

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 66 OF 2012

[Appeal from the judgment and decision of the RM's Court, Kisutu
(Nongwa, SRM) in Criminal Case No. 244 of 2011)
Dated 10th March 2012]

DAVID LUDOVICK MAKOHA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

Date of last order: 05/11/2012

Date of judgment: 12/12/2012

J U D G M E N T

Fauz Twaib, J:

In the Resident Magistrate's Court, Kisutu, the Appellant was charged and convicted of three counts, namely:

1. Unlawful presence in the United Republic of Tanzania, contrary to section 31 (1) (i) and 31 (2) of the Immigration Act, Cap 54 (R.E. 2002);
2. Unlawfully engaging in occupation without being in possession of a valid residence permit issued for such purposes, contrary to section 31 (1) (m) and (2) of the same Act;
3. Making a false statement for the purposes of obtaining a Tanzanian passport contrary to section 19 (2) (1) of the Passport and Travel Document Act, No. 20 of 2002.

It was alleged by the prosecution that on 25th July 2011 at AC Nielsen Offices, Dar es Salaam, the Appellant, being a citizen of Uganda, was found unlawfully present within the United Republic of Tanzania without a valid resident permit or pass allowing him to stay in the country and that he engaged himself in occupation without being in possession of a valid residence permit issued for that purpose. It was further alleged that the Appellant had obtained a Tanzanian passport through a false statement.

The trial Court found the Appellant guilty as charged and sentenced him accordingly. Aggrieved, the Appellant preferred the present appeal, raising eight grounds.

Arguing the appeal by way of written submissions, counsel for the Appellant has combined several grounds and argued them together. Counsel for the Respondent Republic followed the same pattern. In essence, the appeal is centred on what is now Ground No. 1, which is a combination of the original Grounds Nos. 1, 2, 4 and 5. The issue arising out of this ground is whether the Appellant's father was a Ugandan, which would mean that the Appellant was born with a dual citizenship. If that was the case, then he would have been required to renounce his Ugandan citizenship in order to retain his Tanzanian citizenship. The answer to this issue will determine the answers to all other issues in this appeal.

Section 7 (1) of the *Tanzania Citizenship Act*, Cap 357, R.E. 2002), which deals with cessation of citizenship, states as follows:

"Any person who, upon the attainment of the age of eighteen years is a citizen of the United Republic of Tanzania or Republic of Tanganyika or of the former People's Republic of Zanzibar and also is or either former Republic of Tanganyika or the former People's Republic of Zanzibar shall, subject to the provisions of subsection (8), be deemed

to have ceased to be a citizen of the United Republic upon the specified date unless he previously renounced his citizenship of that other country, took the oath of allegiance and, in the case of a citizen by descent, made and registered the declaration prescribed...”

Learned counsel for the Appellant has argued, the section presupposes that the person concerned must have had a dual citizenship, a fact which must first be established by evidence. Was the Appellant such a person?

It is not in dispute that the Appellant was born in Tanzania (though the place of his birth is a matter of controversy, as he is said to have been born in Mwanza, but his birth certificate indicated that he was born in Kizuite, Sumbawanga, Rukwa Region). His mother was also a Tanzanian by virtue of birth. The dispute is as to the nationality of his father. The Respondent maintains that he was Ugandan. The Appellant says he was a Tanzanian from Rukwa Valley.

As is the case in all criminal proceedings, the burden of proof lied on the prosecution to establish that the Appellant was not a Tanzanian. In doing so, it was upon them to prove, beyond reasonable doubt that his father was not Tanzanian but Ugandan. The prosecution brought evidence to show that the Appellant had gone to school in Uganda (where his parents moved) and that his University Diploma mentioned his nationality as Ugandan. The Respondent did not tender a birth certificate or a passport (either the Appellant's or his father's, to support the contention that either of them was Ugandan). Counsel for the Appellant argued, and I tend to agree with him, that these facts do not confer a person of Ugandan citizenship, and neither do academic transcripts.

As I stated earlier, the burden of proving a criminal charge lies always with the prosecution. However, section 30 of the Immigration Act places the burden of proof of Tanzanian citizenship on the person who

alleges that he/she is Tanzanian. The Appellant presented his Birth Certificate and produced his mother, who gave sworn oral testimony regarding his son's birth. This evidence cannot be disproved by academic transcripts or the fact that the person concerned attended school outside Tanzania. Only evidence of similar strength and quality (or better) can do that.

It is thus apt to conclude that, contrary to the findings of the trial Court, the Appellant's father was not Ugandan.

As it has been correctly argued in favour of the Appellant, so as to bring a person within the purview of section 7 (1) of the *Citizenship Act*, Cap 357, one must prove dual citizenship, which, as already found, the prosecution failed to establish. For that reason, the Appellant had never been a person of dual citizenship and, therefore, cannot fall within the purview of section 7 (1) of the *Citizenship Act*.

It follows, therefore, that it was wrong for the trial Court to find the accused guilty of the first and second counts.

As for the third count, the accused was convicted of making a false statement in order to obtain a Tanzanian passport. The evidence on record shows that the alleged statement was a statement made in respect of the place of birth of the Appellant which appeared on the Appellant's Birth Certificate. The Appellant's mother was not the accused. It was thus wrong for the Court to convict the Appellant on a statement that was made by somebody else.

In any case, there is conflicting evidence from the prosecution side, with PW1 saying that according to the Appellant, he was born at Kizuite, Sumbawanga, while his uncle said that the Appellant was born in Mwanza. There is also the evidence of the Appellant's mother (DW2). She told the Court that the Appellant was born at Bugando Hospital, Mwanza, on 25th February 1980. I would take this evidence as true. I

see no reason why it should not be true, since it is not disputed. It therefore means that statement DW2 gave to obtain the Appellant's birth certificate (that the Appellant was born at Sumbawanga) was not true.

DW1's explanation for this was that it was easier for her to obtain the certificate at Sumbawanga, where she now resides, than to go all the way to Mwanza. Be that as it may, she was not the one facing charges, and one cannot do much about it for the moment. Suffice it to say that the Appellant's conviction for the third count was also improper, as there was no evidence to support it.

Furthermore, even if it was the Appellant who made the statement, as it was held in *John Straton Bihigomondo v R* (1987) TLR 94, for a person to be guilty of the offence of making a false statement to an immigration officer, the maker of the statement must have known that the such officer would act or omit to act in a manner as to be detrimental to some person or contrary to what such officer would have done if the true facts had been known to him. In the present case, would the Immigration Department not have issued a Tanzanian passport to the Appellant if they had known that the Appellant had been born in Mwanza and not Sumbawanga? Obviously not. Hence, even if it is found that it was the Appellant who made the false statement, no offence can be said to have been committed.

In the final analysis, I would allow this appeal in its entirety, quash and set aside the conviction and sentences.

DATED at DAR ES SALAAM this 12th day of December 2012.

Fauz Twaib
JUDGE
12th December 2012

Delivered in Court this 12th day of December 2012.

Fauz Twaib
JUDGE
12th December 2012