

**IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR**

(CORAM: MUNUO, J.A., KILEO, J.A. And BWANA, J.A.)

CRIMINAL APPEAL NO. 121 OF 2010

DIRECTOR OF PUBLIC PROSECUTION ZANZIBAR APPELLANT

VERSUS

ZALHA ABDULRAHMAN TAKADIR RESPONDENT

**(Appeal from the Judgement of the High Court
at Zanzibar)**

(Makungu, J.)

dated the 28th day of January, 2010

in

Criminal Appeal No. 21 of 2009

JUDGEMENT OF THE COURT

15th & 25th November, 2010

MUNUO, J.A:

The Director of Public Prosecutions, through the services of Mr. Salum Toufiq Alli, learned advocate, is challenging the decision of the High Court of Zanzibar in Criminal Appeal No. 21 of 2009. In the said Appeal, Makungu, J. quashed the conviction and set aside the three year imprisonment sentence imposed on the respondent, the accused in

Criminal Case No. 139 of 2007 in the Mwera Regional Court, Zanzibar. In the trial court the respondent was charged with the offence of false accounting c/s 322 (a) of the Penal Act, No. 6 of 2004 of the Laws of Zanzibar which states verbatim:

"322. Any person who, being a clerk or servant, or being employed or acting in the capacity of a clerk or servant, does any of the acts following with intent to defraud, that is to say:

(a) Destroys, alters, mutilates or falsifies any book, document, valuable security or account which belongs to or is in the possession of his employer, or any entry in any such book, document or account, or is privy to any such act;

(b)

(c)

Is guilty of a felony, and is liable to imprisonment for a term not exceeding seven years.

It was alleged by the prosecution that the respondent, an accounts clerk of ZAPOCO, sometime in October, 2004 and September, 2006 at Dole in Zanzibar, altered the account books of ZAPOCO and stole Tanzania shillings in the sum of sh.40,000,000/= the property of ZAPOCO. The respondent denied the charge. She was found guilty, convicted and imprisoned for three years by the trial court. However, the decision of the trial court was reversed by Makungu, J. in the High Court of Zanzibar in Criminal Appeal No. 21 of 2009. Aggrieved by the acquittal of the respondent by the learned judge, the Director of Public Prosecutions engaged Mr. Salum Toufiq Alli, learned advocate, to prosecute the present appeal.

The facts of the case are simple. The respondent, Zalha Abdulrahman Takadir, was employed by ZAPOCO as a cashier and book-keeper of the company account books. ZAPOCO produces chicken, eggs and chicken feed at Maruhubi and Kizimbani, Zanzibar. PW1 Dr. Salim Said Nassir stated that the company had a chief accountant under whom the

Respondent worked. In September, 2006, PW2 Emanuel Thomas Tete, audited the account books of the company and discovered a discrepancy of sh.40,000,000/=. It was the evidence of PW2 that in the cash book (costs, sales and expenditure) in terms of income and expenditure was correct but the balance was different. PW2 stated that a total of sh. 39,245,000/= was missing from the cash book between August, 2005 and September, 2006. The Managing Director stated that the missing cash was Tsh.39,000,000/=. The investigating officer, PW 4 D. 2647 Detective Sergeant Kombo said that the sum of Tsh.40,000,000/= had been embezzled by the respondent. Hence the present charge of false accounting and stealing. The audit report compiled by PW2 Emanuel Thomas Tete, was, however, not tendered as an exhibit to substantiate the false accounting.

The respondent gave a sworn defence denying the charge. She said that on the instructions of her boss figures were sometimes altered to reduce the profit margin, impliedly to evade taxes.

Before us, learned counsel for the appellant Director of Public Prosecutions, consolidated the three grounds of appeal namely-

1. *That the learned judge erred in law to ignore the evidence of PW2.*
2. *That the learned judge erred in failing to consider the evidence of PW3 and PW4 who proved the change of figures in the books.*
3. *That the learned judge erred in failing to consider the prosecution side had proved the case beyond reasonable doubt.*

The above grounds of appeal, counsel for the appellant observed, can be reduced to one ground, that is, the learned judge erred in holding that the charge was not proved beyond all reasonable doubt.

