

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

AT BUKOBA

CRIMINAL APPEAL NO. 111 OF 2021

(Originating from Criminal Case No. 238 of 2021 of District Court of Ngara at Ngara)

EGIDIUS SAMWEL-----1ST APPELLANT

SANCHOYI ELIAS-----2ND APPELLANT

VERSUS

REPUBLIC-----RESPONDENT

JUDGEMENT

Date of Last Order: 10/03/2022

Date of Judgment: 25/03/2022

Hon. A. E. Mwipopo, J.

Appellants namely Egidius Samwel and Sanchoyi Elias filed the present appeal against the decision of the District Court of Ngara at Ngara in Criminal Case No. 238 of 2021. Appellants were arraigned in the trial District Court for the offence of transporting illegal immigrants contrary to section 46 (1) (c) and (2) of the Immigration Act, Cap. 54. R.E. 2016. Appellants pleaded guilty to the offence and were convicted accordingly. The trial Court sentenced each appellant to pay a fine of Tshs. 20 million or to serve 7 years imprisonment in default to pay fine. As it

was stated earlier, appellants were aggrieved by the decision of the District Court and filed the present appeal.

In his petition of appeal, the Appellant has raised a total of three grounds of appeal as provided hereunder:-

- 1. That, trial magistrate erred both in law and facts for convicting the appellants on defective charge.*
- 2. That, trial magistrate erred both in law and facts for convicting the appellants basing on their equivocal plea.*
- 3. That, trial magistrate erred both in law and facts for convicting the appellants on the facts read to the appellants by the prosecutor which did not at all contain the essential ingredients of any criminal offence.*

On the hearing date, appellants appeared in person. The 1st appellant, being lay persons, prayed for the grounds of appeal found in the Petition of Appeal to be considered by the court. The 2nd appellant submitted that his plea before the court was equivocal because he did not have intention to transport illegal immigrants. The said immigrants were passengers like others and they did not know that the passengers were illegal immigrants. He said that he did not understand the charge sheet as he was hungry and he prayed for all their grounds of appeal to be considered by this court.

In response, Mr. Amani Kirua, State Attorney appearing for the respondent, supported the appeal. His reason for supporting the appeal is that their grounds

of appeal has merits. He said that the charge sheet which they were charged with was defective. The particular of the 1st count did not contain ingredients of the offence. The particular of the offence failed to name the alleged illegal immigrants. The motor vehicle which transported the illegal immigrants did not show its make. Also, the particulars did not specify the country which those immigrants were from. The same to the second count does not state the alleged illegal immigrants came from which country. Section 132 and 135 of the Criminal Procedure Act requires important element of the offence to be contained in the particular of the offence.

The counsel said that appellants' plea was equivocal as the appellants said the car which carried the illegal immigrants was registered as No. 775 BHY while the charge sheet shows in its particulars and that the registration number of the car is T 775 DHY. The facts adduced has to disclose and establish element of the offence charged and the court must satisfy itself without doubt that facts adduced disclosed or established all elements of the offence charge. He cited in support of the submission the case of **Richard Liaga @ Simageni v. Republic**, Criminal Appeal No. 14 of 2020, CAT at Dar Es Salaam, (Unreported), at page 8. He said facts read to the Court did not provides in details how the offence was committed apart from restating the particulars of the offence. Also, the important elements of the offence were not disclosed. He cited the case of **Buhimila Mapabe v. Republic [1988] TLR 179** where it was held that the technical aspect of the

charge has to be explained to the accused person before he is asked to plea thereto.

After hearing submissions from both parties, the Court is called upon to determination whether the appeal before this Court has merits.

As a general principle, a person convicted of an offence on his own plea of guilty is barred from appealing against conviction. The person can only appeal against the extent or legality of the sentence imposed. This is in accordance with section 360(1) of the Criminal Procedure Act, Cap. 20 R. E. 2019 (the CPA). The section provides that:-

"360.-(1) 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, there are circumstances which may render a plea to be equivocal hence a conviction on one's plea of guilty may successfully be challenged by way of an appeal. The Court of appeal in the case of **Karlos Punda vs Republic**, Criminal Appeal No. 153 of 2005 (unreported), did set four factors which will render the plea equivocal. The said factors includes that the plea was imperfect, ambiguous or unfinished; that the appellant pleaded guilty as a result of mistake or misapprehension; that the charge laid at the appellant's door disclosed no

offence known to law; and that upon the admitted facts the appellant could not in law have been convicted of the offence charged.

The Court of appeal illustrated more on the unequivocal plea in the case of **Michael Adrian Chaki v. Republic**, Criminal Appeal No. 399 of 2019, Court of Appeal of Tanzania at Dar Es Salaam, (Unreported). The Court emphasized on the conditions to be met for the plea to be considered as unequivocal. These conditions includes that the appellant must be arraigned on a proper charge and must fully understands what he is actually faced with. The charge has to be stated and fully explained to the appellant before his plea is recorded or before he admit each and every particular ingredient of the offence. The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged and the appellant must be asked to plead to each and every ingredient of the offence charged and the same must be properly recorded. Finally, the court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged before a conviction on a plea of guilty is entered.

In the case at hand, the counsel for the respondent said that the charge sheet was defective and the facts narrated by the prosecution failed to disclose an offence known to the law.

It is a statutory requirement that a charge in criminal case has to contain statement of the specific offence with which the accused is charged together with

such particulars necessary for giving reasonable information as to the nature of the offence charged. This is provided under section 132 of the Criminal Procedure Act, Cap. 20, R.E. 2002 which reads as follows hereunder:-

"132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

The above cited section, makes it mandatory requirement for a charge in a subordinate court to contain statement of the specific offence with which the accused is charged and such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

It is settled that the particulars of the charge shall disclose the essential elements or ingredients of the offence. In the case of **Leonard Mwanashoka v. Republic**, Criminal Appeal No. 226 OF 2014, Court of Appeal of Tanzania, at Bukoba, (Unreported), the Court of Appeal held that:-

"It is settled law that where the offence charged specifies factual circumstances without which the offence cannot be committed, they must be included in the particulars of the offence."

The prosecution has duty to prove that the accused person committed the unlawful act of the offence charged with the necessary intention if required during

hearing. In the same spirit, the particulars of the offence must disclose essential facts of the offence and any intent specifically required by law for the purpose of affording the accused person a fair trial by enabling him to prepare his defence. This was stated by the Court of Appeal in the case of **Isidori Patrice v. Republic**, Criminal Appeal No. 224 of 2007, Court of Appeal of Tanzania, at Arusha, (Unreported).

Appellants in the present case were charged for the offence of transporting illegal immigrants contrary to section 46 (1) (c) and (2) of the Immigration Act, Cap. 54. R.E. 2016. The charge reads as follows:

"1ST COUNT FOR THE 1ST AND 2ND ACCUSED PERSONS

STATEMENT OF THE OFFENCE: *Transporting illegal immigrants contrary to section 46 (1) (c) and (2) of the Immigration Act, Cap. 54. R.E. 2016.*

PARTICULARS OF OFFENCE

That, Sanchoyi Elias and Agidius Samwel are charged on 29th day of October, 2021 during a day time at Sekeseke barrier in Ngara District within Kagera Region were found with illegal immigrants as mentioned in the second count of this charge sheet. The accused were found with illegal immigrants while transporting them and the vehicle used to transport illegal immigrants is registered with No. T 775 DHY and the vehicle is included in the charge sheet.

SECOND COUNT FOR 2ND, 3RD, 4TH, 5TH, 6TH, 7TH, 8TH, 9TH, 10TH, 11TH, 12TH AND 13TH ACCUSED PERSONS

STATEMENT OF THE OFFENCE: *Unlawful presence in the United Republic of Tanzania contrary to section 45 (1) (i) and (2) of the Immigration Act, Cap. 54, R.E. 2016,*

PARTICULARS OF THE OFFENCE

That Ndaikeza Claude, Niyongeko Inos, Shimirimana Philimo, Bigilimana Jamal, Nahovukiye Alexander, Niyonzima Jerome, Manilakiza Odetha, Bazizane Beatrice, Nzeimana Kasilide, Peruce Mahige and Solanji Nakirutimana are charged on 29th day of October, 2021 during daytime at Kasulo Ward in Ngara District within Kagera region were found without passport or any other documents that allowed them to be in the United Republic of Tanzania. "

The above particulars of the 1st count which the appellants were charged with does not disclose important ingredients of the offence. The said particulars does not provide names of the alleged illegal immigrants and it refers to the names in the second count. Unfortunately, the second count is not against the appellant. Accused persons in the second count were arrested in different area from where the appellants were arrested. The particulars shows that the alleged illegal immigrants were arrested at Kasulo Ward in Ngara District while the 1st count shows that the appellants were found with illegal immigrants at Sekeseke barrier. These areas appears to be different. The particulars of the offence in the first count states that the appellants were transporting the illegal immigrants but it

does not say from where and the direction they were headed. The said particulars does not say at all if the appellants had knowledge that they are transporting illegal immigrants. The Court of Appeal in the case of **Christopher Steven Kikwa v. Republic**, Criminal Appeal No. 126 of 2020, Court of Appeal of Tanzania at Dar Es Salaam, (Unreported), held at page 13 that:-

"The prosecution had the onus to establish that the appellant engaged in transporting the aliens knowingly or having reason to believe that they were illegal immigrants."

From above cited case it is important for the particulars of the offence of transporting illegal immigrants to show that the suspect knowingly engaged in transporting illegal immigrants.

Thus, it is clear that the particulars of the offence in the first Count against the appellants does not disclose the name of the alleged illegal immigrants, the place they did take the illegal immigrants and the place they were heading, and the appellants' knowledge that they were transporting the alleged illegal immigrants. This has prejudiced the appellant since the appellant were not in position to prepare their defence.

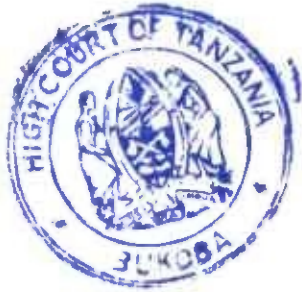
Further, the proceedings reveals that after the charge was read over to appellants, they admitted to transport illegal immigrants by using a motor vehicle with registered No. T 775 BHY. This means there was contradiction between the

identities of the motor vehicle mentioned in the charge which was registered with No. T 775 DHY and the motor vehicle they mentioned to use in transporting the illegal immigrants. The trial Court was not supported to record that the plea of guilty was entered by the appellants since the plea was equivocal. Even the facts narrated by the prosecution after the court recorded appellants' plea of guilty does not disclose the important ingredients of the offence in detail including the appellants' knowledge that they are transporting illegal immigrants.

All those defects in the charge, plea recorded and facts narrated by prosecution vitiates the whole proceedings against the appellants. The counsel for the respondent prayed for the trial to start afresh but in this situation allowing the trial to start afresh is to allow the respondent to fill in gaps which has been revealed in the particulars of the offence and facts narrated by the prosecutor and therefore occasion an injustice to appellants. Retrial should not be ordered where prosecution evidence on record is weak as it was held in the case of **Eliah John v. Republic**, Criminal Appeal No. 306 of 2016, Court of Appeal of Tanzania at Arusha (unreported).

Therefore, I quash the proceedings and conviction by the trial District Court against both appellants and I set aside its sentence and orders. The appellants are discharged and I order for the immediate release of appellants from prison unless they are held for other lawfully cause. Further, I order for the motor vehicle with

registration No. T. 775 DHY make Toyota Town Hiace confiscated and forfeited to the Government to be returned to its rightful owner. It is so ordered.



A.E. Mwipopo

Judge

25/03/2022

The Judgment was delivered today, this 25.03.2022 in chamber under the seal of this court in the presence of the Appellants and in the absence of the Respondent. Right of Appeal explained.



A. E. Mwipopo

Judge

25.03.2022