IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 6 OF 2020

(Originating from Criminal Case No. 3 of 2018, Resident Magistrate Court of Moshi at Moshi)

JAILO SOSPETER CHACHA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

MUTUNGI .J.

The appellant herein was arraigned before the Resident Magistrate Court of Moshi on a charge that contained three counts as hereunder: -

1st Count: Smuggling Immigrants contrary to section 46 (1) (a) of the Immigration Act, Cap 54 R.E. 2016

2nd Count: Hosting Illegal Immigrants contrary to section 46 (1) (b) of the Immigration Act, Cap 54 R.E. 2016.

3rd Count: Facilitating Illegal Immigrants, contrary to section 46 (1) (b) of the Immigration Act, Cap 54 R.E. 2016.

It is imperative before proceeding further to narrate albeit briefly the genesis of the present appeal. It was alleged that, on 9th December, 2017 during morning hours the appellant was found smuggling three illegal immigrants of Ethiopian origin from Kenya to Tanzania via Tarakea. At the trial court, the prosecution averred that, the appellant received the said immigrants from Mombasa through an agent called "Dalala" and facilitated them with food and shelter. On the material day the appellant took them to the bus stand at Tarakea and boarded with them a small white vehicle make Noah with registration No. 676 DDF but when the car reached Himo Police Checkpoint they were exposed. The Ethiopians pointed fingers to the appellant as the one who had been facilitating them throughout the journey thus he was charged forthwith.

In his defence, the appellant claimed that he has never been out of Tanzania, he neither has a passport nor visa. He also alleged that on 8th December, 2017 a day before the incident he couldn't have facilitated the transfer as he was attending his graduation ceremony at Ushirika College. Further that he was in no position to travel to Mombasa as by that time was still a student. In the end after which the

prosecution paraded a total of five (5) witnesses, and the defence brought two witnesses (the appellant and his witness) the trial court was convinced that the prosecutor had proved the case against the appellant on all counts. He was sentenced to pay a fine amounting to Tshs. 20,000,000/= or serve ten years in jail in default in respect of the 1st count. On the 2nd and 3rd counts he was sentenced to pay a fine of Tshs. 20,000,000/= or serve five years in jail for each count in default thereof. In the event he fails to pay the fine, the imprisonment sentences were ordered to run concurrently.

Aggrieved, the appellant preferred this appeal advancing a total of ten grounds, I will not reproduce each ground in verbatim but I will consider each of them in the course of preparing this judgment. This appeal was heard orally, the appellant was legally represented by Mr. Wilhad Kitaly and Dr. Mchami learned advocates whereas the respondent was represented by Mr. Omary Kibwana Senior State Attorney.

Arguing in support of the 1st ground of appeal, Dr. Mchami submitted that, pleas are taken twice as per **Section 228 (3) of the Criminal Procedure Act**. But at page 5 of the typed proceedings no plea taking was done before

commencement of the trial, failure of which the whole proceedings should be nullified. The same was observed in the case of **Emmanuel Malahya V Republic Criminal Appeal No. 212 of 2004 (CAT-Tabora)** and in the case of **Joseph Mbilinyi @ Sugu and Emanuel Godfrey Masanja V Republic Criminal Appeal No. 29/2018 (Mbeya HCRT).** In view thereof the Court of Appeal decisions underscored plea taking should be done before commencement of proceedings.

On the 2nd ground the Appellant's advocate argued that, there was no proof of a declaration by a competent authority that PW1 and PW2 were illegal immigrants. This could have been done by the Minister for Home Affairs or Commissioner General of Immigration as per **Section 23 of Immigration Act, Cap 54 R.E. 2016**. Throughout the proceedings there was no evidence tendered to prove PW1 and PW2 were illegal immigrants. The case proceeded without that proof while the prosecutor was duty bound to prove the same. A mere fact that during that time PW1 and PW2 were at all times at Karanga prisons does not necessarily mean they were illegal immigrants.

On the 3rd ground, it was submitted in respect of 1st count of

smuggling illegal immigrant, that the same means bringing someone in the country without obtaining a visa or being allowed by a competent authority. This fact is seen and done at the point of entry into the country. However, the same is neither proved in the proceedings nor in the particulars of the offence. The particulars reveal that on 9/12/2017 at 11hours (Morning) at Kilimapofu Himo Police checkpoint, the appellant was found smuggling Ethiopian immigrants. The question then will be whether the said checkpoint was a border or point of entry.

Further, the learned Advocate argued that, it must have been shown that Moshi district in Kilimanjaro was a border/Entry point to the United Republic of Tanzania. It must have been proved that, the accused was smuggling the alleged immigrants into the country, either by carrying them in his own car or a motorbike or was holding them by hand or any other possible means and bringing them to Tanzania either by production of a visa or passport. Meanwhile, the evidence that was presented at the trial court is to the effect that, the appellant was seen sitting close to PW1 and PW2 in a rear seat in a car.

Mr. Kitaly argued that, the said car was already in Tanzania, it did not belong to the appellant, he was not the one driving it and he did not pay their fare. The evidence of PW1 and PW2 that it was the appellant who facilitated their entry to the country leaves a lot to be desired. In other words it would seem PW1 and PW2 focused to protect their skin since they claimed their time of entry and stay was after 9th December, 2017 but at the same time they admitted that they had been in Tanzania before and they had been here for some time.

Mr. Kitaly submitted on the fourth ground of appeal which is in respect to the 2nd count i.e. Hosting of illegal Immigrants that, PW1 and PW2 alleged they were hosted by the appellant in Mombasa and not in Tanzania therefore it cannot be against the laws of this country. PW1 and PW2 did not show which place in Tanzania the appellant hosted them except in the car where the appellant was found with PW1 and PW2. Mr. Kitaly argued that fact alone, does not establish that he was hosting them. Be as it may as earlier submitted it was not established that, these were illegal immigrants.

Further that, the evidence of PW1 and PW2 revealed by 28/1/2018 they were already in the country as seen at page

17 of the proceedings, therefore the appellant could not have hosted them on 9/12/2017. This contradiction raises a doubt.

On the 5th ground which refers to the 3rd count on facilitation of illegal immigrants, Mr. Kitaly argued that for the concept of facilitation to stand it entails providing food, transport costs, living facilities and transport within the country. However, there is no evidence that the appellant provided such facilities, accommodation in the lodges or transport fares.

It was Mr. Kitaly's argument in respect of the 6th ground that, all three counts were not proved to the required standard as the contradictory evidence cemented that on the alleged dates PW1 and PW2 were already in the country. Mr. Kitaly further cited the case of **Republic V Mathayo Kingu, Criminal Appeal No. 189 of 2015 (CAT)**, to support his stance. He further lamented that the charge sheet was not properly framed and the evidence does not support the charge sheet. To this he added that, at page 17 and 25 of the typed proceedings PW1 and PW2 reflect on acts committed in 2018 whereas the charge sheet states that the offence took place

in December 2017. This is a clear indication that, the charge sheet was prepared before the time the alleged illegal migrants entered into Tanzania which prejudiced the appellant in preparing his defence properly. Moreover, the said charge sheet did not establish the essential elements of the offence contrary to **Section 132 of the Criminal Procedure Act.** The duty of framing a proper charge is on the respondent and if the same realized such anomaly should have made necessary amendments earlier. To support this argument he cited the case of **Mohamed Kalinyo V Republic No. 190/1980 TLR [1980] 279**.

Still pressing on the variation of dates on the 7th and 8th grounds of appeal regarding analysis of evidence, Mr. Kitaly argued the trial court did not properly evaluate evidence before it as the prosecution evidence had a lot of irregularities. He pointed out the first irregularity as that found on page 16 of the typed proceedings where PW1 states that at night the bus took them from where they had slept which contradicts PW3, PW4 and PW5's testimony that they boarded a Noah at Tarakea. Another irregularity was that of PW1 claiming that they stayed at Mombasa for a month while PW2 stated that they had lived in Mombasa for a day.

The counsel argued that, such contradiction goes to the root of the case and is fatal. The court was invited to the Court of Appeal case of **Shaban Amir V Republic, Criminal Appeal No. 18/2007 (CAT Arusha)** to buttress his argument.

