IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MBAROUK, J.A., NDIKA J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 274 OF 2016

CHEDIEL MSUYA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Mwingwa, J.)

Dated 17th day of June, 2016
in
DC. Criminal Appeal No. 9 of 2014

JUDGMENT OF THE COURT

27th June & 3rd July, 2018.

MBAROUK, J.A.:

In the District Court of Same at Same, the appellant was arraigned for different counts, a total of 12 counts. The 1st, 2nd, 3rd and 4th counts were in relation to the offence of **Forgery** c/ss 333, 335(a) and 337 of the Penal Code, Cap 16 R.E. 2002; the 5th, 6th, 7th, and 8th counts were in relation to the offence of **Use of documents intended to mislead the principal** c/s 22 of the Prevention and Combating of Corruption Act, No. 11 of 2007; and the 9th, 10th,11th and 12th counts were in relation to the offence of **Diversion,** c/s 29 of

the Prevention and Combating of Corruption Act, No. 11 of 2007; while the 13th count which was in relation to **Occasioning loss to a specified Authority,** contrary to paragraph 10 (1) of the First schedule to section 57(1) and 60 of the Economic and Organized Crimes Control Act (Cap. 200) R.E. 2002 which was an alternative to counts 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th. The appellant was convicted of all the charged counts. He was as a result, sentenced as follows: **first** a term of 5 years imprisonment on each of the 1st to 8th counts; **secondly** a term of 2 years imprisonment for each of the 9th to 12th counts; and finally, 7 years imprisonment for the 13th count. The jail terms were to run concurrently. Aggrieved, he filed an appeal to the High Court where Mwingwa J. upheld the trial court's decision. Dissatisfied, he has come to this Court on a second appeal.

In this appeal, the appellant appeared in person, un-presented, whereas Mr. Omar Abdalla Kibwana, learned Senior State Attorney, represented the respondent/Republic. The appellant adopted the grounds in his memorandum of appeal but was guided to stick on his Notice of Appeal in which he

only appealed against the 13th count which was an alternative count. He then had no more to submit but, having adopted the memorandum of appeal, requested the learned Senior State Attorney to respond and wished to rejoin thereafter, if need would arise.

From the outset, the learned Senior State Attorney declined to support the appeal. He started by submitting that, in the Notice of Appeal the Appellant indicated that he is appealing against one count only i.e. the 13th count which is occasioning loss to a specified authority while he was convicted of all 13 counts. He elaborated that under Rule 68(2) of the Court of Appeal Rules, 2009 the appellant should be deemed to appeal against the 13th count only and not the 5th to 12th counts. However, the learned Senior State Attorney conceded that the trial court wrongly convicted the appellant on the 13th count, which was an alternative count to counts 5 to 12. He said that, the court having convicted him on the eight substantive counts, it ought to have made no finding on the 13th count.

All in all, Mr. Kibwana urged us to allow the appeal, by quashing the conviction, set aside the sentence on the 13th count and set the appellant free.

In response, the appellant had nothing useful to add but he agreed with the learned Senior State Attorney's submission.

We are of the considered view that, since the main eight counts (counts 5 to 12) were determined and sustained by the trial court, it was then incorrect to make a finding on the last count in the alternative. The first appellate court was supposed to address this anomaly and rectify the error committed by the trial court accordingly. The appellant, in our view, must have been prejudiced by this anomaly which led him to serve a prison term of 7 years as well as to the payment of compensation of Tshs. 1,200,000/= after serving of his sentence. (See: **Derick Alphonce and Simon Seleman Salu vs The Republic,** Criminal Appeal No. 23 of 2015 CAT Mbeya (Unreported).

In the case of **Seifu s/o Bakari v. Republic** [1960]1 EA 338 this Court held as follows:-

> *"(i) Where charges against an accused person are alternative, the proper course, upon conviction of the accused on one count, is for the court to refrain from entering a verdict or finding on the other count".*

In the East African case of **Achoki vs. Republic** [2000] 2 EA 283, the appellant was charged and tried on one main count of attempted rape and the alternative count of indecent assault on a female. The trial court convicted him on the main charge of attempted rape and made no findings on the alternative charge of indecent assault. His appeal to the High Court was dismissed. On second appeal, the Court of Appeal agreed with both the trial and the High Court and endorsed the findings that, once an accused is convicted on the main count, the trial court is prohibited to make findings on the alternative charge, which is naturally left to remain on the record.

We are of the view that, it was a serious misdirection on the part of the trial court to convict the appellant on all counts including the alternative one, which no doubt prejudiced him.

We subscribe to the holding in **Seif Bakari** (supra). For the foregoing reasons, we are constrained to allow the appeal. We allow the appeal, quash the conviction and set aside the sentence in respect of the 13th count. As we were made aware at the hearing that, the appellant served out his sentence and was subsequently released from prison, we make no consequential order.

DATED at **ARUSHA** this 1st day of July, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL