THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 16 OF 2022

(Arising from Criminal Case No. 115 of 2021 from the Resident Magistrate's Court of Morogoro)

SEYI AYUBU..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last order date on: 07/03/2023

Judgment date on: 14/03/2023

NGWEMBE, J.

This is an appeal against conviction and sentence meted by the trial court. The appellant being dissatisfied with his punishment, has preferred this appeal in this house of justice clothed with eleven (11) grievances. It is evident that before the trial Resident Magistrate's Court of Morogoro, a charge comprising three counts was laid against thirty (30) accused persons; two Tanzanian Citizens (the appellant as 1st accused) and Kanuti Stephano Kanuti (30th accused) including other 28 Ethiopian nationals (2nd to 29th accused) for three offences contrary to the provisions of **The Immigration Act, Cap 54 RE 2016.**

The appellant faced the first count of transporting illegal immigrant's contrary to section 46 (1)(c) and (2) of **The Immigration Act,** which was alleged to have been committed on 7th December 2021. The 2nd to 29th accused were charged with unlawful presence in the United Republic of Tanzania, Contrary to section 45 (1) (i) and (2) of

the Immigration Act. The third count was for the 30th accused for aiding persons in committing immigration offences contrary to section 45 (1)(p) and (2) of **The Immigration Act.**

The evidence advanced by the respondent was that, police at Mikumi were informed on availability of a motor vehicle at Msimba Mikumi Morogoro – Iringa Road which faced a mechanical fault and offloaded illegal immigrants and hid them in a bush. Police officers went to the scene of crime and found the appellant who was a driver. Inspected the vehicle and questioned the appellant, who admitted to have transported illegal immigrants from Ethiopia. He took those Police Officers to the bush about 500 meters where he did hide those illegal immigrants. When interviewed, he categorically admitted to have taken those illegal immigrants from Chalinze heading to Iringa while transporting cement for Iringa Municipal Council and Makambako Depot.

The appellant was convicted and sentenced to pay Tshs 20,000,000/= fine or twenty (20) years imprisonment. The 2nd to 29th accused were convicted as well for plea of guilty and were sentenced to TZS 1,000,000/= fine each or to serve 2 years imprisonment, while the 30th accused was found not guilty, hence acquitted. The appellant was determined to challenge his conviction and sentence, filed notice of intention to appeal within time and lodged his eleven (11) grounds of appeal timeously. For convenient purposes, those grounds melts into three namely: -

1) That the trial court erred in relying on exhibit P1, P2 and P4 which were admitted in contravention of the legal procedures;
2) That the trial court disregarded the defence case; and
3) That the prosecution evidence was inconsistent and did not prove the case beyond reasonable doubt.

On the hearing of this appeal, the appellant appeared in person while the Republic was represented by a learned State Attorney. On 25/07/2022, this court ordered the matter be heard by written submissions, unfortunate the parties dishonoured the scheduling order. Had the parties obeyed the scheduling order, the judgment would have been delivered since 26/08/2022. But for the interest of justice, this court vacated its order, in lieu thereof hearing *viva voce* was ordered, which was conducted on 6th and 7th March 2023.

During hearing, the appellant who is unrepresented and layman, did not have specific submission to the grounds so raised, instead he made a general prayer that his eleven grounds of appeal be considered by this court, decision be entered in accordance with the law and find him not guilty.

However, extracting from his petition of appeal, the appellant complaints fall within the first ground that, his cautioned statement was illegally recorded as it was taken out of prescribed time of four (4) hours from arrest and PW1 who recorded the statement failed to accord him basic rights such as having relatives present when recording his statement. He alleges that, the statement was admitted despite his objection which was again unprocedural. Exhibit P2 (TRA Form) was tendered by an incompetent witness because he was not a TRA Officer. Exhibit P4 (the vehicle Reg No. T552 DNG and trailer No. T434 DPB) was not to be relied upon by the court as the said immigrants were not found inside the vehicle. Lastly, exhibit P4 so relied upon by the trial magistrate had no seizure certificates connecting the appellant to the offence and no independent witness was present during seizure.

In respect of the second ground, as I gather from his petition, he laments that the trial court convicted him based on the 30th defendant's evidence who was not an eye witness while ignoring appellant's defence.

It is the appellants contention on the last ground, that the case was not well investigated and no proof beyond reasonable doubt was attained. Proceeded that, PW2 who arrested the appellant without warrant, his evidence was unreliable. PW1's evidence was imagination, as he and PW2, altogether did not see the 28 illegal immigrants inside the lorry, hence their evidence is hearsay. As such the trial magistrate erred to convict and sentence the appellant on a case that was not proved beyond reasonable doubt.