On the last grounds (9th and 10th) Mr. Kitaly contended that, the evidence that incriminated the appellant was weak and failed to prove the Respondent's case beyond reasonable doubt. He prayed the appeal be allowed.

Opposing the appeal Mr. Kibwana averred that, hearing of the case at the trial court was conducted by adhering to all procedures of law specifically reading the charge to the appellant in the language that he understood for each and every count of the charge sheet. Therefore, **section 228 of the Criminal Procedure Act** was adhered to effectively as seen at page 1 and 5 of the typed proceedings respectively.

Further that, at page 7 and 8 of the proceedings it is seen that, the appellant was represented by two advocates including Wilhad Kitaly which indicates that, the appellant and his advocates knew categorically what the accused was charged with. The learned Senior Attorney conceded that on 23/1/2019 when the hearing commenced, the

appellant was not reminded the charge he was facing however, since the accused was represented and from the beginning of the case the charge was read over, failure to read the charge at the start of the hearing (second time) did not prejudice the accused/appellant in any way. He added that at page 49 of the proceedings the appellant gave his defence in line with the charge he was facing.

On the 2nd ground, Mr. Kibwana submitted that, the appellant was convicted on the strong evidence adduced by PW1, PW2, PW3, PW4 and PW5. These (5) witnesses were the eye witnesses and some were directly connected to the offence which the appellant faced. Further that the appellant was convicted on the credibility of the evidence of PW1 and PW2 as the trial magistrate believed their testimonies since they were part and parcel of the charge against the appellant. To cement this argument he cited the case of **Omari Ahmed V Republic, Criminal Appeal [1983] TLR 52.**

On 3rd, 4th 5th 9th and 10th grounds, Mr. Kibwana contended that, the respondent was duty bound to prove the guilty of the appellant beyond reasonable doubt which they did by

bringing 5 credible witnesses to prove their case. On the 1st count which the appellant was charged with (smuggling immigrants) he argued, PW1 at page 15 of the proceedings proved that count when he testified that, the accused brought them in Tanzania from Kenya. Further that, PW1 pointed out the means they used to cross the border which was a motorcycle. On top of that, PW1 added that they did not pass through the Migration office which was pure proof of smuggling. The same was also narrated by PW2 as seen at pages 15 and 23 of the typed proceedings.

On the 2nd count of hosting illegal immigrants, Mr. Kibwana argued that the same was fairly and distinctively proved to the required standard of proof since PW1 and PW2 stated that, the bus went to collect them at night from where they slept. Also it was the appellant who was hosting them by facilitating food, shelter, transport fares and accommodation which was enough proof that the appellant was hosting them.

On the third count of facilitating illegal immigrants, the learned state attorney insisted that, the respondent categorically proved the count beyond reasonable doubt

through PW1 and PW2's testimony that, the appellant whom they know as "Jailo Sospeter Chacha" facilitated them with food, shelter, transport fares and accommodation up to the time they were arrested together.

Mr. Kibwana further added that the charge sheet was not defective as it disclosed every ingredient of each count which the accused was charged, convicted and sentenced with and since he was legally represented he was not prejudiced in any manner.

The Learned state attorney urged this court to find, errors on the date and place of the commission of the offence as minor irregularities because in the 1st count, the date and place of the commission of the offence were mentioned whereas the following two counts refer to the same date and place of commission of offence. He prayed this court invokes **section 388 of the Criminal Procedure Act** to cure such minor errors since there was no injustice occasioned.

Opposing the 6th ground Mr. Kibwana submitted that, the appellant was convicted on all three counts as charged. The essential elements of the charged counts namely smuggling, hosting and facilitating illegal immigrants in the United

Republic of Tanzania were shown in the particulars of the offence and the prosecution did prove all the elements in each count beyond reasonable doubt. Further that, although PW1 stated that it was in 2018 when he came in Tanzania, but the charge against the appellant is crystal clear that the offences were committed on 9th December, 2017 as proved by PW3, PW4 and PW5 at page 28, 39 and 43 of the typed proceedings respectively. The Learned State Attorney argued that PW1 only stated he came in 2018 when cross examined but he never said it in the examination in-chief thus it was a minor error which can be pardoned.

Mr. Kibwana also argued that, it is not only the minister who can declare someone as an illegal immigrant but the courts are vested with such powers. After PW1 had admitted at page 17 of the proceedings that he entered Tanzania illegally, he was convicted on 28/1/2018 by the court on grounds that he was an illegal immigrant, the same was a declaration in law pronounced by the court.

Disputing the 7th and 8th grounds of appeal, Mr. Kibwana argued that, the trial Magistrate did verify and greatly succeeded in evaluating properly PW1 and PW2's testimony

as there were no inconsistences in their testimonies. Further that, the trial Magistrate rightly found the 2 witnesses credible and their testimonies were collaborated by the testimonies of PW4 and PW5.

On the last ground the learned state attorney prayed that, this court finds the evidence provided by the prosecutor was strong to the point, coherent and had no discrepancies. However, if the court finds that, there are discrepancies the same are minor and not serious to go to the root of the case. In support thereof he cited the case of **Mohamed Said Matula V Republic, Criminal Appeal [1995] TLR 3 (CAT)**.

He finally prayed that this court upholds the conviction on all the three counts together with the sentences metted out.

In his brief rejoinder the appellant's counsel reiterated his submission in chief and maintained that variation on dates in the charge sheet is not a minor contradiction but it goes to the root of the matter as they strongly affect the accused's defence. Further that the respondent had the duty of preparing a proper charge as underlined in the case of **Abdallah Ali V Republic, Criminal Appeal No. 253/2013 (unreported)**. He also insisted that PW1 and PW2 were not

credible witnesses. These had been in remand for one year hence were ready to say anything to be freed.

Having carefully perused through the trial court's records and the rival submissions for and against the appeal, my focus is now whether the grounds of appeal raised are meritorious or more specifically whether the case against the appellant was proved to the required standard in criminal jurisprudence. In due thereof I will argue each ground of appeal as they appear.

Starting with the 1st ground of appeal the appellant challenges the trial court's magistrate failure to read over the charge to him before commencement of hearing the case which is contrary to **section 228 (3) of the Criminal Procedure Act.** Such provision reads: -

> *"(3) Where the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided."(Emphasis mine)*

This provision indicates that it is mandatory to take a plea of the accused before commencement of his/her trial. In the appeal at hand, on page 1 of the trial court's typed

proceedings, the charge sheet was read over to the accused and he pleaded not guilty thereto. Moreover on page 5 of the same proceedings during the preliminary hearing the charge was again read over to the appellant and he entered a plea of not guilty for the second time. It is therefore my considered opinion that failure by the court to read to the appellant for the third time before commencement of the trial was still fatal. The law as already pointed out mandatorily requires the prosecutor to read out the charge and the plea taken before commencement of the proceedings. In the case cited by the appellant's counsel Emmanuel Malahya case (supra) it is laid down that, according to our long established practice pleas are taken at two different stages. One stage is when the plea triggers off a preliminary hearing and another is where a plea is taken and then a trial begins. The omission therefore is fatal. This ground is henceforth allowed.

Coming to the 2nd ground of appeal, the appellant contended that, there was no proof from a competent authority that PW1 and PW2 were illegal immigrants contrary to **section 23 of Immigration Act, Cap 54 R.E. 2016**. The section generally gives meaning of a prohibited immigrant as a

person who seeks to enter or has entered in Tanzania Illegally. Although it is true that there is no declaration from any authority that the alleged immigrants were illegal but their testimony (PW1 and PW2) shows that they admitted to be illegal immigrants from Ethiopia and they were migrating to South Africa. They even tendered their passports which were admitted as exhibits P1 and P2 respectively clearly showing that, they entered Kenya from Ethiopia on 27th November, 2017 and there was no any other official stamp permitting their entry into the United Republic of Tanzania. I am therefore of the opinion that the said evidence particularly regarding their true identity deserves credence as their evidence suffices to prove their illegal entry and stay in Tanzania. The 2nd ground crumbles.