Counsel for the appellant contended that PW1, PW2 and PW3 established beyond all reasonable doubt that the respondent falsified the account books of the company so the learned judge should not have

reversed the conviction and sentence. The writing of the altered books of account, counsel for the appellant contended, was similar to the specimen writing of the respondent. The handwriting expert confirmed the same in his report, Exhibit 1, counsel for the appellant submitted. In this regard the learned judge should have upheld the conviction, he maintained, urging us to quash the decision of the High Court and restore the decision of the trial court.

Mr. Patel, learned advocate for the respondent, supported the decision of the High Court. To begin with, he contended that the proceedings of the trial court are a nullity for non-compliance with the mandatory provisions of section 218 (3) of the Zanzibar Criminal Procedure Act, No. 7 of 2004, in that the trial court failed to address the respondent on her right to recall witnesses for further cross-examination when the new charge was substituted after two prosecution witnesses had testified. The omission, counsel argued, was a fatal irregularity which rendered the trial a nullity.

Furthermore, counsel for the respondent contended, the audit report and falsefied account books were not produced at the trial to prove the case beyond reasonable doubt. Mr. Patel cited the case of **Nathubhai Thako versus Republic** (1957) E.A 632 wherein the then Court of Appeal for Eastern Africa, held that documents purported to have been falsefied should be specifically proved.

Conceding, in reply that the trial court failed to comply with the provisions of section 218 (3) of the Criminal Procedure Act, No. 7 of 2004, and that in that situation the trial proceedings ought to be nullified, Mr. Salum Toufiq nonetheless urged us to order a retrial in the event of the trial being nullified.

The issue before us is whether the failure of the trial court to comply with the provisions of section 218 (3) of the Criminal Procedure Act rendered the trial a nullity.

Section 218 (3) of the Zanzibar Criminal Procedure Act, 2004 allows the prosecution to vary, and or amend the charge. The section states;

"218 (1) Where at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or form, the court may make such order for the alteration of the charge either by way of amendment of the charge or by the substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case.

(2) where a charge is altered as aforesaid, the court shall there upon call the accused person to plead to the altered charge.

(3) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned have the right

*to re-examine any such witness on matters arising
out of such further cross-examination...”*

The record shows that on the 21st April, 2008, the prosecution applied for, and was granted leave to amend the charge. A new charge was substituted and the respondent pleaded not guilty to the new charge. By then P.W.1 and P.W.2 had already testified. The record is silent on whether or not the trial magistrate complied with the provisions of section 218 (3). We are of the view that if the trial magistrate had addressed the respondent on the provisions of section 218 (3) of the Criminal Procedure Act, the record would reflect the same.

The omission to comply with the provisions of section 218 (3) of the Criminal Procedure Act, in our opinion, renders the trial a nullity. Indeed counsel for the appellant conceded the same but urged us to order a retrial. We are of the settled mind that since the audit report which initiated this case was not tendered at the trial; there is no substantive evidence to justify ordering a retrial.

In the light of the above, we nullify the trial for non-compliance with the mandatory provisions of section 218 (3) of the Criminal Procedure Act, 2004. We make no order for a trial *de novo*.

In the result, we dismiss the appeal.

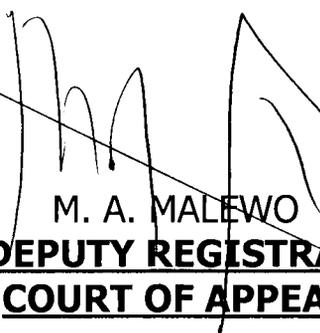
DATED at ZANZIBAR this 25th day of November, 2010

E. N. MUNUO
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL