IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., MWAMBEGELE, J.A., And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 514 OF 2016

1. ROBERT P. MAYUNGA
2. DAVID CHARLES NDAKI .....**APPELLANTS**

VERSUS

THE REPUBLIC .....**RESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Mgonya, J.)

dated the 10th day of October, 2016
in
Criminal Appeals No. 4 and 5 of 2016

JUDGMENT OF THE COURT

27th November & 6th December , 2019

LILA, J.A.:

The 2nd appellant, David Charles Ndaki, according to the scanty information available in the charge sheet, was facing another charge in Criminal Case Number 83 of 2009 before Nzega District Court. The attempt by the prosecution to tender the appellant's extra judicial statement as exhibit was received with an objection which necessitated the conduct of an inquiry. In the course of such inquiry the appellant tendered a Police Form Number 3

(PF3). The genuineness of the PF3 was highly questioned by the prosecution hence they preferred a charge against a prison officer one A. 6679 Simon Bernard, David Charles Ndaki (2nd appellant) and Robert Mayunga (1st appellant). The charge comprised three counts namely; forgery contrary to sections 333, 335(a) and 337 of the Penal Code, Cap. 16 R. E. 2002 (the Penal Code) against all the three suspects and uttering a false document contrary to section 342 of the Penal Code, against the 2nd appellant only. At the conclusion of the trial only the two appellants were convicted with the offence of forgery and the 2nd appellant was further convicted of uttering a false document. Simon Bernard was acquitted. Eventually, the appellants were each sentenced to serve two years imprisonment for the offence of forgery and the 2nd appellant was sentenced to serve twelve months imprisonment for the offence of uttering a false document. They were aggrieved and their appeal to the High Court was unsuccessful.

Undaunted, the appellants have accessed the Court seeking to impugn the findings of both courts below fronting two separate memoranda of appeal. While the memorandum of appeal by the 1st appellant comprised three (3) grounds of complaints which had some few paragraphs, that of the 2nd appellant comprised four (4) grounds of grievance. On account of the fact that

the decision of this appeal may not be founded on the determination of the appellants' grounds of grievances, we see no good cause to recite them.

At the hearing of the appeal before us on 27/11/2019, both appellants entered appearance personally, without legal representation whereas the respondent Republic enjoyed the services of Mr. Miraji Kajiru, the learned Senior State Attorney.

At the inception of the hearing of the appeal, the 1st appellant unhesitatingly sought leave of the Court to withdraw his appeal. Since the conduct of an appeal, in terms of Rule 77(4) of the Tanzania Court of Appeal Rules, 2009, is the exclusive prerogative domain of the appellant, we granted his prayer and we accordingly marked his appeal withdrawn. He, accordingly, jovially left the Court Room leaving behind the 2nd appellant to pursue his appeal.

When we invited the 2nd appellant to address us, he urged the Court to let the learned Senior State Attorney address us on the appeal after which he would make a rejoinder.

On his part, Mr. Kajiru took a long tour of the various parts of the prosecution evidence on record discounting the 2nd appellant's points of

grievance with the quest to demonstrate that the concurrent findings of the courts below are impeccable. The appellant, in rejoinder, first abandoned all the grounds of complaints save for ground 3 which was to the effect that, by wrongly invoking the doctrine of recent possession in the determination of his appeal, the learned appellate Judge wrongly shifted the burden of proof to him (then accused). We shall, however, not venture to narrate the contending arguments of both parties in this respect in view of the reason soon to be apparent.

Upon our serious perusal of the record of appeal at page 25 we realised that the PF3, the subject of the charge the appellants were facing was tendered by one Segolena Melita and was, notwithstanding the serious objection from the defence counsel for the then 1st and 2nd accused persons one Mr. Kabonde, received as exhibit P"2". We noted further, however, that document (Exh. P"2") was not read out to the appellants as the rules of admission of documentary evidence require. We accordingly invited both parties to address us on whether it was properly introduced into evidence and the consequences thereof both to its validity and the sustenance of the appeal as a whole.

Mr. Kajiru was first to take the floor. He was not reluctant to concede that, indeed, after the PF3 was admitted as exhibit the prosecution did not go further to ask the witness to read out its contents. He was, however, emphatic that despite the mishap, the appellant was not thereby prejudiced. Elaborating, he said it was the appellant who had tendered it in court in Criminal Case no. 83 of 2009 hence he was well aware of its contents. He accordingly implored us not to expunge it from the record. That being a legal issue, the 2nd appellant had nothing substantial to contribute. He simply insisted that it was improperly admitted into evidence without him being let to know its contents hence requested us to expunge it as he was prejudiced.