Ms. Vestina Masalu, learned State Attorney who appeared for the Republic strongly opposed the appeal by submitting that the prosecution proved the offence beyond reasonable doubt. She made a survey of the prosecution evidence that PW2 went to the scene of crime and found the appellant who took him to the place where he did hide those illegal immigrants. The illegal immigrants led PW2 to the lorry and stated clearly that they were travelling in that motor vehicle by the appellant's aid. Exhibit P1 is also to that effect.

Ms. Masalu advanced her argument in respect of ground one that exhibit P1 was properly admitted in court as per page 32 of the proceeding. PW1 tendered exhibit P2 as per page 16 of the proceedings. PW1 was a competent witness to tender that exhibit. Proceeded to cite the case of **DPP Vs. Mirzai Pirbaksh@ Haoji and Others, Criminal Appeal No. 493 of 2016** on competence of witnesses in tendering exhibits.

Added further in respect of ground one that search and seizure in state of emergency may be made without certificate of seizure. She referred this court to the case of **Geofrey Kitundu and another Vs. R Criminal Appeal No. 96 of 2018 (CAT).**

Submitting on ground two, insisted that the appellant was given all his rights to defend, but he failed to shake the prosecution evidence.

Therefore, the whole appeal should be dismissed, and prayed this court to uphold the trial court's conviction and sentence.

This being a first appellate court, it is bound to re-evaluate the evidence and make its findings therein. But it cannot vary the trial court's finding on matter facts unless there is misapprehension of fact or law resulting into miscarriage of justice. The case of **Omari Ahmed Vs. Republic [1983] T.L.R. 52** held: -

> *"The trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a reassessment of their credibility."*

Following the relevant guidance alluded above, this court will determine issues raised therein. The first ground is on improper procurement and admission of exhibits P1, P2 and P4. The appellant argued that exhibit P1 was obtained illegally by contravening the requirement of four (4) hours rule under **The Criminal Procedure Act, Cap 20 RE 2019.**

The general rule is that, where an exhibit is admitted in contravention of the mandatory legal procedure, it must be expunged from the records. The Court of Appeal in the case **Emanuel Malabya Vs. R, Criminal Appeal No. 212 of 2004 (unreported)**, observed on contravention of the legal requirement in recording statements of suspects as follows: -

> *"The violation of section 50 is fatal and we are of the opinion that section 53 and 58 are on the same plane. These provisions safeguard the human rights of suspects and they should therefore not be taken lightly or as mere technicalities. We therefore expunge exhibit PI."*

The rationale is to ensure that suspects are not prejudiced in arrest, investigation and trial. It was emphasized in **Hamisi Mbwana Suya Vs. R, Criminal Appeal No. 73 of 2016** that: -

> *"Compliance with the requirement of law in interviewing suspects under police custody is an issue which is not to be taken lightly because of its sensitivity that, it deals with rights of the suspects"*

From the trial court proceedings, exhibit P1 (caution statement) was recorded after expiry of seven days from the appellant's arrest. He was arrested on 07/12/2021 and interviewed on 14/12/2021. Further revealed that, the appellant was kept at Mikumi Police Station and on 14/12/2021 was sent to the Regional Immigration Office, where he was immediately interviewed. In such circumstance the question is whether the cautioned statement was recorded in contravention of the law. According to PW1 testimonies, the seven days lapsed due to police officers conducting investigation.

Considering the circumstance surrounding this case, I think despite the fact that section 50 (1) provides mandatory four hours' time for an accused person to be interviewed, a balanced consideration should be made based on the circumstances of each case. Section 50 (2)(a) of **The Criminal Procedure Act, [Cap 20 RE 2019],** is quoted verbatim hereunder: -

> **Section 50 (2)** *"In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence-*

(a) while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation"

Considering the true meaning and intention of this provision in line with the account given by IPW1, I find serious doubt on failure of Police to hand over the accused to the relevant authorities until lapse of seven days. I understand taking the appellant to the Immigration Officers would not interfere with police investigation if well devised. On the other hand, I have considered that, the one who recorded the cautioned statement (exhibit P1) was not among the police officers, but from the Immigration Office, who recorded it immediately after they had the appellant under their custody. Had the cautioned statement been recorded by police officer, I would have different opinion, but since same was recorded timely by the relevant authority that is immigration officer, obvious such exhibit must stand. Therefore, exhibit P1 was properly procured and thus its admissibility was proper.

Regarding exhibit P2 (letter from TRA establishing ownership of the motor vehicle), was tendered by PW1. Correctly as the appellant contends, PW1 was not a TRA officer. The contention that PW1 was not competent to tender the said letter from TRA because he was not a TRA officer, such assertion is relevant based on the general principle that the author of a document is competent to tender it in court for court use. However, the law provides an exception, that for a person to be a competent witness to tender an exhibit in court, it is not necessary that such person must be a maker of the document, but knowledge, possession and being involved with the said document in any other capacity even being an addressee entitles such person to tender it,

correctly as Ms. Masalu observed. In the case of **DPP Vs. Mirzai Pirbakhishi @ Hadji & 3 Others it was held,** that: -

"The test for tendering exhibit is therefore whether the witness has the knowledge and he possessed the thing in question at some point in time albeit shortly."

In this case, PW1 was an addressee of the letter and the appellant did not object to the admission of exhibit P2 as per the proceedings. Unfortunate this point is likewise defeated as unmerited.

Considering exhibit P4, the appellant lamented that, there was no witness who testified to have seen the illegal immigrants coming from his vehicle (exhibit P4). This argument, in my considered view, does not entail admissibility but one of evaluation. Consideration is paid also to the proceedings where the appellant had no objection in its tendering.

Regarding certificate of seizure in respect of the motor vehicle (exhibit P4), search warrant and warrant of arrest, the proceedings truly show that no certificate was produced in accordance with section 38 of **The Criminal Procedure Act (supra)**. It was necessary for the police officers to follow the procedure despite the fact that exhibit P4 was stationary and tendered while at the scene. The rationale of warrants and certificates is to avoid the possibility of fabrication and planting evidence to incriminate innocent persons. This was rightly held in the cases of **Selemani Abdallah and Others Vs. R, Criminal Appeal No. 354 of 2008, CAT** and **Shabani Said Kindamba Vs. R, Criminal Appeal No. 390 of 2019.**

However, the failure to issue search warrant and seizure certificate, was not material and did not result into miscarriage of justice. There was no dispute in respect of exhibit P4 and that the appellant was driving the motor vehicle on the same day. The question of planting exhibits would thus not arise. The complaint that he was arrested

without warrant is equally without point. I have considered circumstances that led to search, seizure and arrest of the appellant and find that they were not favorable for the police officers to have the warrants and certificates with them. In such a situation the law allows to act as they did. There are several precedents to that effect such as, **Samson Mzamani Vs. R, [2002] TLR. 79 (HC), Wallenstein Alvares Santillan Vs. R, Criminal Appeal No. 68 of 2019, CAT at Dsm** and **Maluqus Chiboni @ Silvester Chiboni and John Simon Vs. R, Criminal Appeal No. 8 of 2011** are among the cases that expound at length circumstances where arrest or search can be conducted without warrant. In **Maluqus Chiboni** also followed in **Wallenstein,** the Court observed the following: -

> *"We are aware of the law governing search warrants and seizure (Part IIA (d) of the CPA, Cap 20 R.E 2002 particularly section 38 and 42, section 38 and 40 require generally that a search warrant be issued to a police officer or other person so authorised, before such officer or person executes the search. However, under exceptional circumstances, a police officer may conduct search and seizure without warrant. Such circumstances are listed under section 41 and 42 of the CPA Cap 20. Relevant to this case are the provisions of section 42 (1)(b) of Cap 20.*

Likewise in **Geofrey Kitundu's** case, the Court of Appeal despite emphasizing on evidence of chronological documentation and paper trail showing the seizure, custody, control, transfer analysis and disposition of an exhibit alleged to have been seized from the accused, it maintained that where the environment is not ideal and there is no possibility of mistaken identity, the same cannot be a bar against admissibility of exhibits. It specifically held: -

"Unlike in that case where the items were seized in the accused's premises, in this case the item (the gun) was shown by the 2nd appellant in the bush in which case even section 38 (1) of the CPA could not have applied. Instead, section 42 of the CPA could cater for the situation as the seizure was under emergency. And, looking at the item involved, in our view, it is not among items which could easily change hands or be tempered with."

In that case the court proceeded to observe that the requirement may be relaxed in situations where items involved may not change hands easily or cannot be tempered with.

In this appeal, section 42 (1) of **the Criminal Procedure Act (supra)** fits the most. It allows an officer to enter and conduct search and seizure where need arise, even without warrant when under emergence. I agree with the learned State Attorney in this aspect that exhibits P1, P2 and P4 were admitted procedurally and thus, the trial court was entitled to make use of them. This ground of appeal is therefore dismissed.

