

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)
AT MTWARA

CRIMINAL APPEAL NO 75 OF 2020

(Originating from Resident Magistrate Court of Lindi in Criminal Case No. 8 of 2020)

RAYNESS ALOYCE OLUOCH APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing date on: 16/6/2021

Judgment on: 24/6/2021

NGWEMBE, J:

Rayness Aloyce Oluoch is in this court intending to challenge the conviction and sentence meted by the trial court. The appellant was sentenced to pay fine to the tune of TZS 500,000/= or imprisonment for the period of five months. The appellant paid fine, but was dissatisfied with such conviction and sentence, hence within time, she issued notice of appeal and appealed to this court having two grounds namely:-

1. The prosecution did not prove the case against the appellant beyond reasonable doubt;

2. That the trial court erred in law and fact in shifting the burden of proof to the appellant herein.

However, on the hearing date, both parties were represented by learned counsels. While the appellant was represented by learned advocate Rainery Songea, the Republic was represented by Mr. Wilbroad Ndunguru – learned senior State Attorney. Mr. Songea argued quite convincingly, that the prosecution abdicated their duty to establish and prove a prima facie case against the appellant. Thus, offended section 3 (2) of the Evidence Act.

Argued further that, section 44 of Immigration Act shift the burden to a person who alleges to be a citizen. Distinguished that section by arguing that the appellant in her evidences testified that her husband was a Tanzanian, therefore, the burden was of the prosecution to prove that he was not a Tanzanian. Thus, the trial magistrate erred in shifting such burden to the appellant instead of doing so to her husband.

Added that, even in her caution statement, she admitted that she had no knowledge that, her husband was a Burundian. Submitted that even the prosecution admitted that, the husband had no special mark indicating that he was a Burundian as opposed to a Tanzanian.

Contented further that, the prosecution ought to charge the husband who identified as a Tanzanian while not. But mistakenly the prosecution charged his wife who is a Tanzanian. Went further, by referring to PW1, PW3 & PW4 who all proved that the two were married and lived as

husband and wife since the date of their marriage. The appellant produced Certificate of Marriage during trial which was admitted as exhibit D1.

Rested by submitting that the appellant had no means to know that her husband was a foreigner, thus lacked *mens rea*. Therefore, prayed this court to allow the appeal and quash the conviction and set aside the sentence of the trial court.

Mr. Ndunguru, responded to the appellants' submission by opposing the appeal and insisted that the trial court did not error in convicting and sentencing the appellant. The evidence was watertight against the appellant that she employed a foreigner without working permit. That the evidence of PW1, PW2 & PW3 proved beyond doubt that the appellant employed a foreigner without working permit.

Further, submitted that, it was a duty of the appellant to do due diligent to ascertain nationality of her husband. Thus, the trial court did not error in convicting the appellant for the offence charged.

Considering holistic of this appeal, certain elements are inevitable to be determined. One is the true meaning of *mens rea*; second is evaluation of evidences adduced during trial; and finally consideration of the appeal in totality.

The Latin maxim of *mens rea* is defined by Black's Law Dictionary eighteenth edition to mean guilty mind, the state of mind that the

prosecution, to secure a conviction, must prove that the accused had when committing a crime; had criminal intent or recklessness. This definition is well known to every legal practitioner, including the maxim of *actus reus* meaning the actualization of *mens rea*. Therefore, in every criminal trial, unless the trial is under strict liability, otherwise, the prosecution in proving criminality of the accused, must establish and prove both *mens rea* and *actus reus*. Even in this appeal, the learned advocate argued quite strongly that the appellant had neither *mens rea*, nor knowledge nor intent to commit offence and that the prosecution failed to prove it against the appellant.

According to the charge sheet, the appellant was alleged to commit an offence of employing a non-citizen of Tanzania without permission from the relevant Authorities contrary to section 45 (1) (q) of Immigration Act. For clarity the section is quoted hereunder:-

Section 45 (1) (q) "*Any person*

(q) employs any person who is not a citizen of Tanzania and who has no pass or permit authoring him to be so employed, shall be guilty of an offence"

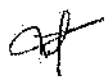
This subsection alone is incomplete until subsection 2 of the section is cited. Subsection 2 is conferring powers to the court to sentence the convict. The subsection is quoted hereunder:-



"Any person who commits an offence under this Act shall, except where any other penalty is specifically provided therefore, be liable on conviction to a fine not less than five hundred thousand shillings or to imprisonment for a term of not exceeding three years or to both such fine and imprisonment"

This section does not need any further interpretation, in fact it says what it means and means what it says. Therefore, whoever defaults this section obvious punishment is assured of either fine or imprisonment or both. Above all, employing a foreigner in our Country without working permit is criminalized by our laws. In this point I fully subscribe to the arguments advanced by the learned senior State Attorney. However, considering the circumstances of this appeal, I think is a bite different. That the appellant and the alleged employee were husband and wife whose marriage as per exhibit D1 and at pages 21 of the trial court's proceedings was contracted on 15th May, 1999 at Kanisa la Pentekoste Kijitonyama – Yombo Dar es Salaam bearing certificate No. 00130985. Having that marriage, they were blessed with two issues.

Under the Law of Marriage Act, the two were legally married and blessed with two children. In this point, there was no dispute as she testified in page 22 of the proceedings that the appellant met with her husband in year 1995 and in year 1999 the two were married. Added that the parents of her husband were all living at Yombo Dar es Salaam and at last they died and buried at Yombo cemeteries in Dar es Salaam. Further testified that she never knew that such husband was not a Tanzanian, rather she knew that he was from Kigoma in Tanzania.



Construing her testimonies during trial, the appellant pleaded ignorance of fact as opposed to ignorance of law. Usually, ignorance of law is not a defence. Section 8 of the Penal Code cap 16 R.E. 2019, provide that:-

Section 8 "Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence"

The legislature had a purpose behind this section. Obvious ignorance of law should not be pleaded as defence, otherwise every accused person would plead ignorance of law. However, the same legislature, enacted section 11 of the same Act that ignorance of fact is a defence. The section is quoted hereunder for ease of reference:-

Section 11 (1) "A person who does or omit to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist"

In the absence of knowledge, obvious ill intention won't be found and that *mens rea* won't be found. Consequently, criminal responsibility won't be found. In this appeal, the appellant's evidence from the outset, pleaded ignorance of fact that her husband was a foreigner and what assured her that he was a Citizen is the presence of his parents in Yombo Dar es Salaam and at the end they all died and buried at the same place in Tanzania.

I would therefore, conclude this point that the prosecution had a duty to prove both *mens rea* and *actus reus* before the appellant is convicted and sentenced by the trial court. Failure to establish and prove *mens rea* and *actus reus*, criminality of the accused won't be properly established and proved to the standard required by law, which is, beyond reasonable doubt.

Another area which requires critical thinking is the employment of the husband in the business of his wife. Undoubtedly, the prosecution proved to the standard required that the husband was an employee of Southern Star Nursery and Primary school. The owner is the appellant, which fact was undisputed and all necessary documentations proved the same. The husband was employed as a manager of the school. The two are husband and wife. The school was founded and registered on 7th November, 2018 under the ownership of Rayness Aloyce Oluoch, who is a wife of the school manager. Noted that, the school was found during the existence of their marriage. Under normal circumstances, such property ought to be treated as family property despite the fact that the owner is recorded to be the appellant.

In law is not a strange for family members to be employed in the family owned business. But in respect to this appeal, the appellant is accused of employing a foreigner, who is a husband of the owner. This fact goes to the same issue which I have already decided that whether the appellant had a knowledge that she was employing a foreigner in her business. How could she know, if they lived together for all those years, without her

knowledge that he was a Burundian? Moreover, in her caution statement, which was admitted in court during trial, she stated as follows:-

"Shughuli zetu kwa sasa tuna miliki shule ambayo inajulikana kwa jina la Southern Star Pre- and Primary school, ambayo katika shule hiyo mimi ni mmiliki na Bw. Nimrod Elite ni meneja wa shule" Explained further that "Mimi katika maisha yangu yote hakuwahi kunieleza kwamba yeye ni raia wa Burundi, bali alinieleza kwamba yeye ni raia wa Tanzania na ni mtu wa Kigoma – Ujiji wakati huo huo wazazi wa Bw. Nimrodi walikuwa wanaishi Dar es Salaam Yombo Machimbo"

This piece of evidence, assures every reasonable person that the appellant had no knowledge of fact that her husband was a foreigner and the school was a family property. I think, the prosecution had a duty to prove that the appellant knew that her husband was a foreigner, otherwise, throughout, the appellant was laboring under ignorance of fact on the status of her husband for all those years and had no other means to know otherwise.

I need not to labour much on the current status of their marriage, bearing in mind that, the husband as of now is in Burundi, while the wife is at Ruangwa in Tanzania the question on the status of their marriage remain unanswered. Likewise, the welfare of their children, one may ask, are they Tanzanians or Burundian, anyway, the Citizenship Act may provide any answer, which I need not to discuss it hereto. Another similar question is on the up brings of those children as provided for under the Law of the Child and under the Law of Marriage Act. Moreover, is on the rights of properties found jointly with the appellant, if their marriage is by operation



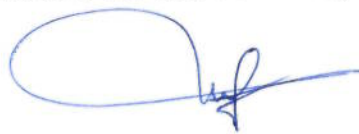
of law, forced to divorce. These are some issues among many, which have no answer and I cannot provide an answer either.

Having considered holistically, this appeal and in the circumstances of the whole trial, I find the trial magistrate had a duty to consider on the element of *mens rea* before arriving to the conclusion. Also the prosecution ought to establish and prove existence of *mens rea* of the accused/appellant during trial. In the absence of *mens rea* or guilty conscious or ill intention, I find the appellant was improperly convicted and sentenced. Therefore, this appeal has merit.

In totality, I proceed to quash the conviction and sentence meted by the trial court, and order an immediate refund of fine paid instead of imprisonment.

I according Order.

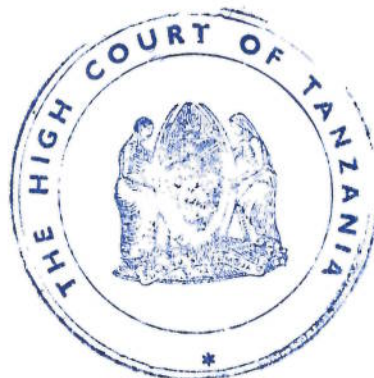
Dated at Mtwara in Chambers on this 24th day of June, 2021



P.J. NGWEMBE

JUDGE

24/6/2021



Court: Delivered at Mtwara in Chambers on this 24th day of June, 2021 in the presence of Ms. Mziray, Advocate for the Appellant and Mr. Ndunguru senior State Attorney for the Respondent.

Right to appeal to the Court of Appeal explained.



P.J. NGWEMBE

JUDGE

24/6/2021