We entirely agree with the concurring submissions of the parties that Exhibit P "2", as can be discerned from the record, was not read out to the 2nd appellant in court. The learned Senior State Attorney could not hide that he was aware of the legal position that the mishap has the effect of the document being taken to have been irregularly received as evidence with the consequences of being expunged from the record but, in the peculiar circumstances of this case, he pressed that it should not be expunged. The circumstance relied on being that it was tendered by the appellant in Criminal Case No. 83 of 2009 hence he knew its contents.

It is settled law in our jurisprudence which is not disputed by the learned Senior State Attorney that documentary evidence which is admitted in court without it being read out to the accused is taken to have been irregularly admitted and suffers the natural consequences of being expunged from the record of proceedings. There is a plethora of decisions expounding that stance. See, for instance, **Juma Kuyani and Another vs Republic**, Criminal Appeal No. 525 of 2015, **Misango Santiel vs Republic**, Criminal Appeal No. 250 of 2007, **Roland Thomas @ Malangamba vs Republic**, Criminal Appeal No. 308 of 2007, **Petro Teophan vs Republic**, Criminal Appeal No. 58 of 2012, **Juma Mnyama Kinana and Another vs Republic**, Criminal Appeal No.133 of 2011 (all unreported decisions of the Court).

It seems to us that Mr. Kajiru intended to invoke the principle of overriding objective recently introduced into, inter alia, the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 (the AJA) under section 3A and 3B following the amendment effected by the Written Laws (Miscellaneous Amendments) Act No. 8 of 2018 which enjoins the Court to focus on substantive justice so as to expedite the administration of substantive justice to the parties. The bottom line in determining whether that principle applies in a certain situation is whether the infraction prejudiced the appellant.

Consideration of the circumstances of each particular case is, therefore, very important before a court comes to its conclusion.

As intimated above, the charge levelled against the appellants was founded on exhibit P"2". That document was therefore crucial in the determination of the appellants' guilt. In essence the requirement to have the document read out to the appellant after it is cleared for admission is meant to let the appellant aware of what was written in the document so that he can properly exercise his right to cross-examine the witness effectively. Failure to read out to the appellant a document admitted as exhibit denies the appellant the right to know the information contained in the document and therefore puts him in the dark not only on what to cross-examine but also how to effectively align or arrange his defence. The denial, therefore, abrogates the appellant's right to a fair trial as we stressed in our decision in the case of **Misango Santiel vs Republic** (supra). In that case, the appellant's cautioned statement in which he allegedly confessed to the commission of the offence of armed robbery was admitted as exhibit P6 without its contents being read out to the appellant. The Court stated that:-

"The statement was then tendered in court as exhibit P6. Since the witness did not read the whole statement, it is hard to say that the appellant became aware of what was written in exhibit P6 and cross-examine on it effectively.... Under such circumstances it is doubtful to say that the appellant was fairly treated when the statement was used to form the basis of his conviction."

In the instant case, the predominant issue is therefore whether the appellant was prejudiced to warrant expunge from the record of exhibit P"2".

From the testimony of PW3, it is evident that the PF3 was admitted as exhibit and labelled ID "1" during the inquiry proceedings in respect of Criminal Case No. 83 of 2009. She had participated in those proceedings as a court clerk despite the fact that she was an office attendant. She said that PF3 was produced by the 2nd appellant and after it was admitted as exhibit P"2" she filed it in the court file.

It is clear therefore that exhibit P"2" remained in the court file which was in PW3's custody. It was not established by any cogent evidence that the appellant had ever possessed or seen it ever since. There was no assurance

that it could not be tempered with in any way. Even, the document remaining in the court file was no assurance that the document tendered in Criminal Case No. 83 of 2009 (ID.1) was the very one tendered in the instant case. For clearance of doubts, which is the primary duty of the prosecution, it was pertinent that the document ought to have been read out to the appellant after its admission as exhibit. Failure to read out exhibit P"2" to the appellant not only denied him the right to know its contents but also invited doubts on its being the very one tendered in Criminal Case No. 83 of 2009. The appellant was, in the circumstances, prejudiced.

All said, exhibit P"2" was irregularly admitted into evidence and wrongly acted on to found the 2nd appellant's convictions in both counts. It is hereby accordingly expunged from the record.

Central to the charge against the appellant before the trial court was exhibit P"2" that it was forged and uttered. The prosecution case rested wholly on it. It's expunge from the record, no doubts, renders the charge to have no legs to stand on. Consequently, the charge collapses.

For the foregoing reasons, we invoke the powers of revision bestowed upon us by section 4(2) of the Appellate Jurisdiction Act, Cap. 141 of the

Revised Edition, 2002, to quash the convictions in both counts, set aside the respective sentences meted out to the 2nd appellant by the trial court and sustained by the first appellate court. We accordingly order his immediate release from prison unless held therein for another lawful cause.

DATED at **TABORA** this 5th day of December, 2019.

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Judgment delivered this 6th day of December, 2019 in the presence of the appellant in person and Mr. Tumaini Pius, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL