IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

CRIMINAL APPEAL NO. 80 OF 2021

JAMAL BABUU MARTIN
WISTON ALEX MAKIA .....**APPELLANTS**

VERSUS

THE REPUBLIC.....**RESPONDENT**

(Appeal from the Judgment of Dodoma District Court, Rugemalila-SRM)

Dated the 23rd of February, 2021

In

Criminal Case No.13 of 2019

.....

JUDGMENT

16th May& 22ndJuly,2022

MDEMU, J.:

In the District Court of Dodoma, the two Appellants and Four Others who were convicted on their own plea of guilty, were charged with three counts in Criminal Case No. 13 of 2019. The 1st count was for the then 1st, 2nd, 3rd and 4th Accused persons, two Somalis and two Ethiopians, charged of unlawful present in the United Republic of Tanzania contrary to the provisions of section 45(1)(i) and (2) of the Immigration Act, Cap.54. The 2nd and 3rd Counts were for the Appellants herein in which, each was charged with one count of smuggling immigrants contravening the provisions of

section 46(1) (c) and (2) of the Immigration Act, Cap.54. According to the charge laid at the door of the two Appellants, on or about the 23rd of October, 2019, the Appellants herein were arrested at Mtera Village within Mpwapwa District transporting four illegal immigrants of Somalia and Ethiopia Nations from Arusha to Iringa. As per the prosecution evidence, the 1st Appellant was transporting two Somalis namely, Lisha Hoshi Ibrahim and Yeberow Mahamud (the then 1st and 2nd Accused persons) using a motor cycle with registration No. MC 942 AXK. On his part, the 2nd Appellant used a motor cycle registered MC 767 CEB in transporting Eshetu Tesfaye Lubango and Selam Yohannes Oloro, the then 3rd and 4th Accused persons respectively.

As said, Lisha Hoshi Ibrahim, Yeberow Mahamud, Eshetu Tesfaye Lubango and Selam Yohannes Oloro the then 1st, 2nd, 3rd and 4th Accused persons respectively were convicted on their own plea of guilty on 18th of December, 2019. They were accordingly sentenced each to a fine of Tshs. 500,000/- or two (2) years' prison term in default thereof.

Trial therefore proceeded in respect of the two Appellants herein and upon conclusion, the trial court found evidence in respect of transporting illegal immigrants overwhelming thus convicted and sentenced them to a fine of 20,000,000/= Tshs. each or a prison term of twenty (20) years in

default thereof. This was on 23rd of February, 2021. Aggrieved, the two Appellants approached this Court on five grounds summarized in the following: **one**, the charge on smuggling immigrants was not proved and no corroborative evidence; **two**, that the sentence of twenty years' prison term is tainted with procedural irregularities and **three**, that the defence case was not considered by the convicting trial Senior Resident Magistrate.

On 16th of May, 2022, I heard the two Appellants who appeared unrepresented while the Respondent Republic had the service of Ms. Bertha Kulwa, Learned State Attorney. The two Appellants in their submissions first adopted their grounds of appeal to be part of their submissions. In their addition version, each admitted to have been arrested by the police for no valid grounds and further denied involvement in the two counts of smuggling immigrants. It was their observation that, they be released for want of any offence committed by them.

Resisting the appeal, Ms. Bertha Kulwa argued all the grounds of appeal as one. The first piece of evidence she banked on was conviction on unlawful present in the United Republic of Tanzania to the four illegal immigrants. In her view, conviction on that count proved the count of smuggling immigrant charged to the Appellants. She added that, this was

also the case in the testimony of PW1, so to PW5 one William Mkono who testified on the arrest of the 1st Appellant first then the 2nd Appellant followed.

Another evidence relied by the prosecutions submitted by the learned State Attorney is the caution statements of the two Appellants which were admitted un objected. In her view, the uncontroverted caution statements corroborated the prosecution evidence that the two Appellants' were arrested transporting illegal immigrants. She contradicted the Appellants version that the two caution statements were recorded out of time.

Regarding seizure certificate to have not been read in court following its being admitted, the learned State Attorney conceded that, PW2 did not read the said seizure certificate in court. She however noted not be not fatal because the seized motorcycles were admitted in court as real evidence. She fronted also that, complaints on non-consideration of the defense case remain unfounded as the Appellants never denied to have been arrested at Mtera in possession of the two motorcycles tendered as real evidence.

She therefore concluded that, the prosecution case was proved even in absence of evidence from cyber department regarding mobile phone

conversation of the 2nd Appellant leading to the arrest of the 1st Appellant. She thus faulted the Appellants' grounds on conviction and sentence. The latter was not illegal in terms of the provisions of section 46(2) of the Immigration Act, Cap.54. The Appellants had nothing useful in rejoinder.

I have earnestly perused the record and took into account submissions of parties and the grounds of appeal as a whole. In all, the complaints as raised in the grounds of appeal and as dully summarized, all add up to one issue that, whether there is evidence on record to sustain conviction and sentence of the offence of smuggling immigrants as meted by the learned trial Senior Resident Magistrate.

As correctly submitted by the learned State Attorney and gathered from the record, it is not disputed that the two Appellants were arrested at Mtera each owning a motorcycle with registration No. MC 942 AYK for the 1st Appellant and MC.767 CEB for the 2nd Appellant. As per the memorandum of facts not disputed, the Appellants' arrest is also not controverted. Were they arrested smuggling immigrants? This is the issue to be resolved.

Regarding conviction on unlawful present in the United Republic of Tanzania for the two Somalis and two Ethiopians, the facts, as said, the four

were found unlawful present and were accordingly convicted. Ms. Bertha Kulwa convinced this court to use that evidence to find the two Appellants responsible for smuggling immigrants. Going to her shoes, she meant, the four illegal immigrants could not gain access to the United Republic without assistance from the two Appellants. The evidence on record should lead us to that end.

When looking to this, the test available should be one, that is, the admitted facts leading to conviction should, in their contents, be the prosecutions evidence in the trial of the two Appellants. At the inception, facts were read twice. First set of facts was to the then four Accused persons who pleaded guilty and the second set was to the two Appellants who pleaded not guilty. Again, those pleaded guilty, were not convicted on the very same day they admitted the charge. According to the record, on 13th of November, 2019, the then four Accused persons pleaded guilty to the 1st count of unlawful present in the United Republic of Tanzania. The trial magistrate entered a plea of guilty. The matter was set for mention on 27th of November, 2019, then 11th of December, 2019 and further to 18th of December, 2019 when facts constituting ingredients of the pleaded offence were stated to the then four Accused Persons. They were subsequently

convicted. In my view, the law requires conviction to proceed soon after pleading guilty. In this, the prosecutions were to state ingredients of the offence soon thereafter. This procedure deployed by the learned trial Magistrate was uncalled for and contravened the provisions of section 228 of the Criminal Procedure Act, Cap. 20 which reads:

> *228.-(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.*
>
> *(2) Where the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary.*
>
> *(3) Where the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.*

Now to the facts; in the record, there is a somehow difference on facts admitted by the illegal immigrants and those stated to the smugglers (the Appellants). The variations are in two fold. **One** is the date of commission of offence which is 3rd of October 2019 in the admitted facts and 23rd of October, 2019 for facts stated at the preliminary hearing to the two Appellants.

Two, in the admitted facts leading to conviction on a plea of guilty (pages 14-15), there is nothing like costs of transporting those illegal immigrants of which, those stated during preliminary hearing (pages 33-34), the Appellants were paid 1,000,000/=. Under the circumstance of this case, since the date which the illegal immigrants were found present differs materially with the date the Appellants herein were charged to transport them, the prosecution may not deploy that to be evidence that, the convicted illegal immigrants were being transported by the Appellants herein. I am saying so because, according to the facts and evidence of the prosecution, the acts of being found unlawfully present and that of transporting such immigrants by the Appellants herein occurred under one transaction. They cannot be disjointed.

To the caution statements, it is on record that such statements were admitted as exhibits P3 and P4 for the 1st and 2nd Appellants respectively. In her submissions, the learned State Attorney submitted that the said caution statements were admitted without objections. This is not correct at all. The record is clear at page 59 of the typed proceedings that, the 1st Appellant objected to the tendering of a caution statement. For clarity, it is stated that:

> *PW3: I identify the document as caution statement of Jamal Babuu Martin as they have my handwriting and signature. I pray to tender it as exhibit in court.*
>
> *5th Accused objection:* ***I told him I have relatives but he refused to call them. He also forced me to give the statement. He only gave me the statement to sign****. (emphasis mine)*

It cannot be overemphasized that the 1st Appellant objected to the inception of the said caution statements in evidence. The 2nd Appellant also objected as per the record. Given this situation, it was wrong for the trial court to deploy the two caution statements because **one**, the Appellants

were not cautioned as in the statements, it is not filled in the place the offence the Appellants confessed. The Appellants therefore, by that anomaly, did not know the offence they were confessing. **Two**, the caution statements were not read by witnesses in court after being admitted in evidence. Such statements therefore are expunged in evidence. See in **Robinson Mwanjisi &3 Others vs. R [2003] T.L.R. 218; Anania Clavery Batela vs. R, Criminal Appeal No. 365 of 2017**(unreported). **Three**, as the Appellants objected, the caution statements would not have been admitted in evidence unless the learned trial Magistrate directed himself to the conduct of an inquiry. This was the position in the case of **Sabas Bazil Marandu@ Myahudi and Another vs Republic [2014] T.L.R. 558.**

On the evidence generally, I agree with the Appellants that. much as they were arrested in a broad day right with such illegal immigrants, some other civilian's witnesses should have been assembled in evidence other than persons in authority only. PW1, PW2, PW3, PW4 and PW6 all are policemen. PW5 is a security guard from SUMA JKT. Persons like the garage man etc. in my view, were material witnesses to corroborate the prosecution evidence. It is trite law that, adverse inference be drawn for failure to call material witnesses. See in **Ridhiki Buruhani vs. Republic [2011] T.L.R. 303**.

In all therefore, it is obvious that, this being a criminal case, the duty of the prosecution not discharged was to prove their case beyond reasonable doubts. This is unescapable legal requirement. That said, I allow the appeal by quashing conviction and set aside the sentence met by the trial Senior Resident Magistrate. The two Appellants be set free, unless held lawful for some other lawful reasons.

It is so ordered.

Gerson J. Mdemu
JUDGE
22/7/2022

DATED at **DODOMA** this 22nd day of July, 2022

Gerson J. Mdemu
JUDGE
22/7/2022