IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 65 OF 2020

(Originating from Criminal Case No. 396 of 2018 of the District Court of Moshi at Moshi)

SAID RAMADHAN OMARI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

MUTUNGI .J.

The Appellant with six others were charged for different counts. In the case of (Said Ramadhani Omari) appellant was charged for the 2nd count with the offence of **transporting illegal immigrants c/s 46(1)(g) of the Immigration Act, Cap 54 R.E. 2016.** The third to seventh accused persons pleaded guilty to the third count **(unlawful presence within the United Republic of Tanzania c/s 45(1)(i) and (2) of the Immigration Act, Cap 54)** and were dully convicted and sentenced to pay a fine of Tshs. 500,000/= in default thereof to serve a jail term of two years.

The particulars of the offence on the second count were such that, Said Ramadhani Omari on 27th August 2018 at Njia panda area within the District of Moshi, in Kilimanjaro being the citizen of Tanzania was found transporting five Ethiopians illegal immigrants namely Geremy Arega Tirkaso, Muluken Sisay Abiye, Tsegaye Kutso Forsido, Teshale Teshome Tadesse and Teshome Erdole Mandalo in the United Republic of Tanzania.

Before embarking on the merits or demerits of the appeal, I deem it appropriate to give albeit briefly the background of this appeal. The appellant was among the accused charged at the District Court of Moshi, for the second count as elaborated earlier. The 1st accused person was charged with the first count of facilitating illegal immigrants **c/s 46(1)(e) of Immigration Act (supra)** but he jumped bail before commencement of the trial. It was alleged on the material day the police received information from an informer that, there was a vehicle transporting illegal immigrants. The police prepared themselves and proceed to the scene of crime where they found a vehicle driven by the appellant stationed at Njia Panda (Himo) near the weighing bridge. Suddenly after the police were noticed some culprits ran away but the police managed to

ambush and surround the said vehicle. They arrested the appellant and his friend (1st accused). As they searched the said vehicle they found it was carrying some items which included crates of beer which were arranged in such a way that, a big space was left in the middle. This is when they noticed five people hiding therein whom they later learnt were illegal immigrants of Ethiopian decent. The vehicle carrying the illegal immigrants and the appellant and his friend were escorted to the police station. When interrogated by the immigration officers, the five illegal immigrants admitted to have entered unlawfully in the United Republic and were being transported to Dar-es-Salaam. In the case of the appellant he admitted to have been in the course of transporting in his vehicle the illegal immigrants. The trial Magistrate was convinced beyond doubt with the appellant's involvement in the crime, and proceeded to convict and sentenced him to pay a fine of Tshs. 20,000,000/- in default thereof 20 years imprisonment.

Aggrieved by the above decision, the appellant now appeals to this court as per the Memorandum of Appeal which contains 7grounds as hereunder: -

1. That the learned trial Magistrate erred in law and fact in overlooking the fact that the prosecutors tendered

the exhibits PI and P2 wrongly by assuming the role of witnesses without any reason explained, while they were not capable of examination to comply with section 198(1) of the Criminal Procedure Act, Cap 20 re 2002.

2. That, the learned trial Magistrate erred in law and fact in withholding the appellant of his right to a fair and justice proceedings in which the alleged tendered motor vehicle was not allocated by the court neither was it identified by any prosecution witness throughout the trial.
3. That, the trial Magistrate erred both in law and fact in admitting and relying on Exhibit P3, P4 and P5 the statements of the 4th, 5th, 6th and 7th accused persons without any proof from the prison in which it was certain that they were sentenced to serve 2 years hence complied with the prosecution lies, more over the same were contradicting and un-corroborating.
4. That, the trial Magistrate grossly erred in law and fact in relying on exhibit P6 (cautioned statement) which was recorded outside the prescribed time by the law and neither was the same mentioned during the preliminary hearing to accord the appellant with a proper preparation of his defence while the

interrogating officer was below the rank of corporal c/s 3(1)(d) of TEA.