In respect to the 3rd ground, the appellant challenges that the 1st count of smuggling illegal Immigrants **c/s 46 (1) (a) of the Immigration Act** was never proved at the required standard. The section reads: -

"46.-(1) A person who –

(a) smuggles immigrants;

Commits an offence and on conviction, is liable to a fine not less than twenty million shillings or imprisonment for a term of twenty years."

In the appeal at hand the only evidence which incriminated the appellant to the alleged smuggling is PW1 and PW2's testimony who were apprehended together with the appellant. At page 16 of the typed proceedings, PW1 stated;

"During night hours around 09:00 pm hours the bus came and took us from where we slept. On our way and when had been arrived in Tanzania were stopped by Police Officers and arrest. The accused person facilitated everything for us, food, shelter transport fairs and accommodation... "

The same is also stated by PW2's on page 23 of the typed proceeding where he stated: -

"... After that, were dropped somewhere in the city and slept in the guest house. I don't know names of that city. During the night those people came and took us. In the morning during 06:00 am hours a Police Officer arrested us. I don't

know the names of the country when met with a police officer. We used another way across the border."

Meanwhile PW4 (a Passenger) and PW5's (the Noah Driver) testimonies on how the appellant was apprehended given a different narration. According to these witnesses, they boarded a vehicle (make Noah) and not a bus at Tarakea bus stand with registration No. T. 676 DDF on the way to Moshi. Further that, the appellant, PW1 and PW2 boarded just like any other passengers not that they were taken from the lodge/hotel as they claimed to have slept in, the previous night. In the case of **Crospery Ntagalinda @ Koro V R, Criminal Appeal No. 312 of 2015, CAT-Bukoba, (unreported)** the Court of Appeal stated: -

"Every witness is entitled to credence and his testimony believed unless there are good and sufficient reasons for not believing the witness."

Therefore the above contradiction between the prosecution witnesses on the mode of transport used on the alleged smuggling leaves their credibility wanting. PW4 and PW5 also

raised another doubt that the appellant never communicated with PW1 and PW2 during their trip. He neither paid for their transport fare nor was he the owner or driver of the car. This testimony paints a picture that there was no communication between the appellant, PW1 and PW2 to conclude that they knew each other.

Moreover, after PW1 tendered his passport as exhibit, at page 17 of the trial court typed proceedings, he went on stating that: -

> *"As you can see all Immigration stamps all is for Ethiopia and Kenya but not For Tanzania Immigration because we did not pass through Immigration Offices. We entered Tanzania illegally. I completed saving two years punishment in Tanzania then I came illegally again and arrested. I was convicted on 28/01/2018. That's all."*

From this narration what I have gathered is that, PW1 was not smuggled in Tanzania by the appellant but he entered in the country through his own illegal means way back in 2017. He was arrested and punished on 28/01/2018, after his

punishment he went back to Ethiopia and came back for the 2nd time, this time around the appellant allegedly helped him and they got arrested. Now the question remains on how he was smuggled in Tanzania for the 2nd time in 2017 while at that very particular time he admitted to have already been in Tanzania illegally where he was arrested and convicted on 28/01/2018 consequently ordered to serve two years in jail.

In **Shaban Daud V Republic, Appeal No. 28 of 2000 (unreported)** the Court of Appeal stressed on the credibility of witnesses that: -

> *"May we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as the demenor is concerned. The credibility of a witness can be determined in two other ways; One, when assessing the coherence of the testimony of that witness. Two, when the testimony is considered in relation with the evidence of other witness including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."*

Apart from PW1 and PW2's evidence when is coherence and questionable, there was no proof of how the appellant hosted or facilitated PW1 and PW2 apart from PW4 and PW5's testimonies that, when they were stopped by PW3 (Police Officer) at the checkpoint, PW1 and PW2 pointed fingers to the appellant to indicate that he was with them. This alone does not suffice to prove how he smuggled, hosted and facilitated them. In the case of **Mohamed Muumin Mussa Vs. Republic [2004] TLR 1** it was held that: -