In the second ground, the appellant contended that the trial court disregarded the defence case. His defence was created in the theory that when he was repairing his vehicle, police officers came and inspected his vehicle and then took him to about 500 meters away where they found 28 illegal immigrants. This narration and the defence of 30th accused are found at pages 4 - 6 of the trial court's judgment. Then at page 6, first paragraph, the trial court observed: - *I have also considered the 1st accused defence, however, it does not cast any colour of doubt on the strongest prosecution evidence.*

Having read the trial court's judgment, I found that the evidence of both, the appellant (first accused) and 30th accused were considered

squarely. It is clear that the trial court did not seem to have ignored the defence case, but analyzed all the evidences laid before it. This ground bears no merit same is dismissed.

The last question is whether the offence against the appellant was proved beyond reasonable doubt. The rule is that the burden of proof is on the prosecution and generally, the burden does not shift, the case of **Ali Ahmed Saleh Amgara Vs. R, [1959] EA 654** and **Christian s/o Kaale and Rwekiza s/o Bernard Vs. R, [1992] TLR 302** are among the earlier cases on the principle. What amounts to proof beyond reasonable doubt was held in the cases of **William Ntumbi Vs. Director of Public Prosecutions, (Criminal Appeal 320 of 2019) [2022] TZCA 72** and **Magendo Paul & Another Vs. R, (1993) T.L.R 219** held: -

> *"For a case to be taken to have been proved beyond reasonable doubt, its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed"*

Both parties being aware of the law as above, have had a serious rival argument on the issue. While the appellant stood firm that the offence was not proved, the Republic is steadfast on the fact that the proof was beyond reasonable. This being the first appeal as earlier observed, the court has re-evaluated the evidence before the trial court in order to be able to answer this pertinent issue.

The evidence and proceedings before the trial court covers the following. *One:* the appellant on the fateful date was the driver of a motor vehicle make DAF No. T 522 DNG with trailer No. T 434 DPB which vehicle got breakdown at Msimba, Mikumi Iringa road. *Two:* Just around 500 meters from where the vehicle got breakdown, 28 illegal immigrants were found hiding. *Three:* All the illegal immigrants admitted

that they were travelling by the said motor vehicle which was being driven by the appellant. The three facts are not disputed at all.

Apart from the above, it was strongly established by PW2 that when the appellant was questioned at the scene, he admitted that he was transporting the illegal immigrants from Coastal region to Iringa and actually led the police to the bush where the immigrants were hiding, about 500 meters, the immigrants who also positively stated that they were travelling through the appellant's vehicle. The same facts were found in exhibit P1(cautioned statement) which is more elaborate and much linked to what the prosecution witnesses adduced.

In similar way, the accused persons from 2nd to 29th, admitted to have been travelling in the motor vehicle driven by the first accused (appellant). Usually, the confession by the co-accused deserves consideration by the court in the case of another accused though it cannot in itself ground conviction unless the court has warned itself before relying on the same. Section 33 (1) of the **Evidence Act**, Cap 6 RE 2019 provides clearly on the position thus: -

> *"Section 33. -(1) When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons is proved, the court may take that confession into consideration against that other person."*

The above provision has been followed in a number of cases by this court and The Court of Appeal, including **Asia Iddi Vs. R,** [1989] T.L.R 174 (HC), **Pascal Kitigwa Vs. R,** [1994] T.L.R 65 (CA). The 2nd to 29th accused persons pleaded guilty on the offence that was directly linked to that which the first appellant was charged. I take regard of the

confessions together with all other evidences adduced before the trial court.

Having analyzed the evidences on record, this court finds that the offence of transporting illegal immigrants contrary to section 46 (1) of **Immigration Act [Cap 54 RE 2016]** was proved against the appellant beyond reasonable doubt. This takes the court to dismiss the last ground.

The failure by the police to hand the appellant over to the Immigration Office, search and seizure without warrant under the circumstances were justified and did not occasion any prejudice to the appellant. The sentence awarded is within the limits of the law, such that this court possesses no valid reason to disturb. The conviction, sentence and orders issued by the trial court are upheld. Consequently, this Appeal is dismissed entirely.

Order accordingly.

Dated at Morogoro in chambers this 14th day of March, 2023.

P. J. NGWEMBE

JUDGE

14/03/2023

Court: Judgment delivered in chambers this 14th day of March, 2023, **before A.W. Mmbando,** DR in the presence of the appellant and Ms. Vestine Massawe, State Attorney for the respondent/Republic.

Sgd: A.W. Mmbando

DEPUTY REGISTRAR

14/03/2023

Right of appeal to the Court of Appeal explained.

Sgd: A.W. Mmbando

DEPUTY REGISTRAR

14/03/2023

I Certify that this is a true and correct copy of the original

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Deputy Registrar

Date 16/3/23 at Morogoro