5. That the trial Magistrate erred in law and fact in relying on the alleged search warrant and seizure note which was filled by police officers themselves while it was on the high way, however there was unresolved contradiction on whether the same was filled at the scene of crime or at the police station.
6. That, the learned Trial magistrate erred in both law and fact in weighing the prosecution evidence critically hence left the charge unestablished and unproved if not defective for there is difference between transportation and attempting transportation.
7. That the trial magistrate erred in law and fact in not being concerned by the absence of first accused in court while he had sureties and did not appear to tell his whereabouts.

At the hearing, the appellant was represented by Miss Minde learned advocate while the respondent (Republic) was represented by learned Attorney Ignas Mwinuka. It was agreed and ordered the appeal to proceed by way of written submissions.

Submitting on the 1st ground of appeal, the appellant's advocate explained, exhibit P1 (search warrant) and P2 (motor vehicle) which were tendered during the preliminary hearing were improperly admitted. These exhibits were admitted without the accused person afforded a right to cross-examine on the same. She cited the case of **Republic vs. Saimon Bernard and Three Others Criminal Revision No. 5/1997** to cement her position.

As for the 2nd ground of appeal the learned advocate commented, the Appellant was curtailed his right to cross examine on Exhibits P1 and P2. She further stated, though the trial court at page 10-11 of the judgement found it was unsafe to rely on uncorroborated evidence, yet the appellant was condemned and convicted based on uncorroborated evidence.

As for the 3rd ground of appeal concerning exhibits P3, P4 and P5 which are accomplices' statements tendered by the Immigration Officers, Mrs Minde argued, these Officers were independent witnesses not capable of corroborating the prosecution witnesses. On the same ground the learned advocate stated, page 7 and 8 of the proceedings reveal, there is no reflection of these exhibits and no reference of such statements had been made by

the respective accused. For that reason, the evidence in these exhibits is hearsay which cannot be relied upon.

As to the 4th ground of appeal, the learned advocate commented, the trial Magistrate relied on a caution statement which was recorded outside the prescribed time in complete disregard of the law. The learned advocate stated it was thus wrong to rely upon the caution statement (Exhibits P6) and the statements of co-accused as basis of convicting the appellant as seen at page 12-13 of the judgement.

In regard to the 5th ground of appeal, the learned advocate contended, it was ASP Rogers who conducted the search at the police station and filled the seizure certificate which was tendered as exhibits P1 and P2. PW6 at page 40 of the proceedings confirmed there was no independent witness other than the police themselves. For this she highlighted renders the documents unreliable.

Moreover under the 6th ground, the learned advocate faulted the trial Magistrate for failure to analyse the evidence. She submitted, despite the definition of transport which was provided for by the trial Magistrate at page 8 of the judgement, such definition was not adhered to during the analysis of the evidence. Clarifying on this, the

advocate submitted the 3rd to 7th accused admitted to be in the country without permission as seen at page 8 of the proceedings and they were convicted accordingly. In view thereof the evidence of 3rd - 7th accused did not suggest the movement from point A to B and the appellant being part of such movement. She continued arguing that, the trial court relied on hearsay evidence taken during interrogation which was never tendered. The accused was never given an opportunity to cross examine the co accused.

The learned advocate further contended, the conviction was based on the evidence of the defence and not of prosecution. She also averred that the motor vehicle driven by the appellant was stationary and not moving for that, it cannot be said the appellant was in the move of transporting illegal immigrants. In conclusion, the learned advocate prayed the appeal be allowed.

In reply thereof Mr. Mwinuka State Attorney submitting on the 1st and 2nd grounds quickly admitted that exhibit P1 (search warrant and certificate of seizure) and P2 (motor vehicle with registration No. 671 CPM makes Fuso) were admitted during the Preliminary Hearing stage. In view thereof there was no need of further proof. Above all they

were admitted without objection from the Appellant. It was his settled view that objecting against these exhibits is unwarranted at the appeal stage.

Replying to the 3rd ground of appeal as far as the statements of 4th, 6th and 7th accused persons are concerned, the learned State Attorney submitted, these were corroborating the fact that the appellant was arrested with illegal immigrants. Be as it may, the fact that he was the driver of exhibit P2 on the material day was part of the undisputed facts during the preliminary hearing. Further collaboration was the evidence of an eye witness (PW1) and the appellant's caution statement.

Responding to the 4th ground of appeal Mr Mwinuka contended, exhibit P6 was admitted without any objection. Even if there was to be any objection then the same should have been raised before it was admitted as held in the case of **Shihoze Seni and Another vs. Republic 1992 TLR 330**.

In so far as the 5th ground of appeal is concerned, the learned State Attorney cited the case of **Tongora Wambura vs. The DPP, Criminal Appeal 212 of 2006 CAT (Unreported)** and explained that, to have an independent witness to a search warrant (Exhibit P1), would depend on

the particular circumstances. However, it should be emphasised that the absence of such witnesses perse, was not fatal in the prosecution case.

Responding on the 6th ground of appeal on lack of clear analysis of evidence by the trial court, Mr Mwinuka contended the judgement clearly analysed the evidence as per the requirement of law and it is self-explanatory. In the upshot it was the learned Attorney's prayer, the appeal be dismissed.

In rejoinder the learned advocate stated, the conviction was based on circumstantial evidence but the facts did not support conviction. She also reiterates the point that the caution statement was clearly in violation of section 50 and 51 of the Criminal Procedure Act, Cap 20 R.E. 2019. The counsel also stated lack of an independent witness is fatal, since the prosecution side had prior information of the alleged offence. They should have been dully prepared by requiring the presence of independent witnesses. As to the cited case by the learned State Attorney, she stated was distinguishable with the present situation. She cited the case of **Roland Thomas vs Mwangamba vs Republic Criminal Appeal No. 308/2007** and argued, it is in all fours with the present case, in which such omission is fatal.

Miss Minde concluded by arguing, the prosecution evidence was not water tight and for that, the appeal ought to be allowed as prayed.

Having critically analysed the submissions of the rival sides and the evidence on record the following are the issues to be determined ***first***, whether the disputed exhibits were properly admitted and ***second***, whether the trial court had properly evaluated the evidence adduced.

Starting with the first issue, exhibit (PI search Warrant and certificate of seizure) and P2 (motor vehicle with Reg. No. T.671 CPM), were admitted without objection during the preliminary hearing stage as seen at page 6 and 7 of the typed proceedings. The appellant's advocate pressing complaint was that, the same were admitted during the said stage but during trial the Appellant did not get an opportunity to cross examine on the same as a prosecutor cannot be examined.

The law is very clear as far as preliminary hearings are concerned. The purpose of the said procedure is to accelerate trial. I am fortified in my view by the holding in the case of **Joseph Munene and Another vs Republic, Criminal Appeal No. 33 of 1997** which set down a procedure that, after the preliminary objection, the

Magistrate has to write a memorandum of agreed facts. These facts will not be transacted or discussed during trial as the matters are not indispute. There was no dispute on these exhibits hence the appellant's complaint does not hold water.

Further, the learned advocate had faulted the tendering of exhibit P1 because it was not signed by an independent witness and this renders the document unreliable. Having gone through exhibit (P1), I find the same was signed by the 2nd accused and police officers and it was tendered during the preliminary hearing. I am alive that independent witness have to be there during a search, but despite the fact that there was no independent witness yet the operational circumstances and content of Exhibit P1 is self-explanatory. In the same vain the absence of an independent witness does not render the operation illegal as rightly argued by the State Attorney who cited with approval the case of **Tongora Wambura vs The Director of Public Prosecutions (supra)**.

More over the said exhibits had been admitted without objection from the Appellant as seen at page 6 and 7 of the typed proceedings. For that the appellant is barred from questioning its admissibility as rightly submitted by the

learned State Attorney at the appeal stage. See the case of **Abas Kondo Gede vs Republic, Criminal Appeal No. 472 of 2017**.

The learned advocate had raised her concern on the statements of co-accused which were tendered by the Immigration Officers that, she doubted the competency of these Officers to tender them. It is obvious that the party is at liberty to choose whom they want to be witnesses. What is required is for the prosecution to prove the case beyond reasonable doubt and the accused to raise a doubt.

Tendering of witness statements is provided for under **Section 34B (1) of Evidence Act, Cap 6 R.E. 2019** which I find worth reproducing for ease of reference: -

> *34B.-(1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written or electronic statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.*
>
> *(2) A written or electronic statement may only be admissible under this section-*

(a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;

(b) If the statement is, or purports to be, signed by the person who made it?

The above provision allows the statements to be tendered instead of oral evidence. In the case at hand, the witnesses (co-accused) were nowhere to be found as contended by the prosecution side at page 28-29 of the typed proceedings. The witness had clearly intimidated that all reasonable steps had been taken to procure their attendance but could not be found.

Be as it may, the case of **Deus Josias Kilala @ Deo vs Republic (Criminal Appeal No 191 of 2018** held clearly that an exhibit can be tendered by a person who has the knowledge of its existence. Since the reason given was that the prosecution did not know the whereabouts of the witness and since the statements were made before those

Immigration officers, it suffices that the statements be part of the prosecution evidence, hence these were competent witnesses in the given scenario.

As to exhibit P6 which is the accused caution statement the complaint is that, was recorded out of time and it was not mentioned during the Preliminary Hearing. I find the same was not objected to (page 37 of the typed proceedings) during trial when introduced in evidence. My concern will be on the grievances that it was out of time. **Section 50(1) (a) (b) of Criminal Procedure Act (supra)** provides for caution statements to be recorded within four hours after the arrest, failure of which such caution statements will be expunged from the record, the position stated in the case of **Msafiri Emmanuel Daniel & Another vs Republic Criminal Appeal No 194 of 2018** where the court at page 8-9 quoted with approval the case of **Pambano Mfilinge vs Republic, criminal appeal no. 283 of 2009 unreported** which held: -

> *"Upon numerous occasions, this court has been confronted with situations similar to the one at hand. (see the unreported) decisions of the court in* ***Criminal Appeal No. 278 of 2008 - Emilian Aidan Fungo @ Alex and Another vs Republic, Criminal Appeal No. 51 of 2020-Mussa Mustapha***

Kusa and Another vs Republic, Criminal Appeal No. 126 of 2011-Hamisi Juma @ Nyambanga and Others vs Republic Criminal Appeal No. 261 of 2011- Majull Longo and Another vs Republic).

In all these decisions the court held, "the non-compliance vitiated the particular caution statement."

Since the caution statement was recorded out of time it ought to be expunged from the record and I hereby expunge the same. The issue is whether the prosecution case can stand without the accused's caution statement. This will be answered in the due course while answering the issue on the trial Magistrate's analysis of evidence.

Coming back to the second issue of analysing the evidence, the Appellant's advocate complained, the conviction was based on hearsay evidence obtained during interrogation, and the defence evidence. This particular evidence does not show how the appellant transported the immigrants form one point to another. Flipping through the judgement of the trial court it has been observed, the honourable magistrate at page 12 to 13 wrote: -

"It is clearly from the 2nd accused cautioned statements and defence there is no doubt that

the illegal immigrants were found at the scene of crime. In his defence he claimed the illegal immigrants were not in his vehicle yet when they were arrested. Statements from the co-accused corroborated with his own statements (exhibit P6) and the direct evidence from the police who caught the illegal immigrants hiding in his motor vehicle. It was also clear from the search warrant and certificate of seizure Exhibit P1 that; the 2nd accused was found transporting the illegal immigrants using the motor vehicle with Reg. No. T. 671 CPM made Fuso (Exhibit P2)."

Based on the above quoted statement and the judgement as a whole, the evidence was properly analysed by the honourable trial magistrate. The case had been proved beyond reasonable doubt even if exhibit P6 (caution statement) is excluded as already ordered earlier. There is direct evidence from the police officers, Immigration officers and caution statements from the co-accused collaborating what transpired as well as the seizure certificate, search warrant and the motor vehicle which the accused is not disputing was driving at the

material time. By all standards this was a clear case of transporting illegal immigrants.

From the foregoing analysis, I support the submission that the case had been proved beyond reasonable doubt and this court upholds both the conviction and sentence by the trial court. Conclusively I hereby dismiss this appeal.

B. R. MUTUNGI
JUDGE
27/5/2021

Judgment read this day of 27/5/2021 in presence of the Appellant and Mr Mashurano (S.A) for the Respondent.

B. R. MUTUNGI
JUDGE
27/5/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
27/5/2021