

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

CONSOLIDATED (DC) CRIMINAL APPEALS NO. 94 AND 95 OF 2021

(Original in Criminal Case No. 27 of 2020 from the Resident Magistrate Court of
Dodoma at Dodoma, Mpelembwa SRM dated 17th June, 2021)

1. ALIFA JUMA HUSSEIN 2. HAJI HARID KAMTOI 3. ISAYA MICHAEL OPIYO	} APPELLANTS
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VERSUS

THE REPUBLIC RESPONDENT

11/11/2021 & 24/11/2021

JUDGMENT

MASAJU, J

These are Consolidated Appeals (DC Criminal Appeals No. 94 and 95 of 2021. The Appellants, Alifa Juma Hussein, Haji Harid Kamtoi and Isaya Michael Opiyo were tried and convicted in the Resident Magistrate's Court of Dodoma at Dodoma for the offence of SMUGGLING IMMIGRANTS contrary to Section 46 (1) a of the Immigration Act [Cap 56 R.E 2016]. Both Appellants were sentenced to pay, fine worthy TZS 20,000,000/= or to serve twenty (20) years imprisonment.

Aggrieved with the trial Court's decision the Appellants Alifa Juma Hussein filed a Criminal Appeal No. 94 while the Appellant Isaya Michael Hussein filed Criminal Appeal No. 95 of 2021. Since both Appeals come from the same original Criminal case, the Court consolidated the Appeals into one. The 1st and 2nd Appellant's Petition of appeal is comprised of one (1) ground of appeal while the 3rd Appellant's Petition of Appeal is made up of four (4) grounds of Appeal in which they both argue that the prosecution case against them was not proved beyond all reasonable doubt.

When the Appeal was heard in the Court on the 11th day of November, 2021 the 1st and 2nd Appellants were represented by Mr. Fred Kalonga, the learned counsel, while the 3rd Appellant was represented by Mr. Majaliwa Wiga, the learned counsel and the Respondent Republic was in service of Mr. Harry Mbogoro the Senior State Attorney.

Submitting in support of Appeal the 1st and 2nd Appellants argued that the prosecution case against them before the trial Court was not proved beyond reasonable doubt given the weak, poor and contradictory evidence by the prosecution.

That, the three prosecution witnesses testified that they found illegal immigrant in the motor vehicle that was being driven by the 2nd Appellant at Mtera Bridge area. That, they interrogated the said illegal immigrant (the then 1st accused) who told them that he was being trafficked by the 3rd Appellant as per the Cautioned Statement by the immigrant. That, the said Cautioned Statement (Exhibit P1) was not read out before the trial court and nobody knows its content. That, this was against **Robinson Mwanjisi & others V.R** [2003] TLR 218. That, the evidence by the illegal immigrant is

the one which connected the 3rd Appellant with the crime. The Appellants prayed the Court to expunge Exhibit P1 from the record of the trial court.

That, as regards the 1st and 2nd Appellants believed in good faith that when they took in their motor vehicle the then 1st Accused and 3rd Appellant were just transporting passengers not a smuggled and the smuggler person. That is to say the prosecution case was not proved beyond reasonable doubt. The 1st and 2nd Appellants prayed the court to allow the Appeal.

On his part, the 3rd Appellant submitted that the defence case was not considered by the trial Court contrary to Section 312 of the Criminal Procedure Act [Cap 20]. That, the prosecution case was also not proved and the evidence thereof was at variance. The 3rd Appellant prayed the Court to allow the Appeal.

On her part the Respondent Republic did not contest the Appeal. The learned State Attorney supported the appeal on the reasoning that the evidence that was adduced before the court does not reflect the charge/offence that, the Appellants were charged with. That, the charge is at variance with the evidence, thus no evidence in support of the charge. That, the offence of Smuggling includes the act of smuggling within or outside the country. That, the evidence adduced before the trial court does not specify whether the Appellants were smuggling the Ethiopian to the country or outside the country. That, the evidence of the prosecution case was that the Appellants were transporting the alien, which falls under Section 46(1) (c) of the Immigration Act [Cap 54] which offence of Transporting Immigrants was not charged. Hence variance of the evidence with the

offence. That being the case, the offence of smuggling was not proved beyond reasonable doubt.

The Court appreciates the submissions by the parties in support of the appeals in the Court. The Court is inclined to agree with the parties that the prosecution case against the Appellants was not proved beyond reasonable doubt in the trial Court.

The Appellants were charged with the offence of smuggling immigrants contrary to section 46 (1) (a) of the Immigration Act [Cap 54 R.E 2016] but the prosecution side evidence did not constitute the offence. The prosecution side witnesses only alleged that they found the Appellants transporting the illegal immigrant. Thus, the charge against them was not proved beyond all reasonable doubt.

The trial Court based its decision on the illegal immigrant alleged Cautioned Statement (Exhibit P1) but the in the said exhibit the immigrant did not state to have been helped by the 3rd Appellant in any means. He just alleged to have been helped by someone he does not know. The said exhibit was neither read in the trial court after it was admitted. Sarah Ramadhan Tama (PW2), the Immigration Officer, testified in the trial court to have prepared the Seizure Certificate (Exhibit P1) after the Appellants were allegedly searched. That, they seized mobile phones, ignition keys, driving licence of the driver (2nd Appellant), ballot card of the 3rd Appellant and copy of registration card and motor vehicle (Fuso) with Registration No. T 443 DLN. The certificate of seizure was also not read in the trial court after it was admitted.

The Court finds that the non-reading of the two exhibits both marked as exhibit P1 is fatal as it was held in **Issa Hassan Uki V.R (CAT) Criminal Appeal No. 129 of 2017**, Mtwara Registry (unreported) thus;

" It is fairly settled that once an exhibit has been cleared for admission and admitted in evidence it must be read out in court"

Thus, it is the requirement of the law that the two (2) exhibits should have been read in the trial court to afford the Appellants with opportunity to prepare their defence, if any. The Exhibits P1 are hereby therefore expunged from prosecution case evidence.

The trial court also did not consider the defence case in its judgment as so required by the law. That said, the court is of the considered position that, with the exhibits P1 and P1 being expunged from the record of evidence, the remaining prosecution case evidence, was still wanting against the appellants since there are also some serious irregularities thus the prosecution case evidence was short of proving the case against all the three Appellants beyond reasonable doubt. The two Appeals are therefore hereby allowed. The conviction, sentence and orders are quashed and set aside respectively. The Appellants shall therefore be released from prison forthwith unless they are otherwise held for other lawful reason.




GEORGE M. MASAJU

JUDGE

24/11/2021