

TANZANIA / JUDGMENT

ismail mohamed same vs the republic 2010 tzhc 203 26 august 2010

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TZHCDECIDED
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IN THE HIGH COURT OF TANZANIA AT TANGA MISC. CRIMFINAL APPEAL NO. 22 OF 2010
(Originating from Tanga RM. Criminal Case No. 26 of 2010) ISMAIL MOHAMED
SAME..... APPELLANT Versus THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order: 09/08/2010 Date of Judgment: 26/08/2010 Mussa, J; This appeal has its genesis in RM. Criminal Case No.26 of

2010. The appellant was arraigned there upon a statement of offence simply stating thus:- OFFENCE, SECTION AND LAW: Aids or abets any person in committing any of (sic) the offence c/s 31 (1) (p) and (2) of the Immigration Act No.7, 1995. On the particulars, the allegation was that on the 9th day of April, 2010, at Muheza, the appellant was arrested for knowingly aiding or abetting two Somalis whom were illegal immigrants. At the inception of the proceeding, upon the rather, home made charge sheet being read over and explained to the appellant; the latter denied it and a plea of not guilty .was entered. A good deal later, at the preliminary hearing, the prosecution brought forth a statement of facts, as it were, serialized in six paragraphs; of which, was read over to the appellant. As it turned out, the latter's response was to admit the contents of each and every paragraph; whereupon, rather incredibly, the trial Magistrate was privy to this:- MEMORANDUM OF MATTERS NOT IN- DISPUTE: NIL SGD LJ. MBUYA, PRM. 20/ 6/2010 Still, more surprises were in the offing; much as, having adjudged that everything was in dispute, apparently, from without, the presiding officer alluded to this:- Court: The accused person has admitted all the facts constituting the ingredients of the charged offence. He is hereby found guilty and convicted as per charge sheet. Sgd: LJ. Mbuya - PRM 20/ 6/2010 Such was deemed due process upon which the appellant was convicted and severely punished; for that matter. He was subjected to payment of a fine in the sum of shs.80,000/=; failure of which, he was serve an eighteen month's imprisonment term. As if such was not sufficient punishment, it 2 was specifically expressed that over and above the fine, the appellant was to serve a custodial sentence of two and a half years imprisonment. Thus, much as the appellant paid the fine, he could not overcome doing porridge on account of the custodial sentence; hovering over and above. Naturally, the appellant is aggrieved and; to the foregoing

methodology of founding a conviction; Mr. Akaro, his learned advocate, is bitterly at odds. Counsel fully adopted the petition of appeal, urging, in the first place, that the statement of offence fell short of disclosing any offence. Expounding on this point, he said, for the charged offence of aiding or abetting to be constituted; the statement of offence must disclose the substantive offence so sought to be aided or abetted. And; to the extent that there was no such disclosure, counsel concluded, the appellant did not unequivocally plead to the charge; that is, if at all. In the alternative, Mr. Akaro sought to elaborate that at no time did the appellant plead guilty to the charge. He, actually, denied it and; in counsel's submission, an admission of facts at a preliminary hearing does not, ipso facto, constitute a plea of guilty. Finally, learned counsel was all out to impress that the sentence was manifestly excessive. For the respondent Republic, Miss Naiman did not support both the conviction and sentence. To begin with, learned state attorney advanced a proposition like: Looked at as a whole, the entire proceedings were a travesty of justice. As I shall no 3 sooner demonstrate, this proposition, I promptly subscribe to and adopt. Coming to the substantive side of her submission, learned state attorney urged that the charge did not disclose any offence and; should not have been admitted, in the first place. To this, Miss Naiman sought reliance in the decision of this court comprised in Republic Vs. Titus Petro [1998] TLR 359. There it was held that where a charge sheet does not disclose any offence; the appropriate response should be for the trial court to refuse its admission at presentation. Addressing learned concurrent submissions, I should, in the first instance, take a glance at the provisions of Section 31

- (1) (p) of the Immigration Act, Chapter 54 of the revised laws; the one under which the appellant was arraigned:- Any person who - aids or abets any person in committing any of the foregoing offences; shall be guilty of an offence It is noteworthy that the provision enlists numerous offence as sequentially enumerated in paragraphs with letters
- (a) to (q). But, as is patently inferable from the expression; "any of the foregoing offences;" it would have required the statement of offence to further particularize which of those enumerated offences was aided or abetted. Only then, so to speak, would the charge be said to have disclosed a triable offence. If I may digress a bit, whatever was the wisdom of the legislator; to me, justification for the extracted paragraph
- (p) does not click at all. I take the position that the penal 4 provisions as stipulated in the immigration Act are in addition to and; not, as such, derogative of the general principles of criminal responsibility as enunciated in the penal code. Upon clear expression, the latter views an aidor or abettor on the same plane with the actual perpetrator and; on the score, the instruction is to charge him/her as if he/she was the perpetrator. That being so, I am at a loss coming to grips with the practical utility of paragraph (p). Nonetheless, that was a by-the way and; back to the situation at hand, it is beyond question that none of those enumerated offences were alleged on the statement of the offence and; to that effect, no triable offence was disclosed. If should say so, this appeal is disposable on that point alone. That said, I could have as well ended here but; I cannot help the urge to deplore the manner

in which these proceedings were conducted. Quite frankly, the appellant was dispatched to gaol upon a hasty exercise and; it appeared as if the presiding officer was in a hurry to convict and punish. To begin with, I should, perhaps, say this: In summary trials, the authority to convict on a plea of guilty obtains and; exclusively so obtains, upon the provisions of section 228 (2) of the Criminal Procedure Act. Allowance must, however, be to instances involving certain warrant offences, in which an accused may plead guilty in writing even without a court appearance (section 193). 5 If, upon an ordinary summary trial, the accused does not admit the charge, there is no authority to convict; rather, nowadays, the court thereafter proceeds to a preliminary hearing ahead of the trial. The point worth clear expression is that nowhere is it mentioned under section 192 that upon an accused admitting to the prosecution factual setting laid at the preliminary hearing; such would be authority for the trial to convict. The proposition I am anxious about is that whereupon a preliminary hearing, an accused succumbs to a sufficiently incriminating factual setting laid by the prosecution; the hasty conviction should refrain a trial court and; instead, revert to the provisions of section 228 (2), acquiring him/her to plead afresh. If it so happens that the accused pleads guilty upon the factual setting, fully explained; only then, would the trial court be said to have obtained authority to convict. When all is said, in the matter under consideration, the conviction, as I said, was upon a hasty background to which the trial court had no authority. And; finally, I should caution, by way of a postscript, that a lot is being taken for granted downstairs when it comes to the conduct of preliminary hearing. It is, for instance, not quite apparent as to how the prosecution's fact sheet gained entrance into the record. It' should be noted that the procedure under section 192 is supplemented by the Accelerated Trial and Disposal of Cases Rules comprised in G.N. 192 of 1988. I should imagine, the 6 latter provisions are rarely glanced at by presiding officers. In terms of Rule 3, the person prosecuting shall prepare, as clearly as possible, the facts of the case which shall be read to the accused and explained in a language he understands. Implicit upon the Rule, is the duty imposed upon a trial court to record the facts as and when adduced by the prosecution. If the trial court is otherwise minded to shorten the process, the — prosecution fact sheet should be caused to be formally admitted upon record, so as to manifest unto it the presence of the document. Short of that, as here, the prosecution fact sheet is an extraneous matter; not being a part of the record. Back to the appeal, as already hinted, the same is allowed. The appellant should be set at liberty unless he be held in custody for some other lawful cause. Order accordingly. 7

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