IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 371 OF 2020

UMAIYA MAKILAGI @ MUSOMA ..... 1ST APPELLANT

GEORGE EDWARD NGATUNGA..... 2ND APPELLANT

BOAZ LUNYUNGU ..... 3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the Decision of the High Court of Tanzania at Tabora]

(Khamis, J.)

dated the 10th day of July, 2020

in

Consolidated DC Criminal Appeals Nos. 137, 138 and 149 of 2018

.....

JUDGMENT OF THE COURT

18th & 26th September, 2023

LILA, JA:

Before the Resident Magistrates' Court of Tabora, in Criminal Case No. 154 of 2015, the appellants herein namely, Umaiya Makilagi @ Musoma, George Edward Ngatunga and Boaz Lunyungu (henceforth the 1st, 2nd and 3rd appellants), were tried for various offences, some jointly and others separately. In counts numbers 1, 2 and 3, all the three appellants were jointly charged with the offence of conspiracy to commit an offence contrary to section 384 of the Penal Code, stealing contrary to

section 258 and 265 of the Penal Code and money laundering contrary to sections 3(k), 2(a) and 13(a) of the Anti-Money Laundering Act No. 12 of 2006 as amended by Act No. 1 of 2012. The 3rd appellant was separately charged with the offence of Money Laundering in count No. 4. The 2nd appellant was, too, separately charged with the offence of Money Laundering in counts Number 5, 6 and 7. At the conclusion of the trial, all the appellants were convicted as charged. In counts No.1 and 2, all the appellants were sentenced to three years imprisonment; in count No. 3, the 2nd and 3rd appellants were sentenced to pay fine of TZS 100 Million or serve five (5) years imprisonment in default; on the 4th count the 1st accused was sentenced to pay fine TZS 100 Million or serve 5 years jail term in default and for counts number 5, 6 and 7, the 2nd appellant was ordered to pay fine TZS 100 Million or serve five years imprisonment in default. Imprisonment sentences were ordered to run concurrently in the event the appellants failed to pay the fines. In addition, and in terms of section 358(1) of the Criminal Procedure Act, (the CPA), the appellants were ordered to compensate the complainant the stolen money or else distress be effected of their respective properties to realise the amount stolen.

The appellants were aggrieved and preferred an appeal to the High Court. The High Court nullified the trial court proceedings and ordered a

retrial of the case before another magistrate of competent jurisdiction. The order of retrial aggrieved the appellants hence the present appeal.

It was the prosecution's case that on diverse dates between January, 2014 and July, 2015, the 1st appellant, a business man, the 2nd and 3rd appellants, Branch Operations Manager and Branch Manager at Tanzania Postal Bank, Tabora Branch, respectively, conspired and did actually steal TZS. 710,232,600.00 the property of Tanzania Postal Bank and they converted the stolen money into other dealings including buying various movable properties and acquired various immovable properties for the purposes of disguising the origin of the said money while they knew or ought to have known that the said money was the proceeds of a predicate offence; stealing.

As indicated above, the trial court found all the appellants guilty as charged. Dissatisfied with the decision, the appellants lodged separate appeals to the High Court. The 1st appellant's appeal was registered as DC Criminal Appeal No. 137 of 2018, 2nd appellant's appeal as DC Criminal Appeal No. 138 of 2018 and that of the 3rd appellant as Dc Criminal Appeal No. 149 of 2018 for which each appellant fronted several and diverse own grievances. As the appeals arose from the same trial proceedings, they were merged, heard and determined in Consolidated DC Criminal Appeals Nos. 137, 138 and 149 of 2018. Considering the nature of the appeal and

the course taken by the first appellate judge in determining the appeal which triggered lodgement of the present appeal, we are convinced that it is of no significance to recite them herein. Suffice it to note here that the 2nd appellant lodged additional grounds of appeal among them being that: -

> *"1. That the trial magistrate erred in law and fact for convicting the appellants without following a fundamental principle of our criminal justice that at the beginning of a criminal trial the accused must be arraigned."*

The record bears out that the learned presiding judge was inclined to only consider the above procedural flaw to determine the appeal. He found the omission to remind the accused of the charge was a fatal irregularity rendering the entire proceedings, judgment and sentences nullity. He was, however, not ready to set free the appellants after quashing the conviction and setting aside the sentence. Instead, he found an order for trial *de novo* before another magistrate to be a proper way forward, the order subject of this appeal.

The Director of Public Prosecutions was aggrieved and filed Criminal Appeal No. 367 of 2020 which was however, with leave of the Court, withdrawn under Rule 77(4) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Equally aggrieved, the appellants preferred a joint

appeal, Criminal Appeal No. 371 of 2020 on 23/11/2020 comprising five grounds. A reason for not reciting them shall come to light soon below. It appears the 1st appellant was not happy with the grounds of appeal contained in the joint memorandum of appeal as he, subsequently, on 25/11/2020, lodged a separate memorandum advancing only two grievances thus: -

1. *That, the learned High Judge (sic) erred in law to order for the retrial of the case without considering that the appellant has been in prison since 2015 to date which is more than the sentence of three (03) years imposed upon him by the trial Court thus subjecting the appellant to the possibility of being punished twice for one and the same cause which is barred by the law.*
2. *That, the learned first appellate Judge erred to order for the retrial of the case without considering the insufficiency of the evidence against the appellant as brought before the trial Court.*

Before us, the 1st appellant appeared in person to prosecute his appeal. Mr. Enosh Gabriel Kigoryo, learned State Attorney represented the Republic Respondent, the same did Mr. Saikon Justin Nokoren who represented the 3rd appellant. Despite being duly served with the notice

of hearing of the appeal on 13/9/2023, the 2nd appellant did not show up to argue his appeal and neither was he represented by an advocate. Worse still, there was no any notice as to the predicaments that had befallen on him which prevented him from entering appearance. Following that, the 1st appellant and Mr. Justin urged the Court to proceed with the hearing of the appeal in his absence in terms of Rule 80(4) of the Rules to which prayer we acceded and we proceeded with the hearing of the appeal in his absence.

Shortly and before hearing could proceed, the 1st appellant intimated to the Court that he would only argue the grounds of appeal he lodged separately and leave those grounds contained in the joint memorandum of appeal be argued by Mr. Justin for the reason that he might also benefit from their outcome. Such anticipation could not come true as Mr. Justin rose and intimated to the Court that, save for ground 5 of appeal, he was abandoning the rest of the grounds of appeal in the joint memorandum of appeal and, in terms of Rules 4(2)(a)(b) and 81(1) of the Rules, sought and was granted leave to argue two new grounds. In the circumstances, Mr. Justin had three grounds to argue: -

> *"1. That, the first appellate court erred in law for failing to determine other grounds of appeal with which a retrial order could not have been made,*

hence the need for all the grounds of appeal to be conclusively determined before making a decision on whether or not a retrial order is viable.

2. *That, the first appellate court erred in law by nullifying the proceedings and judgment of the trial court with an order for retrial.*
3. *The learned Judge erred in law in ordering a retrial of the case instead of allowing the appellants' appeal before him and ordering their acquittal."*

Having noted that Mr. Justin had abandoned most of the grounds of appeal in the joint memorandum of appeal and had advanced two new grounds, the 1st appellant changed goal post and stuck to his grounds of appeal and abandoned all the grounds of appeal in the joint memorandum of appeal.

Brief as he was, the 1st appellant argued the two grounds of appeal conjointly stating that upon the learned judge noting the infraction of not reminding the appellants (then accused) and having nullified the proceedings and judgment, he ought to have had quashed the convictions, set aside the sentences and set all the appellants free instead of making an order for retrial which would allow opportunity for the prosecution to fill the yawning gaps in their case such as exhibits not being read out in court. He went on to give examples of exhibit P1 at

page 105, P2 at page 109, P3 at page 111, PE4 at pages 128 and 129, P6 at page 144, P8 at page 155, P9 at page 173 and others which were admitted as exhibits and which formed the basis of their convictions. He pointed out another reason as being no evidence sufficiently establishing the offence of conspiracy and even if there could be such evidence, a retrial order was unnecessary he having already completed serving the sentence in that respect.

Elaborating further his grounds of appeal, the 1st appellant contended that the High Court judgment was rendered when he had already completed serving the sentence of three years meted out by the trial court hence the order for retrial was improper and subjects him to the risk of being punished twice for an offence the sentence of which he had already served. This, he argued, will occasion an injustice to him. Although he was already out of the prison bars, he urged the Court to quash and set aside the order for retrial and formerly set him at liberty.

Mr. Justin's arguments were not far from what the 1st appellant had complained but was concise in his arguments on laws applicable in the circumstances supporting them with various legal principles propounded by the Court in various decisions. His first attack was on the failure by the first appellate judge to determine all the eight grounds of appeal as he considered and determined only one ground as was raised by the 1st

appellant as reflected above. His contention was that had he considered the other grounds of appeal, he would have realised that an order for retrial was not suitable as there were procedural flaws such as failure to read out documentary exhibits in court so as to avail the appellants with the knowledge of their contents. In his view, that amounted to denial of the appellants' right to have them head in completeness citing as his support, Article 13(6)(a) of the Constitution of the United Republic of Tanzania which imperatively requires the courts to observe it when the rights of individuals are being determined by courts of law. He relied on the Court's decision in **Salum Njwete @ Salum @ Scorpion vs. Republic**, Criminal Appeal No. 182 of 2019 (unreported).

The next attack by Mr. Justin was directed on the validity of the learned judge's order arguing that, at the stage the case had reached, it was not a requirement of the law that the appellants ought to have been reminded of the charge before the trial magistrate could continue with the trial of the case by recording the witnesses' evidence. To cement his contention, he referred the Court to its decision in **Thabit Dotto vs. Republic**, Criminal Appeal No. 32 of 2017 (unreported). He further contended that as the learned judge was legally wrong, then the order for retrial missed legs to stand on and should be quashed and set aside with the effect that the appeal remains not determined. The record of the

High Court, Mr. Justin proposed, should thereby be remitted to the High Court for it to hear and determine the appeal afresh but before another judge.

Elaborations by the 1st appellant and Mr. Justin eased the job by Mr. Kigoryo. He was inclined to agree with the duo's argument that the order for retrial was unwarranted for but was not ready to agree with the 1st appellant that the remedy was for the first appellate court to order for the all the appellants' release from prison. He associated himself with Mr. Justin's arguments that it was not a legal requirement that the appellants ought to have been reminded the charge and that the learned first appellate judge did not consider the factors that guide the court to order or not order a retrial as were stated in, among other decisions of the Court, the case of **Fatehali Manji vs. The Republic** [1966] 1 EA 343 one such conditions being sufficiency of the prosecution evidence and any prejudice that would be occasioned on the appellants. To realise that, Mr. Kigoryo asserted, the learned judge ought to have considered the other grounds of appeal. The fact that it had taken about five months for the case to proceed with hearing alone, he insisted, was not sufficient to displace the law and make it mandatory for the appellants (then accused persons) to be reminded the charge they were facing and such failure to mean that the appellants were, in terms of section 228 of the CPA, not

duly arraigned. His reliance was in the Court's decision in **Rojeli Kalegezi and Two Others vs. Republic**, Criminal Appeal No. 141, 142 CF 143 of 2009 (unreported) and **Thabit Dotto vs. Republic** (supra). While acknowledging that the Court, under these conditions, can step into the shoes of the High Court and do what it ought to have done, he was reluctant to propose that course be taken so as to avail an aggrieved party to have recourse to the Court by way of an appeal. He cited the case of **Salum Njwete @ Salum @ Scorpion vs. Republic** (supra) to augment his assertion. In all, he urged the Court to remit the record to the High Court for it to determine the appeal afresh discounting the worries by the 1st appellant that the outcome may occasion injustice to him stating that whatever the decision of the High Court would be, it will be according to law hence just to all parties.

We think, in sum, the grounds of appeal and the arguments by the parties call for the Court to determine two crucial issues; **one**, whether the order by the learned first appellate judge to nullify the proceedings, judgment and sentences meted out by the trial court was justified and, if this issue is answered positively, **two**; whether the order for retrial was justified in the circumstances of this case. Before we embark on the determination of the grounds of appeal, we find ourselves indebted to the

elaborate arguments by the parties before us which made our task relatively easy. We commend them for that.

Going further, to appreciate the essence of the grievances before the Court, we cannot avoid tracing, in some sufficient details, what exactly triggered the learned first appellate judge embark on the purported anomaly. That takes us to the proceedings of the trial court dated 14/4/2016. On that date the case file was placed before Chugulu SRM. The record is clear that the charge was lastly amended on 14/4/2016 and, on the same day, read over to the appellants and all the appellants denied the allegations levelled in the respective counts. The preliminary hearing, too, was conducted on the same date. Further, the record is silent on any other amendment being done to the charge. In our view there was sufficient arraignment in terms of section 228 of the CPA. The issue here is whether there was onus on the trial magistrate to remind the charge to the appellants when trial commenced on 21/9/2016 by recording evidence of the prosecution witnesses.

Legally speaking, the duty to read or remind the charge to the accused arises when a fresh charge is lodged in court in terms of section 228 of the CPA or when a charge is amended or altered by adding or removing an accused from the charge, a count in the charge sheet is withdrawn or when there is variance between the charge and evidence

(see section 234 of the CPA) or when a trial court complies with an order of retrial made by a superior court and the case is scheduled to recommence the trial. Otherwise, and with respect to the learned first appellate judge, it is not a legal requirement that a trial magistrate has to read again or remind the accused the charge when the case commences hearing even if time had lapsed from when the accused persons were first arraigned and their respective pleas recorded as the Court pronounced itself in **Thabit Dotto vs. Republic** (supra) rightly cited to us by Mr. Justin. It was therefore a misdirection on the part of the learned judge to find as he did that the trial magistrate was duty bound to remind the appellants the charge on the basis that five months had lapsed from 14/4/2016 when the appellants were first arraigned to 21/9/2016 when the trial commenced. Much as logic and common sense would command that the appellants be reminded the charge due to lapse of time which we think is a good thing to do, but failure to do so is not fatal and cannot displace the fact that the requirement of the law was duly complied with on 14/4/2016. As a way of emphasis, the provisions of section 228 of the CPA come into play when an accused is first arraigned in court whereby a presiding magistrate is enjoined to ensure that the charge is read over to an accused person so as to appraise him of the accusations levelled against him. This is what, in legal arena, is termed as arraignment. Had

the learned judge read, within lines, the two cases of **Mussa Mwaikunda vs. Republic** [2006] TLR 387 and **Rojeli Kalegezi vs. Republic** (supra) he cited in his judgment, he would have realised that the principles propounded therein applied in such circumstances. That was not the case herein as, on 14/4/2016, the charge was amended and a preliminary hearing conducted on the same day to which situation the provisions of section 234 applied. There was, therefore, no need for the appellants (then accused persons) to be reminded the charge when hearing of the case commenced on 21/9/2016.

To this end and without hesitation, we agree with Mr. Justin and Mr. Kigoryo and hold that it was an error for the learned first appellate judge to quash the trial court's judgment and proceedings and set aside the sentence as well as order as he did that the record be remitted for the trial court to conduct the trial afresh. We accordingly quash and set aside such decision and orders thereof.

Having held as above, the need to consider the second issue whether the retrial order was justified does not arise. It shall be wholly academic to engage into such discussion hence unnecessary.

The obtaining consequences is that the appellants' appeal was not heard to its completeness as rightly complained by Mr. Justin and Mr.

Kigoryo. Justice demands that we, as we hereby do, order the record of appeal of the High Court be remitted for it to expeditiously hear and determine the appeal *de novo* and according to law. The worries expressed by the 1st appellant cannot override the need to do justice to all and according to law.

DATED at **TABORA** this 25th day of September, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

Judgment delivered this 26th day of September, 2023 in the presence of Mr. Saikon Justine Nokoren, learned counsel for the 3rd Appellant and Ms. Suzan Barnabas, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL