

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CONSOLIDATED CRIMINAL APPEALS NO. 28 & 29 OF 2022

(Appeal from the decision of the District Court of Biharamulo at Biharamulo in Criminal Case No. 68 of 2021, Dated 20/05/2021, before Hon. C.G. Rugumila, RM).

NZOBANIMPA ABINADABU.....1st APPELLANT

ERICK JAMES2nd APPELLANT

PAULO ALEXANDER.....3rd APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

27/09/2022 & 31/10/2022
E. L. NGIGWANA, J.

Before the District Court of Biharamulo in Kagera Region, Nzabonimpa Abinadabu who for the purposes of this appeal shall be referred to as the 1st appellant and other eleven (11) people who are not parties to this appeal were jointly charged with two counts to wit; Unlawful entry in the United Republic of Tanzania contrary to section 45 (1) (i) and (2) of the Immigration Act, [Cap. 54 R: E 2016], and Unlawful presence in the United Republic of Tanzania contrary to section 45 (1) (i) and (2) of the Immigration Act, [Cap. 54 R.E 201]. The particulars of the charge are to the effect, 1st appellant and 11 Others being **citizens of Burundi and Rwanda** on unknown date and time, entered the United Republic of Tanzania through unknown border in Biharamulo District without Passports or any legal document allowing them to enter in Tanzania.

It was further alleged that 1st appellant and 11 Others **being citizens of Burundi and Rwanda**, on different dates and time at Nyakahura Village within Biharamulo District were found in the United Republic of Tanzania without Passports or any legal document allowing them to stay in Tanzania.

The records show that the charge was read to them each pleaded guilty to the two counts, and when the facts read and explained to them, each admitted the truth and correctness of the facts. Basing on such plea, the 1st appellant herein was convicted and sentenced to pay a fine of **Tshs. 500,000/=** or one year imprisonment on each count.

Erick James and Paulo Alexander who for the purpose of this appeal shall be referred to as the 2nd and 3rd appellants respectively and the 1st appellant herein were jointly charged with the 3rd count, to wit; Unlawful hosting Illegal Immigrants contrary to section 46 (1) (b) of the Immigration Act, Cap. 54 R: E 2016. It was alleged that the 1st, 2nd and 3rd appellants **being citizens of Tanzania**, on 19/05/2021 in Biharamulo District were found unlawfully hosting illegal immigrants.

The records show that, when the charge was read and explained to them, each pleaded guilty to the charge and when the facts of the case were read to them, each admitted the truth and correctness of the facts, as a result, each was convicted and sentenced to pay a fine of Tshs. 20,000,000/= or twenty (20) years imprisonment.

The court further ordered that the 1st appellant and others eleven (11) people who are not parties to this appeal be repatriated to their respective countries.

The 3rd appellant was aggrieved by the conviction and sentence therefore, registered Appeal No. 28 of 2022 while the 1st and 2nd appellants were also aggrieved by the conviction and sentence therefore, filed a joint Petition of Appeal which was registered as Criminal Appeal No. 29. The two appeals were subsequently consolidated. The grounds of appeal by the appellants raise one major ground; **"that the trial court erred in law to convict and sentence the appellant basing on unequivocal plea."**

At the hearing of this appeal, the appellants appeared in person unrepresented while the Respondent/Republic was represented by Mr. Amani Kilua, learned State Attorney.

The first appellant stated that he does not dispute to have entered the United Republic of Tanzania Unlawfully since he is a citizen of Rwanda. He added that he was an illegal immigrant therefore, he could not have been charged with the offence of unlawful hosting illegal immigrants. He contended that, the error renders the charge incurably defective.

He disputed to have pleaded guilty to the offence unlawful hosting illegal immigrants. He also complained that he was not given an interpreter therefore, the he was not made to understand the charge and facts read to him.

The 2nd appellant Erick James stated that, they were not given an interpreter therefore, he was not made aware of the charge and the facts read to him. He added that, he was later shocked when he knew while in prison that he was in the trial court he was treated as a Tanzanian while for sure, he is a Burundian who entered Tanzania unlawfully, therefore

there is no way, he can be said that he was hosting illegal immigrants while he was also an illegal immigrant.

The 3rd appellant Paul Alexander stated that the plea was unequivocal plea since; he was promised by the police that if he agrees everything, he would be released.

In reply, the State Attorney, Mr. Amani Kilua submitted that where the accused person had been convicted upon his or her own plea of guilty; he has no right to appeal against conviction except on the illegality of the sentence. He made reference to section 360 (1) of the Criminal Procedure Act, [Cap. 20 R.E 2022]. He added that, the record shows that the plea of the appellants was unequivocal plea. He urged the court to be guided by the court of Appeal decision in the case of **Michael Adrian Chaki versus Republic**, Criminal Appeal No. 399 of 2019 (unreported) in deciding whether the plea of the appellants was equivocal or otherwise.

I have considered the grounds of appeal, the appellant's submissions and submissions by the respondent side. Now, the issue for determination is whether the appellant's plea was unequivocal plea or otherwise.

Generally, a person convicted of an offence on his own plea of guilty is barred from appealing against conviction. He can only appeal against the extent or legality of the sentence imposed. That is in terms of section 360 (1) of the Criminal Procedure Act, [Cap. 20 R.E. 2022]

The same provides that;

"No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence"

However, for the court to convict the accused based on a plea of guilty and punish him for the offence charged without trial, the plea must be complete, unequivocal and unambiguous.