> *"Even if there exists an offence in the relevant law, the applicants admission that "I was in the same bus with 6 somalis, I deal with Mitumba" does not amount to a plea to the offence he was alleged to have committed. Granted, the fact in record also disclosed that he had admitted to have helped them. But so long as it was not established if the assistance was lawful or unlawful, admission cannot be used against him. He could have helped them with their language, or to show them the way. The facts also show that he had seen them at Longido at Namanga and not outside Tanzania."*

Therefore a mere assertion that PW1 and PW2 pointed fingers at the appellant when they were caught is not sufficient to disclose that he illegally smuggled, facilitated and hosted them. This piece of evidence is as clear as daylight that, its contradiction shakes the whole prosecution case.

It is a trite principle that in proving the guilt of the accused persons beyond reasonable doubt the prosecution is under a duty to prove each and every essential ingredient of the offence, which the accused person had been charged with. In the case of **Abuhi Omary Abdallah & 3 Others V Republic, Criminal Appeal No. 28 of 2010, CAT Dar Es Salaam**, it was held *inter alia* that: -

> *"...Where there is any doubt, the settled law is to the effect that in such a situation an accused person is entitled as a matter of right to the benefit of doubt or doubts."*

The contradictions and inconsistencies identified in the appeal at hand as seen herein above quivered credibility of the prosecution's witnesses and it did shake their case. The same was going to the root of the matter which could not warrant the appellant's conviction. The 3rd ground is therefore merited as analyzed above. The same goes to the

4th, 5th, 7th, 8th, 9th and 10th grounds of appeal in respect of the 2nd and 3rd counts and analysis of the whole evidence in general. It is found that, the case against the appellant was not proved to the required standard in criminal jurisprudence and the trial magistrate failed to analyze such evidence thoroughly.

In regard to the 6th ground which will not detain me much, the appellant faulted the trial court's proceeding on the ground that, the particulars of the charge sheet were at variance with the evidence adduced. He argued that the charge does not support the offence that took place in 2017 whereas PW1 talked about the incident of 2018. Thus the prosecution had a duty to prepare a proper charge as per **section 132 of the Criminal Procedure Act**. On the other hand the respondent contended that the charge sheet supported the offence.

In the case of **Sali Lilo Vs. Republic, Criminal Appeal No. 431 of 2013 (unreported)**, the Court of Appeal cited with authority the case of **Mohamed Kaningo Vs. Republic [1980] T.L.R. 279** and made an observation that: -

"While it is the duty of the prosecution to file charges correctly, those presiding over criminal trials should, at the commencement of the hearing, make it a habit of perusing the charge as a matter of routine to satisfy themselves that the charge is laid correctly, and if not to require that it be amended accordingly."

Therefore where it is found that the evidence adduced is at variance with the charge, or that the charge is defective either in substance or in form, the court may be moved under **section 234 (1) of the Criminal Procedure Act** to amend the charge to reflect the evidence. However, the amendment must be made before judgment failure of which occasions injustice to the accused as s/he will be prejudiced on his/her right of defence. This was observed in the case of **Said Msusa Vs. Republic, Criminal Appeal Case No. 268 of 2013 (unreported)**. I join hands with the appellant that the charge did not support the offence as I have already narrated earlier on the variances of dates and places, thus the appellant was prejudiced on which incident he should have defended himself. This ground is merited on all its weight.

All said and done, in the case of **Nung'uniko Gidule Vs. Republic, Criminal Appeal No. 223 of 2008, (unreported)** the Supreme Court of this Land observed that: -

> *"Evidence tainted with contradictions and inconsistences could not form the basis of conviction."*

On the basis of the foregoing, I hereby allow the appeal, quash both the conviction and sentences. Should the appellant be still in custody, he shall be released forthwith unless otherwise lawfully detained for some other course.

It is so ordered.

B. R. MUTUNGI
JUDGE
27/08/2020

Read this day of 27/8/2020 in presence of the Appellant and in presence of Mr. Kibwana (S.S.A) for the Respondent.

B. R. MUTUNGI
JUDGE
27/8/2020

RIGHT OF APPEAL EXPLAINED.