

TANZANIA / JUDGMENT

20070418 TZHC Iringa

COURT
TZHCDECIDED
18 April 2007

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE HIGH COURT OF TANZANIA ATIRINGA APPELLANT JURISDICTION (DC) CRIMINAL
APPEAL NO. 7 OF 2007 (ORIGINAL CRIMINAL CASE NO. 100 OF 2007. OF THE DISTRICT COURT
OF IRINGA DISTRICT. ATIRINGA) ALLY ABDI SAAD APPELLANT VERSUS
REPUBLIC RESPONDENT

JUDGEMENT

WEREMA, J. The Appellant, Ally s/o Abdi Saad, and three other persons, namely Lusinde s/o Juma, Omary s/o Salum and Augustin s/o Mgabisa, were charged in the District Court of Iringa District at Iringa with the offence of aiding or abetting other people to contravene the provisions of S. 31 (1) (p) and (2) of the Immigration Act, [Cap; 54 R.E. 2002]. The appellant was charged with a second count for contravening the provisions of S. 31. (1) (a) (2) of the Act. The wording of the offence seems to be that of S. 31 (1) (L) and not (q). The latter refers to employment of a person who is not a citizen of Tanzania and who has no pass or permit authorizing him to be so employed. The appellant 1, ... pleaded guilty. He was convicted on both counts for a term of a year imprisonment. Both sentences are to run concurrently .. The appellant, through his learned advocate Mr. Mkwata, has appealed to this court challenging the decision of Hon. Mwaieseje, Learned Resident Magistrate. The second, third and fourth accused have not preferred to appeal. The second accused person who pleaded guilty also was sentenced to a one year term imprisonment. The third and the fourth were sentenced to pay a fine in the sum of shillings one hundred thousand or a six months imprisonment and in case of default to pay the fine. Mr. Mkwata, the Learned Advocate raised two substantive grounds of appeal as follows:-

- (a) That the learned Resident Magistrate erred in law when he convicted the appellant on a defective charge which did not disclose the offence charge; and
- (b) that the Learned trial Resident Magistrate - erred in law when she passed a custodial sentence against the appellant without affording him an opportunity of paying a fine in line with the provisions of the law under which the appellant was charged and in the circumstances of this case. The learned Advocate addressed the court amplifying these grounds of Appeal. He started with the second ground. His complaint was that the court did not give the appellant the option to pay the fine. He relied on the substantive provisions of S. 31 (2) of the Act, [Cap. 54 R.E 2002]. Mr. Mkwata, Learned State Attorney supported Mr. Mkwata that the Learned Resident Magistrate ought to have given the

appellant the option to pay a fine instead of a custodial sentence. Both Counsel referred me to the case of SALUM SHABAN! V R [1985] TLR 71 where it was held (Mtenga J. as he then was) that:- "Where the legislature has given an option of a fine or imprisonment, -the court, when imposing a sentence, must ascertain that a sentence of fine should first be imposed and in default of payment of such fine, then a sentence of imprisonment can be given" S. 31 (2) of the Immigration Act, Cap 54 provides for a fine as a first option. . The sum stated in the Act, is a fine not exceeding one hundred thousand shillings. Imprisonment is a second option and the term provided thereof is a term not exceeding three years. A third option is a combination of fine and imprisonment. I agree with Mr. Mkwata, the Learned Advocate that the court ought to have given the appellant an option to pay a fine as provided by law and as decided by the High Court. Sentencing is a judicial discretion. In the cited case; Mtenga J. had this to say:- 3, .. "I understand that the task of sentencing is a very difficult one though admittedly, it is a discretionary task. A magistrate or judge who decides what sentence to impose against a convicted person has to consider before passing a sentence such as gravity of the offence, prevalence of the offence, the interest of society, the penalty section under which the accused is charged and last but not least, the record of the accused person. This is a truthful holding on this subject. The learned trial Resident magistrate did not explain her opinion that the appellant deserved a stiff punishment. She proceeded to impose an imprisonment term against the appellant ignoring the first option of a fine. The stiff punishment could also be in the form of a fine. In an appropriate circumstance, this sentence would have been substituted. There are other issues for determination. There is another angle to fault this conviction. The section of law under which the first count was based is section 31 (1) (P) read together with S. 31

- (2) of the Act, [Cap. 54 R.E. 2002). That seems to be an omnibus clause in the following terms "aids or abets any person in committing any of the foregoing offences". The foregoing offences are a range from item (a) to (o). There are a total of 15 offences. This is a second leg of the Appellant complaint. This complaint is also justified. It was difficult for the appellant to have comprehended the charge he was charged with. His plea of guilty was not. . 4 ... 'unequivocal. The same applies to the second count. The offence refers to s. 31
- (1) (q). According to the Revised Edition, item (q) is about a person who:- "employs any person who is not a citizen of Tanzania and who has no pass or permit authorizing him to be so employed; " The prosecution's particulars of the offence do not tally with the offence. They show that the appellant "Did hire a car (and enable?) the Somali contribute money for the journey across Tanzania to Malawi and hide them (sic). These particulars, language syntax as grammar notwithstanding, do not < ... ~ ,. explain the charge. The charge is not supported by the particulars. Nevertheless, the appellant was convicted on this charge and sentenced to one year imprisonment without an option of a fine. This was a travesty of justice which can not be left to stand. Mr. Ntwina, the learned State Attorney. did not support the conviction and supported the grounds of Appeal. He went further to state that the court has powers under S. 366 (I) (a) (i) (c) to revise, acquit, discharge the appellant and order a retrial. He prayed that the court, in meeting the ends of justice, and by virtue of S. 388'

of the CPA, should order a retrial. Having considered all of these arguments; I hold that the appellant was charged with omnibus charges. His plea was not unequivocal. Accordingly, 5 .. this appeal is allowed. The conviction is quashed and sentence on both counts; set aside. The appellant was convicted on 13th February, 2007. Today 18 April, 2007, he has been in jail for two months and five days. This period I would have been sufficient if I had substituted a fine for imprisonment to meet the ends of justice of this case. I do not feel disposed to make an order of a retrial as prayed by Mr. Ntwina, the Learned State Attorney. I order the immediate release of the appellant from custody unless he is held there for any other lawful cause. Finally, let me again re-emphasize the desirability of magistrates to go through a charge before admitting the same. Magistrates should diligently look at the charge and particulars thereof and in case of any defectiveness; they should direct prosecutors to amend the charges as appropriate, before proceeding for trial. Ji. l ..., Frederick M. } Vere I JU 18/4/2007 6

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlil.org/media/judgment/336597/source_file/f359e6c8bf9f764d/20070418_TZHC_Iringa.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/ally-abdi-saad-v-republic-defectivecharge-tzhc-2007--6a3ea5263b1caa912981de95>

Prepared on 14 October 2026 · Esheria