For a plea to be unequivocal for purposes of conviction, there are conditions that the convicting court must ensure that they exist conjunctively at the time of conviction. In the case of **Michael Adrian Chaki versus The Republic**, (Supra) the Court of Appeal stated that there cannot be an unequivocal plea on which a valid conviction may be founded unless these conditions are conjunctively met:

- 1. The appellant must be arraigned on a proper charge. That is to say the offence, section and the particulars thereof must be properly framed and must explicitly disclose the offence known to law;*
- 2. The court must satisfy itself without any doubt and must be clear in its mind, that an accused fully comprehends what he is actually faced with, otherwise injustice may result.*
- 3. When the accused is called upon to plead to the charge, the charge is stated and fully explained to him before he is asked to state whether he admits or denies each and every particular ingredient of the offence. This is in terms of section 228 (1) of the CPA.*
- 4. The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged.*

5. The accused must be asked to plead and must actually plead guilty to each and every ingredient of the offence charged and the same must be properly recorded and must be clear.

6. Before a conviction on a plea of guilty is entered, the court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged. See also Laurent Mpinga vs Republic [1983] TLR 166 and Karlos Punda versus Republic (Supra)

I will now examine at close range and with keen attention, the proceedings of the District Court of Biharamulo dated 20/05/2021 to find out whether the above conditions were met, and determine whether it was proper for the District Court to convict and sentence the appellants.

Firstly, in the matter at hand, the charge was not well-drawn in compliance with section 132 of the Criminal Procedure Act, Cap 20 R: E 2019 hence defective charge because it does not contain particulars of the offence capable of affording the appellants with reasonable information as to the nature of the offence charged. The charge under which the appellants were charged reveals the particulars of the 1st appellant as follows;

"Name: Nzobonimpa Abinadabu

Age: 35

Nationality: Rwandese

Tribe: Hutu

Religion: Christian

Occupation: Peasant

Address: Rwanda"

As per trial court record, the initial words of the 3rd count were very clear that the 3rd count was for the 13th and 14th accused persons only who are now the 2nd and 3rd appellants. Let the record speak for itself;

"3^d Count for the 13 and 14th accused persons"

STATEMENT OF THE OFFENCE

Unlawful hosting Illegal Immigrants contrary to section 46 (1) (b) of the Immigration Act, Cap. 54 R: E 2016"

However, the particulars of the offence included the 1st appellant who was also an illegal immigrant on allegation that he was found hosting illegal immigrant. The particulars of the offence were coached as follows;

"That, Erick James, Nzobonimpa Aminadabu and Paulo Marco are charged being citizens of Tanzania, on 19/05/2021 in Biharamulo District , Kagera Region were found unlawfully hosting illegal immigrants whereby Erick James was found unlawfully hosting his wife Naminani Erali and Nzabonimpa Abinadabu was found unlawfully hosting his wife Kaetesi Odetha and also Paulo Alexander Marco was found unlawfully hosting Oscar Mohamed Edward, Ndayishimiye Elisa, Sajukumiza Richard and Ruassa Daniel Ndeanzake in the United Republic of Tanzania without any legal permit"

The court did not bother to see whether the charge was proper or not. Basing on what has been stated here in above; it is my considered view that the charge was defective.

Apart from being defective, the record is silent as to the language used by the court to read the charge and the facts of the case to accused persons including the appellants herein. The record reads;

"Charge read over and explained to the accused person in the language understood who is asked to plea thereto"

The 1st and 2nd appellants have complained that they were not given an interpreter since they were familiar with neither Kiswahili nor English. Despite the fact that the 1st and 2nd appellants have stayed in prison since May 2021 where the medium of communication is Kiswahili, I have observed them herein court, and with no doubt, they are still facing language problems. Considering the nature of the offence and nationality of each appellant and in absence of specification as to what language was used and whether each appellant was familiar with it, it cannot be said with certainty that the charge and the facts of the case were read to the appellants' own languages.

In the upshot, the pleas of the appellants were equivocal plea for failure to comply with the procedure laid down in the case of **Michael Adrian Chaki versus The Republic** (Supra). It is a principle that where the plea is equivocal, conviction must be quashed and sentence set aside, and then, the case file has to be remitted back to the trial court for the plea to be taken afresh but where the charge is also defective like in this case, the remedy is to quash conviction, set aside the sentence and set the appellant at liberty unless otherwise held for any other lawful cause.

In the event, the conviction and sentence merited against the appellants by the trial court are hereby quashed and set aside. I order an immediate

release of the 3rd Appellant **PAULO ALEXANDER** unless held for any other lawful cause not connected to this case.

It is subsequently ordered that since the 1st appellant **NZOBANIMPA ABINADABU** is a citizen of Rwanda while the 2nd appellant **ERICK JAMES** is citizen of Burundi who both had entered the United Republic of Tanzania unlawfully and remained therein unlawfully, and upon conviction and sentence, have been in prison since May 2021, and since the charge was defective, I direct that each should be released from prison and repatriated to his country of origin according to law as soon as reasonably practicable.

Dated at Bukoba this 31st day of October, 2022



E.L. NGIGWANA

JUDGE

31/10/2022

Court: Judgment delivered this 31st day of October, 2022 in the presence of the Appellants, Mr. Amani Kilua learned, State Attorney for the Respondent/Republic, Hon. E. M Kamaleki, Judges' Law Assistant and Ms. Sophia Fimbo, B/C.



E.L. NGIGWANA

JUDGE

31/10/2022