THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 47 OF 2020

(From the Court of Resident Magistrate of Mbeya, at Mbeya, in Criminal Case No. 51 of 2018).

METUSELA MUSA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

17. 11. 2020 & 15. 02. 2021.

Utamwa, J:

In this first appeal, METUSELA MUSA the appellant, challenged the judgment (impugned judgment) of the Court of Resident Magistrate of Mbeya, at Mbeya, (the trial court) in Criminal Case No. 51 of 2018. Before the trial court, the appellant stood charged with the offence of transporting illegal immigrants contrary to section 41 (1) (c) of the Immigration Act, Cap. 54 R.E 2016. It was alleged that, on the 18th December 2017 at Lupatingatinga village along Lupa-Isangawane road

within Chunya District in Mbeya Region, the appellant was found transporting six (6) Ethiopians as listed in the charge sheet, who were illegally present in the United Republic of Tanzania, by using a motor vehicle make Toyota Succeed with Registration Numbers T. 824 DDB.

The appellant pleaded not guilty to the charge, hence a full trial. At the end of the day, he was convicted and sentenced to pay a fine of Tanzania Shillings (Tshs.) 20,000,000/= (Twenty Million only) or to serve twenty years in prison in default thereof. He is now in prison for failure to pay the fine. He was aggrieved by both the conviction and sentence, hence this appeal.

In his petition of appeal, the appellant preferred ten grounds of appeal. The grounds nevertheless, revolve around a single ground that; the trial court erred in convicting him though the prosecution had not proved the case beyond reasonable doubts. The appellant thus, urged this court to allow the appeal and set aside the conviction and sentence. He further urged this court to set him free. The respondent (Republic) objected the appeal.

When the appeal came up for hearing, the appellant appeared in person and unrepresented. Mr. Davis Msanga, learned State Attorney appeared for the respondent Republic. The appellant had nothing to submit on his grounds of appeal.

On his part, the learned State Attorney for the respondent orally submitted that, the prosecution had proved the case to the required standard through two witnesses; to wit PW.1 and PW.2 (both police officers). One exhibit (the motor vehicle) also supported the prosecution case. He further argued that, the appellant was convicted on his own

conduct which showed that he had common intention with the driver of the motor vehicle who drove away the motor vehicle carrying the illegal immigrants. This was after the vehicle had been stopped by PW. 1 (PC. Emmanuel) for checking. It was at that time when the appellant descended from the motor vehicle and held PW.1 firmly by his neck. The learned State Attorney further contended that, though the appellant was not the driver of the motor vehicle which carried the illegal immigrants, his conduct showed that he had knowledge of the commission of the offence under discussion.

Regarding the appellant's complaint (in the petition of appeal) that, the illegal immigrants at issue were not called in court to give evidence in support of the charge, the learned State Attorney for the respondent argued that; the appellant's conduct demonstrated above sufficed to implicate him.

In his rejoinder submissions, the appellant argued that, the fact that the driver drove away the motor vehicle, shows that he is innocent. He thus, insisted his ground of appeal.

I have considered the ground of appeal by the appellant, the submissions by the parties, the record of the trial court and the law. The issue to be determined here is *whether or not the prosecution proved the case against the appellant beyond reasonable doubts before the trial court*. It should be noted that, the appellant was convicted based on the evidence of two witnesses. It is also not disputed that, the appellant was travelling in the motor vehicle which was found transporting the illegal immigrants according to PW. 1 (PC. Emmanue), a police officer and the

eye witness. It is further not disputed that, the appellant was neither the owner nor the driver of the motor vehicle.

It is also apparent that, the appellant was convicted for his conduct which implied that he had common intention with the driver of the motor vehicle who drove it away with the illegal immigrant therein. They were however, found in the motor vehicle later.

As I have hinted earlier, in this case PW.1, was eye the only eye witness of the appellant's conduct. According to the record, he testified that, on the material date and time, as a traffic police officer, he stopped the motor vehicle for checking. It was travelling from Tabora direction. It stopped, and the appellant came out of it and wanted to give him the Tsh. 10, 000/= for water. Nonetheless, the PW.1 refused the offer. He insisted that the motor vehicle had to be opened for checking. The appellant then held him firmly by his neck and the driver drove the motor vehicle away with the illegal immigrants therein. One PC. Juma, a fellow policeman rescued him from the appellant. They then arrested him. He called his senior the PW.2 Insp. Jumanne Mwangi. He (PW.1) and Insp. Jumanne (PW.2) traced the motor vehicle. They found it abandoned along the road. The driver had disappeared. Upon checking it, they found six persons there in. Four were seated in the back seat while two were in the boot of the motor vehicle.

It was also the evidence of PW.1 that, when he (and PW.2) interrogated the six passengers found in the vehicle, they said they were Ethiopians, but they had no any travelling documents, hence this case.

PW.2 corroborated the evidence of PW.1 that, he (PW.2) and PW.1 found the illegal immigrants in the abandoned motor vehicle and

they confessed to them that they were in fact, Ethiopians. However, they had no any travelling documents.

It must also be noted here that, the fact that the six Ethiopians were charged and convicted for being illegally in the United Republic of Tanzania was not disputed during the preliminary hearing conducted under section 192 of the Criminal Procedure Act, Cap. 20 R. E. 2019 (the CPA).

According to the impugned judgment, it is clear that, the appellant was convicted mainly on his own conduct. The conduct was constituted by the following acts: he wanted to bribe PW.1 with Tshs. 10,000/=. He also held him (PW.1) by his neck so that the driver could drive away the vehicle with the illegal immigrants therein. This was upon the PW.1 refusing the money. When the PW.1 was rescued by another police officer, one PC. Juma, the driver had already driven away the car with its passengers.

In his sworn defence before the trial court, the appellant testified that, he was in fact, in the motor vehicle as a mere passenger for payment of transport fare. There were other passengers in it. At the material place and time, the motor vehicle was stopped by a traffic police in Chunya District. The police ordered him to come out of the motor vehicle. He obeyed the order, but the drive drove away. He did not know the passengers who were Ethiopians. They also said at police station that they did not know him (appellant). He did not try to bribe PW. 1 and he did not hold him by neck. He was however, arrested and taken before the trial court for this case.

It is my settled opinion that, though PC. Juma was not called as one of the prosecution witnesses, the PW.1 was still credible and capable of proving the charge against the appellant. This is because, in the first place, the appellant in his defence admitted a good number of pieces of evidence adduced by the PW.1. He admitted, for example, that, he was in fact, in the motor vehicle at the material time and place. There were other passengers in it. The motor vehicle was stopped by a traffic police in Chunya District. He also came out of the vehicle, but the drive drove it away.

In my further views, the PW.1 was a credible witness as far as the conduct of the appellant was concerned. It was not shaken by the appellant's cross-examination and his defence. Moreover, in law, evidence is weighed and not counted. A single witness can thus, prove a charge. This is the spirit embodied under section 143 of the Evidence Act (supra) and the decision in **Mohamed Msoma v. Republic [1989] TLR 227** (by the High Court of Tanzania). It is also the law that, every witness is entitled to credence in his/her testimony and must be believed unless there are cogent grounds for not believing him or her; see the Court of Appeal of Tanzania (CAT) decision in **Goodluck Kyando v. Republic, Criminal Appeal No. 118 of 2003, CAT at Mbeya** (unreported). In the case at hand, there is no reason to disbelieve the evidence of PW.1 as demonstrated previously.

Indeed, the evidence by the PW.1 was circumstantial due to the conduct of the appellant himself. The law on circumstantial evidence guides that, for a conviction to stand, circumstantial evidence must be water tight, leaving no other interpretation apart from the guilty of the accused; see **Justine Nyari and another v. Republic, criminal**

appeal No. 37 of 2006, High Court of Tanzania, at Arusha (unreported). In my view, in the matter at hand, the prosecution evidence shows that, the appellant tried to bribe the PW.1 so that he could not check the motor vehicle and discover the illegal immigrants therein. Upon his resistance, he decided to assault him by holding his neck so that the drive could drive away to hide evidence. It is thus, inferred from such conduct of the appellant and the circumstances of the case that, he was privy to the transaction of transporting the illegal immigrants with the driver of the motor vehicle. He was thus, striving to ensure that the PW.1 could not intercept their mission.

In fact, one could not directly discover the appellant's intention and plan. Nonetheless, his conducted demonstrated above explained the intention. This is because, it is common ground that, people intending to commit evil acts, do not expressly declare their intentions. The same can thus, be detected from their conducts if they do not expressly declare them. This court is also entitled in law to presume so under section 122 of the Evidence Act. These provisions guide that, the court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The spirit embodied under these provisions was underscored by the CAT in the case of **Issaya Renatus v. Republic, Criminal Appeal No. 542 of 2015** (unreported).

The view on human conduct just highlighted above was also underscore by CAT in the case of **Hatibu Gandhi and others v. Republic [1996] TLR 12.** It observed that, for most humans, including the CAT itself, what goes on in the minds of another person can

reasonably be ascertained only by reference to the conduct or physical appearance of that person. In fact, for this stance of the law, circumstantial evidence discussed above becomes relevant.

It follows thus, that, this court is entitled to find that, the appellant's conduct implicated him. The conduct corroborated the PW. 1 evidence that the appellant was in the mission of transporting the illegal immigrants. It was held by the CAT in the case of **Pascal Kitigwa v. Republic [1994] TLR. 65** that, corroborative evidence may be circumstantial and may well come from the words or conduct of the accused. The CAT further held that, it is an acceptable principle that, the conduct of an accused person, could, in certain circumstances, corroborate the evidence implicating him; see **Dismass Mwanakatwe and Didas Mwanakatwe v. Republic, Criminal Appeal No. 32 of 1994, CAT at Dar es Salaam** (unreported, at page 10 of the typed judgment).

Furthermore, section 23 of the Penal Code, Cap. 16 R. E. 2019 guides that, when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. It follows thus, that, according to the evidence discussed above, both the appellant and the driver of the motor vehicle (though not in court) had a common intention of transporting the illegal immigrants. Had it been true that the appellant was a mere passenger in the vehicle as he claimed in his defence, he could not have come out of the vehicle and attempt to bribe PW.1. He could not have also held him

on the neck so that the driver could drive away with the illegal immigrants.

It is also believable in the case at hand that, the passengers in the motor vehicle at issue were in fact, Ethiopians and illegal immigrants. This is in accordance to the evidence of PW.1 and PW.2 who found them in the abandoned motor vehicle and interviewed them. The illegal immigrants also confessed before them that they were Ethiopians, but they had no any travelling documents. As hinted above, this fact was not disputed during the preliminary hearing and was embodied into the memorandum of agreed matters. In law, such facts are deemed proved and need no formal proof; see section 192(4) of the CPA. In fact, even the appellant did not seriously dispute this fact. He even referred to such persons as Ethiopians in his defence evidence.

It is therefore, my settled opinion that, the evidence against the appellant was sufficient to prove the charge beyond reasonable doubts. His defence could not raise any reasonable doubts. In fact, though it is the law that the prosecution is duty bound to prove a charge beyond reasonable doubts, that does not mean that the proof must be beyond any doubt. What matters is that, the proof should make the court feel that the accused committed the offence at issue. This was the position that was underscored by the CAT in the case of **Magendo Paul and another v. Republic [1993] TLR. 220** which followed the holding by Lord Denning in the English case of **Miller v. Ministry of Pensions (1947) 2 ALL ER 372.** In that **Miller Case,** it was held that, the law would fail to protect the community if it admitted fanciful possibilities to defeat justice. It was further held in that case that, where there is strong prosecution evidence against an accused, then remote

possibilities in his favour can be dismissed and a finding that the case has been proved beyond reasonable doubts should be reached at.

Having said so, I answer the issue posed above affirmatively that, the prosecution proved the case against the appellant beyond reasonable doubts before the trial court. I therefore, overrule the ground of appeal. I consequently dismiss the entire appeal for want of merits. It is so ordered.

J.H.K. UTAMWA
JUDGE
15/02/2021

Date; 15/02/2021.

CORAM; Hon. JHK. Utamwa, J.
Appellant; present (by virtual court link while in Ruanda Prison-Mbeya).
For Respondent; Ms. Zena James, State Attorney.
BC; M/s. Gaudencia, RMA.

Court: Judgment delivered in the presences of the appellant (by virtual court while in Ruanda Prison-Mbeya) and Ms. Ms. Zena James, learned State Attorney for the Respondent, in court, this 15th February, 2021.

JHK. UTAMWA
JUDGE
15/02/2021.