

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 193 OF 2023

(Originating from the District Court of Mbeya at Mbeya, in Criminal Case No. 90 of 2022)

PAUL NORBERTH MWAMKONGWA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 18/03/2024

Date of Judgment: 11/06/2024

NDUNGURU, J.

This is the first appeal by the appellant, Paul Norberth Mwamkongwa challenging the decision of the District Court of Mbeya at Mbeya rendered in Criminal Case No. 90 of 2022. In that case the appellant together with other five person (not parties to this appeal) were charged with the offence of transporting illegal immigrants contrary to section 46 (1) (c) (g) and (2) of the Immigration Act, Cap. 54 R.E 2016.

The allegation as stated in the particulars of the offence was that on 24th May, 2022 at Mlimanyoka area within the district and region of Mbeya the appellant was found transporting illegal immigrants namely, ABRAHAM HUNDITO, DEGEFE WESEGO, DANIEL OSE, ELIMIYAS SHIFAR AND EYASU NIGALU BELERO, all being Ethiopian Nationals within the United Republic of Tanzania by using a motor vehicle with registration numbers T. 139 BES make Toyota Hiace Super Custom.

The appellant denied to have engaged in commission of the offence. At the end of trial however, the trial court found that the prosecution evidence proved the charge to the hilt. Hence, convicted him as charged and sentenced him for 20 years imprisonment.

The substance of the evidence leading to the conviction of the appellant was that PW1, one E169 D/Sgt Ibrahim Husseni on the material date while in his normal duty with his co-police, DCPL Hamisi who also testified as PW2 and CPL Ally, at Mlimanyoka in the City of Mbeya they found a motor vehicle Super Custom make Noah, with registration No. T 139 BSE with technical problem and the appellant was trying to fix it. Having asked the appellant to open the motor vehicle to inspect what was carried therein they found five illegal immigrants.

That, upon asked, the appellant admitted to have carried them from Iringa to Mbeya where they were to be received by another person.

That, PW1 together with his co-police made a trap to arrest the person who had to receive those immigrants. They thus boarded the appellant's motor vehicle up to Nsalaga area, when disembarked from the appellants motor vehicle, those persons noticed that they were police they thus, took to their heels. Then the immigration officers were informed thereafter reached to the scene where they made a seizure certificate which was admitted as exhibit P1.

It was further evidence that PW3, PF4887 CPL Esther an immigration police and PW4, F6503 DCPL Musa, a police officer at inyala police station on 25/5/2022 recorded the statement of the appellant who admitted to have transporting five Ethiopian Nationals taken from Makambako to Tunduma. Also, that the appellant carried those immigrants in the Motor vehicle with registration No. T 136 BES make Hiace Super Custom. Their respective cautioned statements were however, not admitted for having some legal defects. The two motor vehicles were tendered and admitted as exhibit P2 collectively.

In his defence, the appellant testified that on 24/5/2022, he was on his way from Iringa to Mbeya to attend funeral ceremony with motor

vehicle T 139 BSE Toyota Super Custom HIACE he was stopped by police at Mlimanyoka who were in two motor vehicles. That within few minutes immigration officials also arrived. That he heard them talking that "these are motor vehicles of persons (Gari za wahusika ni hizi hapa)" that without inspecting his motor vehicle, they ordered it to be taken to Inyala Police Station. That, thereat Inyala, immigration official inquired him on where he was taking the immigrants, the fact he denied. That he also denied the offence at the immigration office then he was arraigned to the trial court. The appellant then said that in whole of the prosecution witnesses no one tried to indicate if his motor vehicle involved in transporting the illegal immigrants.

As I have hinted earlier on, at the end of trial the appellant was convicted and sentenced for 20 years imprisonment. Aggrieved, he preferred the instant appeal raising 5 (five) grounds as follows:

1. That the trial court erred when convicted the appellant without regard to the absence of evidence in relation to the motor vehicle involved in transporting illegal immigrants between T 139 BSE and T 423 BAK.

2. That the trial court erred when convicted the appellant without the alleged illegal immigrants called as witnesses to substantiate that they were transported by the appellant's motor vehicle.
3. That the trial court erred in convicting the appellant without drivers and passengers who witnessed the incident called to testify if truly they saw illegal immigrants in the appellant's motor vehicle.
4. That the trial court erred in convicting the appellant without considering that all of the prosecution witnesses were coming from the same authority thus they gave biased evidence for their common goal. That there was no any independent witness who is not police.
5. That the appellant defence evidence was not considered.

At the hearing of the appeal, the appellant appeared in person, unrepresented while Ms. Imelda Aluko, learned State Attorney represented the respondent/Republic. It was orally argued.

Taking the floor to expound the grounds of appeal, the appellant submitted in respect of the 1st and 2nd grounds that, the prosecution did not prove the case at the required standard as the witnesses came from

one office of police while it was immigration case. That it was not enough for the witnesses from one office to prove the offence.

In relation to the 3rd ground, the appellant argued like in the previous grounds but worried why there was no independent witness, a person from citizen. According to him the police had interest on the matter thus failed to call independent witness like a passerby, motorists and other road users.

As to the 4th ground the appellant complained that there were contradictions in the prosecution evidence, regarding his name and the motor vehicle alleged to have used in commission of the offence. He contended that while PW2 referred him as Paul Norbert Mwamkungwa, PW3 mentioned single name of Norbert. Also, that PW4 referred him as Paul Norbert Mwamkongwa he made a reference at page 14 of the proceedings. Also that the other witness said Norbert Paul Mwampamba and Robert Paul Mwamkomba. Further that the motor vehicle was referred to as T135 BSE Toyota Custom, Toyota Mark II BAK and Toyota Noah T139 BSE that the contradictions indicate there was interest the witnesses wanted to serve.

On the 5th ground, the appellant complained that his defence was not considered and therefore injustice to him. That in his defence, he

gave his real name as Paul Norbert Makongwa but the trial court did not consider it. The appellant thus prayed his appeal to be allowed the sentence be set aside and he be released from the prison custody.

In response, while opposing the appeal, Ms. Aluko for the respondent conversed on the 1st ground that it was established at page 11 of the proceedings by PW1 that the vehicle found with illegal immigrants was with registration No. T 139 BES and T 423 BAK was mentioned being a car that was traced as it was mentioned to receive the immigrants and that the same witness directed the trial court where the motor vehicle was kept as an exhibit. Also, that PW1's evidence was corroborated by PW2.

On 2nd and 3rd grounds, the complaint that no independent witness was called apart from police officers, Ms. Aluko contended that it is not the requirement of section 143 of the Evidence Act, Cap. 6 R.E 2022 to have certain number of witnesses. She also relied on the case of **Galus Kitaya v R.** Criminal Appeal No. 196 of 2015 CAT at Mbeya to buttress her contention.

Replying against the 5th ground, Ms. Aluko submitted that the defence evidence was considered. She referred at page 4 of the impugned judgment. Further argued that rejection of defence does not

mean unconsidered. To fortify her argument, she relied to the case of **Issa Said v R**. Criminal Appeal No. 10 of 2024. Ms. Aluko concluded that the raised contradictions about the appellant's name are just minor contradictions and an afterthought. Thus, that the appeal be dismissed.

I have considered the grounds of appeal and the submission for and against the appeal. I am constrained to resolve one major issue of whether or not the appeal has merits. Worth noting from this early stage that, submissions by the appellant are mainly directed to the complaint that there was no an independent witness to corroborate the prosecution witnesses who came from the same office of police and immigration. This complaint is contained in the 3rd and 4th grounds of appeal.

According to the appellant, in the absence of an independent witness, the case against him was not proved to the required standard. Ms. Aluko was of the view that there is no required number of witnesses to prove certain fact, thus that the prosecution witnesses managed to prove the case.

On my part, having gone through the evidence adduced before the trial court, indeed, witnesses were police officers (that is PW1, PW2 and PW4), and the immigration officer (that is PW3). Basically, the appellant

was convicted on the evidence of the two witnesses that is PW1 and PW2. According to their respective evidence, PW1 and PW2 were the ones who found the appellant with the alleged illegal immigrants thus arrested him. PW3 and PW4 were only engaged to record the appellant's cautioned statement which were nonetheless rejected, they were not admitted as exhibit.

It follows the question whether it is fatal to convict a person basing on the evidence of the witnesses from the same office. So, to say police office. I have not come across any law prohibiting such witnesses. It is a rule of thumb that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness. Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. (See in **Goodluck Kyando vs Republic**, [2006] TLR 363, and **Mathias Bundala vs Republic**, Criminal Appeal No. 62 of 2004 (unreported)).

In this matter, apart from the appellant's complaint, he did not say that the witnesses either gave improbable evidence nor their evidence contradicted. I have also revisited the evidence, I did not find it

implausible nor contradicting. Moreover, the appellant said that since the witnesses came from the same office, they had common interest to accomplish, but he did not clarify to shade the light for this court to consider as to what common goal related to and the appellant had never alleged if the case was concocted against him and for what reason. Given these circumstances, I find the complaint in the third and fourth ground bereft of merits thus, dismiss it.

Back to the 1st ground of appeal, the appellant complained that there was no evidence to establish which motor vehicle between T 139 BSE and T 423 BAK was found with illegal immigrants. I have revisited the evidence on the record, the appellant's complaint is unmaintainable. It was clear without either self-contradiction or other contradicting evidence of both PW1 and PW2 that the motor vehicle found with illegal immigrants was the one with registration No. T 139 BES make Toyota Hiace Super Custom. The same motor vehicle was mention by the appellant himself in his defence evidence. Though claiming that, he used the same for his journey.

The other motor vehicle with registration No. T 423 BAK, as correctly argued by Ms. Aluko, it was testified by PW1 that the same was abandoned by those who had to receive immigrants in Mbeya who

run away after noticing the presence of police in the appellant's motor vehicle. This ground of appeal therefore, lacks merit.

As to the 2nd ground of appeal, it was complained by the appellant that the alleged illegal immigrants were not called to testify if they were carried/transported by the appellant. In ascertaining the complaint, I went through the record where I found that the alleged illegal immigrants were arraigned before the trial court with the appellant. Upon the charge read to them, they pleaded guilty hence were convicted and sentenced. In the facts constituting their offence it was alleged that they were found transported in the motor vehicle with registration No. T 139 BSE, which is the same vehicle alleged to be owned by the appellant. In that regard, the trial court findings cannot be faulted on the reason that the alleged illegal immigrants were not called as witnesses. This pertinent ground of appeal is also dismissed.

The appellant's last complaint is that, his defence was not considered. Ms. Aluko held the view that it was considered but rejected. Conversely, I am abreast of the position of the law that, a trial court is obliged to consider evidence adduced by both parties ie, the prosecution and defence evidence before reaching to its decision. Failure to do so is

fatal, see- **Stayoo Kundai vs Republic** [2008] TLR 352 and **Hussein Idd & another vs Republic** [1986] TLR 169.

It should however, be noted that failure to consider defence and rejection of the evidence are two different circumstances, see **Godfrey Mwandemwa vs Republic** (Criminal Appeal No. 409 of 2020) [2023] TZCA 41 (22 February 2023). It was observed that:

"...when the defence version of the matter is not accepted by the court as it happened in this case, that does not amount to failure by the court to consider it."(emphasis added).

In this matter, the trial court considered the appellant's defence but rejected it for not raising any doubt to the prosecution evidence. According to the appellant, had the trial court considered that he gave his proper name as Paul Norbert Makongwa would have held the prosecution evidence to be contradictory. That the witnesses gave different name from his real name. Though this ground is new, as it was not delt by the trial court which otherwise should have not been considered, I find the same unmaintainable or an afterthought. This is because, during preliminary hearing the appellant admitted his particulars including the name of Paul

Norberth Mwamkongwa. For that fact it was not upon the prosecution to adduce evidence for proving that fact. Had the appellant denied the name of Paul Norberth Mwamkongwa as it was in the charge sheet, would have availed an opportunity for the prosecution to find the proper name or the evidence to prove the same. In the premises, this ground of appeal is again dismissed.

In the upshot, with the discussion I have offered above, I find the appellant's entire appeal lacking in merits. Thus, I dismiss it.

Ordered accordingly,




D.B. NDUNGURU
JUDGE
11/06/2024