it is imperative that before an exhibit is tendered in court, the accused must be asked if he objects or not and the document to be tendered in court must be cleared for admission. This guidance was given by the Court Appeal in the case of ***Robinson Mwanjisi and 3 Others vs. Republic***, (supra).

But, as the appellant was not asked whether or not he has objection to the admission of the said cautioned statement. The said cautioned statement was illegally admitted. The same cannot be acted upon. Ms. Blandina Manyanda learned State Attorney prayed for the said cautioned statement to be expunged from the court record. The same is hereby expunged.

Regarding the third ground of appeal, the appellant's complaint is that the trial court did not consider his defence and that he was not aware that he was transporting prohibited immigrants, thus *means rea* was not proved. The learned State Attorney conceded to part of the appellant's complaint relating to failure by the trial court to consider the appellant's defence and prayed to this court being the 1st appellate court to step in the shoes of the trial court and re-evaluate the appellant's defence and come with its own finding as it was held in the case of ***Prince Charles Junior vs. Republic***, Criminal Appeal No. 250/2014 CAT (unreported).

The appellant defence mainly is to the effect that on 15/02/2020 he was assigned to drive the motor vehicle made Nissan Tiida No SNC -11-102113 to take it to Tunduma. He started the journey at about 05:00 pm, upon arriving at Iringa Region he took passengers who were on the way to Mbeya. Upon reaching Makambako check point and after he has checked and his documents stamped he proceeded with his journey. But he was arrested by immigration officers who told him that he carried prohibited immigrants. But he said he did not know them if they were prohibited immigrants. He was therefore taken to Makambako police station for further action.

While being cross-examined appellant admitted that it was an offence to carry passengers in that motor vehicle. He carried eight passengers while the capacity of the motor vehicle is only four passengers. But he said he did not know citizenship of those passengers. The immigration officers knew about their citizenship. He said in his cautioned statement he admitted to have committed the offence. But the owner of the motor vehicle did not know that he carried passengers as he did not even inform him about the passengers. The appellant disclosed further that the motor vehicle got an accident at Chalinze. The same was to be received at Nakonde border post by the company known as Ridder.

With such evidence by the appellant the latter did not give meaningful defence. In actual fact what he stated in his defence is an admission that he committed the offence. He alleged that he did not know if they were prohibited immigrants. But he admitted that he was not authorized to carry passengers in the motor vehicle which was a transit good as he admitted

that he committed offence to carry those passengers. *Mens rea* is manifested by his act of carrying passengers in the motor vehicle which is not a passenger vehicle and which is a transit good. It is his act of carrying passenger in a transit good, regardless of whether he carried prohibited immigrants or not is connected with his indifference. He cannot put up the defence that he did not know that the passenger he carried prohibited immigrants.

He might have that knowledge and he carried them in the transit good perhaps to hide them. His defence that he did not know that those were prohibited immigrants cannot be accepted. The appellant's defence did not shake the strong evidence of the prosecution. In the fourth grounds the appellant stated that the prosecution did not prove the offence beyond reasonable doubt.

The learned State Attorney responded to this ground by submitting that the prosecution witnesses PW1 the arresting officer arrested the appellant transporting prohibited immigrants in the motor vehicle No. SNC -11-102113 Nissan Tiida. The eight prohibited immigrants were charged and convicted for unlawful entry in Tanzania. The appellant had no any permit authorizing him to transport those Ethiopians.

The appellant is not disputing to be found transporting the eight persons in his motor vehicle. There is no dispute also that those Ethiopians who had no any permit of entry to Tanzania. They even pleaded guilty to the charge of unlawful entry to Tanzania. They were convicted and sentenced. The allegation of lack of knowledge that they were Ethiopians

and thus prohibited immigrants appears to be an afterthought. It is not expected for the appellant to carry passengers without even asking for their citizenship especially who by their appearance would draw suspicion. It cannot be accepted that he did not even talk to them at least to know who were they and where were they going. The prosecution evidence proved the charge against the appellant beyond reasonable doubt. This appeal therefore lack sufficient ground of complaint the same is dismissed.

As to the appeal by the DPP for the trial court failure to order for forfeiture, there is a legal requirement under Section 46(2)(b) of the Immigration Act, that anything used in the commission of the offence is to be forfeited to the Government. The same provides:-

"46(2) In addition to the penalty imposed for the commission of an offence under this Section, the court may on its own motion or on the application by the Attorney General order confiscation and forfeiture to the Government:-

(b) anything used for purposes of committing or facilitating the commission of the offence of smuggling immigrants".

By that provision the court therefore may order forfeiture of anything used in the commission of offence *suo motu* or after an application by the Attorney General.

The trial court record reveals at page 16 of the typed proceedings, after the appellant was convicted, the learned State who appeared in court on that date Ms. Njovu, after being invited to narrate about previous criminal records of the appellant, she was recorded saying:-

"We have no record but we pray for stiff punishment according to the law. Also we pray as per Section 351(1) Criminal Procedure Act Cap. 20 R.E. 2002, the said motor vehicle to be confiscated by the Government".

In its finding about the prayed order for confiscation, the trial court reasoned as follows:-

COURT:

This court found the information adduced by the accused person through his cautioned statement (P4) is satisfactory that he carried the illegal immigrants (Ethiopian Citizen) without the knowledge of the owner SIAME (MZAMBIA).

Therefore I order the motor vehicle with Registration Number SCN -11-102113 made Nissan Tiida to be returned to the owner. Since it was on the transit to Tunduma

/Zambia will be hand over to the company known as RIDDER COMPANY LIMITED to proceed with journey to Nakonde one stop Border post.

Sgd: I. Msackly, RM

31/03/2020"

At the hearing of this appeal, the learned State Attorney was not aware as to where the owner of the motor vehicle can be found, but as it is disclosed in the court record, the owner of the motor vehicle was not summoned to appear before the trial court for purpose of being heard before an order for confiscation of the motor vehicle under Section 46(2) (b) is made.

As we have seen above, after accused is convicted of an offence like the appellant was facing and sentenced, the trial court has to confiscate the thing used in the commission of the offence. In the case at hand the motor vehicle Nissan Tiida with No. SNC- 11-102113 was used in the commission of the offence by transporting the prohibited immigrants from Iringa to Mbeya. But the provision appears not to be couched in mandatory terms due to the word "may" which is used. But in my considered opinion confiscation was important in order to deter people from engaging themselves to commit like offences.

In her submission Ms. Blandina Manyanda learned Stated Attorney stated that the trial court was supposed to summon the proprietor of the

motor vehicle and give him opportunity to be heard before any order is made in respect of the motor vehicle. The learned State Attorney prayed to this court to issue an appropriate order in respect of the motor vehicle as the same was used as instrument of the commission of the offence. The learned State Attorney did not avail to this court detailed information on the whereabouts of both the motor vehicle and the proprietor and the way to get in touch of them. I had a thorough perusal of the trial court record for the purpose of looking at the necessary documents which could enable me see the owner of the said motor vehicle because as stated above the said motor vehicle was returned to the owner who is a Zambian Nation living in Zambia and the said motor vehicle was just on transit. There is a movement sheet IMS which was tendered and admitted in court as exhibit P1. This just shows the movement of the motor vehicle from Dar es Salaam to Tunduma the importer/consignee name mentioned is John Kitenge of Ndola Zambia. As the motor vehicle has already crossed boarder to Zambia, it is obvious that it is difficult to get it again back and issue an order for its confiscation. The trial court order for the said motor vehicle to be returned to the owner which was made on the ground that the owner was not aware of the said motor vehicle being used in the commission of offence was not proper, as what was required was to summon him and required him to show cause why his motor vehicle should not be forfeiture. Then after being heard an appropriate order would be made but not to rely on the statement of the appellant in his cautioned statement which might be made with a purpose that the motor vehicle he was employed to drive reach its decision. This appeal has merit.

However I am of the considered view that the order sought by the learned State Attorney it is difficult to be implemented as it requires the motor vehicle to be brought back to Tanzania. This if at all is possible would require protracted diplomatic procedures, even the way of getting the owner of the motor vehicle. That said I find the sought order has already been overtaken by event.

DATED at IRINGA this 25th day of September, 2020


F. N. MATOGOLO
JUDGE

25/09/2020

Date: 25/09/2020
Coram: Hon. F. N. Matogolo – Judge
L/A: B. Mwenda
Appellant: Present
Respondent: Veneranda Masai – State Attorney
C/C: Charles

Ms. Veneranda Masai – State Attorney:

My Lord I am appearing for the Respondent Republic. The appellant is present. The appeal is for judgment we are ready.

COURT:

Judgment delivered.


F. N. MATOGOLO
JUDGE
25/09/2020

Right of appeal explained.



F. N. MATOGOLO
JUDGE
25/09/2020

Appellant:

Honourable Judge I intend to appeal against the judgment.

ROFC




F. N. MATOGOLO
JUDGE
25/09/2020