THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO 56 OF 2023

(Originating from Criminal Case No 10 of 2023 in the Resident Magistrate's Court of Mtwara at Mtwara Hon. C.T. Mnzava PRM)

PHILIPO OWUOR MSONGO.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

21st & 30th August 2023

LALTAIKA, J.:

The appellant herein **PHILIPO OWUOR MSONGO** was arraigned in the District Cour of Mtwara at Mtwara charged with the offence of Unlawful Presence within the United Republic of Tanzania contrary to section 45(1)(i) and (2) of the **Immigration Act [Cap 54 R.E. 2016].**

It was the prosecution's assertion that on 12th day of November 2020 at Heritage Primary School area within the Municipality in Mtwara Region, the appellant was found unlawfully present within the United Republic of Tanzania, without being in possession of a valid passport, visa or resident permit.

When the charge was read over and explained to the accused, he pleaded not guilty. This necessitated conducting of a full trial. On its completion, the trial court was convinced that the prosecution had proved its case beyond reasonable doubt. The court convicted the appellant as charged and sentenced him to pay a fine of **TZS 500,000/- (Five Hundred Thousand Only)** or to **imprisonment for a term of one year**.

Dissatisfied, the appellant has appealed to this court by way of a petition of appeal containing 4 grounds. I take the liberty to reproduce them as hereunder:

1. *That the trial court erred in law and facts by convicting and sentencing the Appellant while prosecution failed to prove the case beyond reasonable doubt.*
2. *That trial court erred in law and facts by convicting and sentencing the appellant while the appellant proved on the balance of probabilities that he is a citizen of Tanzania before the trial court.*
3. *That the trial court erred in law and fact by convicting and sentencing the appellant without evaluating the evidence properly.*
4. *That exhibit P1 was improperly admitted by the trial court as the trial within a trial was improperly conducted.*

When the appeal was called for hearing on the 21st of August 2023, the appellant was present while enjoying legal services of **Mr. Rainery Songea, learned Advocate**. The respondent, Republic, on the other hand appeared through **Mr. Melchior Hurubano, learned State Attorney**.

Submitting in support of the appeal, Mr. Songea chose to start with the fourth ground of appeal. He stated that having gone through the proceedings, he had noted that the prosecution had paraded two witnesses. The appellant was the only defense witness, and three exhibits were tendered, including the cautioned statement (P1). Since the appellant had

objected to the admission of the exhibit, Mr. Songea recounted, the court conducted a trial within a trial.

Referring to page 9 of the trial court's proceedings, Mr. Songea asserted that the appellant was also supposed to offer his evidence, but the court did not follow the procedure in doing so. Going deeper into the alleged irregularities, Mr. Songea asserted that the appellant did not take an oath, nor were his particulars recorded. Nevertheless, stated the learned Advocate, the same evidence was used by the court to compose its ruling and proceeded to admit the cautioned statement as Exhibit P1 as per page 11 of the proceedings.

Recording the evidence without adhering to the procedure, Mr. Songea opined, makes it difficult to say the same was properly admitted. To bolster his argument, the learned Counsel referred to several authorities that require a witness to take an oath, including **CATHOLIC UNIVERSITY OF HEALTH AND ALLIED SCIENCE (CUHAS) v. EPIPHANIA MKUNDE ATANAS** CIVIL APPEAL NO 257 OF 2020 CAT AT MWANZA.

Mr. Songea then mentioned that when PW2 was testifying, he tendered two pieces of evidence, namely the seizure certificate (P2) on page 15 and several certificates as per page 16 of the proceedings. He expressed no problem with Exhibit P2 but raised an issue with Exhibit P3. The challenge is that they were not read aloud in court. Inability to read out the exhibits, as per the authorities of this court and the CAT, means they were not properly admitted. He cited the cases of **ROBINSON MWANJISI AND 3 OTHERS V. R.** [2003] TLR 218, **ENEO KILIMO & Another v. REPUBLIC**

Crim Appeal No 206 of 2017 CAT Iringa and LUKAS **NYIRENDA KALIKENE v. REPUBLIC** Crim App No 81 of 2021 HCT, Moshi. In that regard, Mr. Songea believes that Exhibit P1 and P3 must be expunged from the court records.

Having pointed out the above alleged procedural irregularities, the learned Counsel recounted that the appellant was charged with **unlawful presence within the United Republic of Tanzania**. In the event that the exhibits mentioned are expunged, only the seizure certificate remains. To this end, Mr. Songea argued that such a certificate alone cannot prove the offense of unlawful presence in Tanzania.

He further argued that, looking at the evidence of the appellant and that of the respondent, the charge was triggered by the fact that the appellant had studied in Kenya. He had no document to prove that he crossed the border for that purpose. The appellant had also explained how he received his education in Kenya and worked in Tanzania.

The learned Counsel explained how the matter was instituted in court. He alleged that the reason was the difference between him and his employer, namely **SALEM SCHOOLS** located in Mtwara. He had been working in the same school since 2017. To support his argument, the learned counsel referred this court to page 21 of the trial court's proceedings where the appellant had explained that he had a civil claim against his employer that was decided in his favor. As he got a job with another employer, namely **HERITAGE SCHOOL,** trouble started. The learned Counsel quoted a part of the proceedings that provides:

"My former employer assured me that he will make sure that I leave Mtwara Region. Then in August 2020 I was arrested by Immigration Officers for the second time and then I was arraigned in Court."

Mr. Songea argued that the above statement was not cross-examined, as seen on pages 21, 22, and 23. In that regard, it means the prosecution agreed with the facts. In the event of such grudges, the court is duty-bound to address them in the course of composing the judgment, citing the case of **JAMES MALEBO v. REPUBLIC** Crim Appeal No 531 of 2015 CAT, Arusha. It is Mr. Songea's opinion that the issue could have been handled differently had the court taken into consideration the conflict.

On the third ground, Mr. Songea indicated that the court had failed to conduct a proper analysis of evidence. As the first appellate court that can take on the shoes and analyze the records, Mr. Songea reasoned, it was an opportune moment for this court to reevaluate the same and form its conclusions.

On the second ground of appeal, Mr. Songea opined that the appellant had proved on a balance of probability that he is a Tanzanian. He emphasized that according to the Immigration Act, the burden of proof on citizenship lay with the defendant. Comparing the evidence adduced by both parties, especially upon expunging of P1 and P3, the appellant had proved his citizenship.

Mr. Songea asserted that the prosecution had merely suspected the appellant because of the certificate. Nevertheless, the learned counsel asserted, on page 20 and 21 of the proceedings, the appellant had explained

that **he was born in IKOMA VILLAGE** in **RORYA DISTRICT, MARA REGION**, and he studied at **BUGIRE PRIMARY SCHOOL** and **later went to study in Kenya**. He explained that his parents are both Tanzanians.

In Mr. Songea's opinion, since such evidence was not cross-examined, that means the prosecution agreed. **He is aware that the court relied on the failure to call material witnesses to ground conviction**. Nevertheless, even if the mother was not called, Mr. Songea is satisfied that, on a balance of probability, the appellant had proved that he is a Tanzanian.

Sounding more of a moralist, if not a full fledge saint, Mr. Songea argued that the orders made by the lower court were also difficult to implement. He expounded that the first was to require the appellant to vacate the country within 30 days. Secondly, paying a fine of 500,000 or one year in prison in lieu. Had he failed to get the money, how would he have been able to vacate the country? asked the learned lawyer as he wrapped up his submission in chief.

Mr. Hurubano, on his part, argued that on the first ground of appeal, the appellant claimed that the case was not proved beyond reasonable doubt. He asserted that this ground had no merit because the duty to prove citizenship lies with the accused, and the prosecution only needed to cast adequate doubt, which they successfully did.

Mr. Hurubano pointed out that the appellant had an academic certificate obtained in Kenya and, during interrogation, stated that he had obtained a birth certificate in Kenya. Despite the learned counsel's request to expunge exhibits P1 and P3 (cautioned statement and academic

certificate), Mr. Hurubano argued that expunging these exhibits would also remove the certificate of birth claiming the appellant was **born in IKOMA VILLAGE in RORYA**. He further argued that the appellant's failure to explain how the omission prejudiced him, the curability of the irregularity by **section 388 of the Criminal Procedure Act Cap 20 RE 2022**, and the lack of impact on the evidence as a whole supported the dismissal of this ground.

Regarding the appellant's explanation that he moved out of Tanzania in 2003, completed Primary School in Kenya, and subsequently attended Secondary School and College, Mr. Hurubano contended that this corroborated the information in the certificate of seizure. He insisted that the first ground had no merit and should be dismissed.

On the second ground, Mr. Hurubano highlighted that the appellant claimed **Tanzanian citizenship by birth**. However, he pointed out the appellant's failure to produce a birth **certificate of his parent(s) or a national ID, as required by section 5(2) of the Citizenship Act Cap 357 RE 2002**, to prove that at least one parent was born in Tanzania. Mr. Hurubano argued that the **court was justified in drawing a negative inference** due to the appellant's failure to produce these documents, and therefore, the claim of proving citizenship on the balance of probabilities lacked merit.

Regarding the third ground, Mr. Hurubano agreed with the learned advocate that **this court could reevaluate the evidence but insisted** that the lower court had properly analyzed the evidence. He dismissed the

allegations of grudges, citing suspicions of the appellant being a noncitizen since 2018.

On the fourth ground, concerning the admission of the cautioned statement (P1), Mr. Hurubano agreed with the appellant's dissatisfaction, acknowledging that the defence witness did not take an oath. However, he argued that **this did not exonerate the appellant** since nowhere in the proceedings had the appellant denied his statement in total.

In conclusion, Mr. Hurubano stated that the appellant had only relied on the birth certificate, which had **been prayed to be expunged** and was also marked as not proof of citizenship. He prayed for the dismissal of the appeal for lack of merit.

Mr. Songea, in his rejoinder submission, began by addressing exhibits P1 and P2, stating that the learned State Attorney agreed that the procedure was not adhered to. Mr. Songea challenged the State Attorney's claim that exhibit **3 could be cured by section 388** of the Criminal Procedure Act, arguing that no authority was cited. He urged the court to refer to the case **of LUKA** (supra) p. 10, where the court deliberated on the crucial nature of the exhibits in proving the case beyond reasonable doubt.

Regarding exhibit P1, Mr. Songea pointed out that the State Attorney admitted it was not properly admitted, and he suggested that the remedy was to expunge it. He argued that the court could not continue considering the content, knowing it was improperly admitted, citing support from the CATHOLIC Case (Supra).

The remaining argument focused on whether the appellant had proved Tanzanian citizenship. Mr. Songea asserted that the onus was on the appellant, and he had fulfilled it by explaining that he was born in Tanzania. He referred to the appellant's explanation that he left for Kenya in 2003, thus proving the first element. Regarding the parents, Mr. Songea highlighted the appellant's testimony that both his parents were Tanzanians, supported by a section read out by the State Attorney. He argued that if the prosecution had doubts, they would have cross-examined.

Mr. Songea contended that the appellant was arraigned in court because of the certificate and emphasized that studying outside one's country does not negate one's citizenship, especially considering the improperly admitted certificates.

In addressing the suspicion in 2018 and the appellant being arraigned after winning a civil case against his former employer, Mr. Songea suggested that grudges might contribute to the case. He acknowledged the court's authority to evaluate the entire evidence and prayed for a finding that the appellant had proved his Tanzanian citizenship.

I have considered the grounds of appeal and submissions by both parties. I am not going to take the conventional way to determine the merits of this appeal. Apparently, I intimated to counsel after the hearing that it was doubtful whether the appeal was helpful to the appellant, or it served an academic function only. Unfortunately, that was after the laborious work of hitting my computer keyboard to document their submissions.

This judgement seeks to challenge counsel to go beyond the ordinary in addressing legal challenges of their clients. Such an approach, in my opinion, would not only address the real problem of the client but also widen our jurisprudence. To borrow the words of Lord Denning MR, in **PACKER V. PACKER** [1953] EWCA Civ J0511-3

> *"If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both."*

As the above legal exchanges between counsel for both parties indicate, this court is invited to deal with technicalities that have almost nothing to do with the appellant. Let me expound: the appellant's nationality has been questioned by Immigration authorities. He was arraigned in court, charged, convicted, and sentenced accordingly. If this court is to accept Mr. Songea's version of the story that the appellant's conviction was grounded on improperly admitted evidence would that make a difference to his client? The answer is no. The fine (TZS 500,000/=) has already been paid and it is inconceivable that he can still be sent to jail for the same sentence.

If I go by the respondent counsel's submission, would that mean an invitation to this court to deal with an **abstract matter** since the appellant had in fact paid the fine in lieu of imprisonment? Would this court alter the status of the appellant's nationality? The answer is no. Allowing or disallowing a criminal appeal does absolutely nothing to prove one's nationality.

Be it as it may, this appeal is predicated upon obtaining a court decision that in normal circumstances would not have been issued. This is exactly

what abuse of a court process means. In the landmark Privy Council case of **Debi Baksh v. Habib Shah** AIR 1916 it was held that if the courts use a mere procedure to end up doing something that they never intended to do, it is an abuse of the process of court (See a brief but concise analysis of the case in Ouma, Steven ***Commentary of the Civil Procedure Code*** (Nairobi: Law Africa 2015) p. 15.

Let me be pragmatic and advise the way forward. It appears that the appellant is a fantastic teacher. Highly ranked private schools in Mtwara are competing to win him to as their *bona fide* staff. It appears also that Immigration authorities have been alerted on suspicious nationality of the appellant. Instead of paying lawyers for endless criminal appeals, why shouldn't the appellant go back to Mara, collect the necessary evidence to prove his nationality and bring the story to an end? Wouldn't that give him the peace of mind needed for a teacher to utilize his full potential in building the future of out country?

On the side of the leaned Advocate, the way forward is, in my opinion, pursue an administrative or constitutional remedy instead. Counsel can take a deep breath, wait until the appellant has done what is required of him in terms of proving his nationality. If after all that authorities still insist on deporting him to some other country, counsel can confidently approach this court for a prerogative order against such an action. See **JAMA YUSUPH V. MINISTER FOR HOME AFFAIRS [1990] T.L.R. 80.** This advice is to ensure that the *firebrand* teacher faces the reality instead of spending his time and money on criminal litigation which has nothing to do with citizenship or URAIA.

The modern concept of citizenship can be traced back to **ancient Greece** particularly city states like **Athens**. However, it was narrowly confined free male persons who were active in political life of the city states. The Roman Empire is credited to have taken the concept of citizenship to a broader meaning beyond that of Athenians.

Reading throughout the above ancient historical sources and even not-so-ancient history of enlightenment as well as the American and French Revolutions, issues of citizenship have never been resolved through criminal law. One could, however, invoke their nationality to avoid a more severe punishment.

A good example of such invocation is in the Bible **(See Acts 22:25-29)** The Apostle Paul (St. Paul) was about to be flogged by Roman authorities. He revealed his Roman citizenship, which caused them to reconsider their actions. The passage provides:

> *25 As they stretched him out to flog him, Paul said to the centurion standing there, "Is it legal for you to flog a Roman citizen who hasn't even been found guilty?"*
>
> *26 When the centurion heard this, he went to the commander and reported it. "What are you going to do?" he asked. "This man is a Roman citizen."*
>
> *27 The commander went to Paul and asked, "Tell me, are you a Roman citizen?" "Yes, I am," he answered.*
>
> *28 Then the commander said, "I had to pay a lot of money for my citizenship." "But I was born a citizen," Paul replied.29 Those who were about to interrogate him withdrew immediately. The commander himself was alarmed when he realized that he had put Paul, a Roman citizen, in chains.*

This court cannot interfere with legitimate authorities and processes charged with regulating citizenship. It can only come in when invited to

ascertain the legality of such actions and whether or not, in carrying out their duties related to such actions, the authorities concerned exceeded their statutory power. That is not within the scope of this criminal appeal.

In the upshot, I dismiss the appeal for lack of merit.

It is so ordered.

E.I. LALTAIKA
Judge
30/8/2023

Court

Judgement delivered under my hand and the seal of this court this 30th day of August 2023 in the presence of Ms. Atuganile Nsajigwa learned State Attorney for the respondent, Ms. Radhia Abdalah Luhuna, learned counsel for the appellant and the appellant.

E.I. LALTAIKA
Judge
30/8/2023

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA
Judge
30/8/2023