

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CRIMINAL APPEAL NO 346 OF 2016

**(ORIGINATING FROM CRIMINAL CASE NO 69 OF 2013 FROM THE DISTRICT COURT
OF TEMEKE AT TEMEKE BY HON. TARIMO, SRM)**

TEDDY PIUS CHUWA APPELLANT.

VERSUS

THE REPUBLIC RESPONDENT.

Date of last order:12/06/2018

Date of judgment:20/06/2018

JUDGMENT:

MAGOIGA, J.

The Appellant (and two others not in this appeal) were charged in the District Court of Temeke on four Counts namely; Use of documents intended to mislead the principal contrary to section **22 of the Prevention and Combating of Corruption Act No. 11 of 2007**, use of documents intended to mislead the principal contrary to **section 22 of the Prevention and Combating of Corruption Act No. 11 of 2007.**, Forgery Contrary to Sections **333, 335 (d) (i) and 337 of the penal Code Cap 16 {RE 2002}** Embezzlement and Misappropriation Contrary to Section **28(1) of the prevention and Combating of Corruption Act No. 11 of 2007.**

The brief facts of this case are that 15th day of July 2010 at Temeke District Council, the appellant and Cosmas Josephat Kimathi were working as Fisheries Officer and Extension Officer respectively, with intent to deceive the Principal or defraud the Principal did intentionally use Receipt No. 7682 dated 15 July 2010, a document contained false material particulars purported to show that, Five Thousand Kilogram of Tilapia Finger worth Tsh.1,000,000/=, Four Fish cans worth Two Hundred Thousand and Five Hundred Kilogram of Bagridae Lings Tsh. 1,000,000.00 were bought from Bosco enterprises out of the monies given to them Vide Cheque No. 054123 through payment Voucher No. PV0070213 dated 24th May 2010, a fact they knew to be false and which to their knowledge intended to mislead Temeke District Council. It is further alleged that, on unknown date, with intent to deceive, the appellant and Cosmas Joseph Kimathi intentionally did use the document titled payroll (**VIBARUA WA KUHUDUMIA MABWAWA YA SAMAKI 2010**) the document which contained false material particulars, purporting to show that, 31 Persons namely therein had received Twenty Thousand each as cost for saving Fish Ponds as party of retirement imprest given to them Vide cheque no and PV no. mentioned hereinabove, a fact which they knew to be false and which to their knowledge intended to mislead Temeke Municipal Council.

Further, on unknown date, in July 2010 the appellant and one Cosmas Josephat Kimathi jointly forged the document titled, Payroll (**VIBARUA WA KUHUDUMIA MABWAWA YA SAMAKI 2010**) purporting to show that it was signed by **Jumanne Mwanambalu Mtobela** a fact they knew to be false . It is further alleged that, the appellant between 23rd October 2009

and 31st May 2010, being Fisheries Officer (Cosmas Josephat Kimathi) being extension Officer, and Mwajuma Omari Mwakimbeje, being cashier of Temeke District Council, did dishonestly misappropriate Ten million seven Hundred Ninety-five, the money given to them by Temeke District Council for fisheries Development Project for Tuangoma and Kimbiji wards.

The Appellant was convicted as charged and sentenced to be placed under protection three years, hence this appeal.

Aggrieved, the appellant has come to this Court, armed with four grounds of appeal to contest for her innocence, namely;

- I. That, the learned Trial Magistrate erred in law and fact for failure
 - to take into consideration of Exhibit P1 tendered by PW8 from Temeke Municipal Council leading to convicting the Appellant.
- II. That, the Honourable Trial Magistrate erred in law and fact by convicting the Appellant based on the offence of forgery without presenting the specimen of the signatures and handwriting of PW11 and PW12 and in the absence of the evidence from the Temeke Municipal Council
- III. That, the Honourable Trial Magistrate erred in law and fact to convict the Appellant on assumption and without taking into consideration of the testimony of PW4 and PW1 who never denied the laborers working at their ponds.
- IV. That, the Honourable Trial Magistrate erred in law and fact by holding that PW14 is the owner of the Pond and that she does not know the 30 people employed to take care of the ponds.

When this matter was called for hearing on 12th June 2018, the Appellant appeared in person and was represented by Learned Advocate, Ndibalema who was ready for hearing. The Respondent, Republic was represented by Selina Kapange Learned State Attorney. The Learned State Attorney, informed the Court that, she was ready for hearing of the appeal and she supports conviction and sentence. However, she pointed out that, in the course of preparing for hearing of this appeal, she has noted incurable irregularity in the proceedings that, Section 214(2)(a) (b) of the Criminal Procedure Act, Cap 20 [R.E 2002], were not complied with.

She went on to submit that, the trial court proceedings, shows the criminal case no 69 of 2013 was presided over by three different learned Resident Magistrates. The first was Honourable Shao Resident Magistrate, who recorded testimonies of nine witnesses for Republic, this can be gathered from page 1-51 of the type proceedings.

The second was Honorable Mwaikambo Resident Magistrate, who took over and recorded the testimony of two prosecution witnesses, this can be gathered from page 52-63 of the typed proceedings.

The third was Honorable Tarimo Senior Resident Magistrate, who took over and recorded the testimony of two prosecution witnesses and defence testimony gathered from page 64-96 and eventually composed the Judgment which convicted the Appellant.

Of the two Magistrate after Shao, RM, no reasons were recorded to justify change of magistrate, and the accused was not addressed of his right in terms of section 214(2) (a) (b) CPA. Failure to comply, there was no fair

trial to the appellant and the omission is fatal. There are several decisions of the Court of Appeal of Tanzania on this point, submitted the learned State Attorney. She cited the Case of **ELISAMIA ONESMO Vs. REPUBLIC, Criminal Appeal No. 160 of 2005 (CAT Unreported)**. The Court of Appeal Held that, failure to comply with the mandatory requirement of Section 214(2)(a)(b) of CPA, is the fundamental irregularity that cannot spare the proceedings and Judgment. On the noted irregularity, she prays to this court to nullify the proceedings, set aside the judgment of the trial court and order a retrial.

On the other hand, Mr. Ndibalema, learned Advocate, was brief to the point and by wholly subscribing to the submission by the learned State Attorney. However, he begged to differ on the prayer for retrial. He submitted that, since his client has served part of the sentence, retrial won't be fair in the circumstances. He submitted by praying that, the Appellant be set free to continue with her business.

This court has as well gone through the trial court record, and noted that there is no gainsaying that, the trial court record is flawed with the noted incurably irregularities as noted and submitted by the learned State Attorney and whole subscribed by Counsel for appellant. It is equally true, the interpretation of Section **214 of the CPA** is as of now, is plethora of authorities both of this Court and Court of Appeal of Tanzania. To mention few are, **LIAMBA SINANGA VERSUS REPUBLIC [1994] TLR 97 (CA) AND STEPHEN NGONYANI VERSUS REPUBLIC [1989] TLR 53 (HC)** held that: **"the language in section 214 (2) (a) (b) of the Criminal Procedure Act is mandatory in that the second Resident**

Magistrate was obliged to inform the appellant of his rights that witnesses who testified before the first magistrate be summoned to testify before the second magistrate if the appellant so wished."

Yet in the cited case of **ELISAMIA ONESMO Vs. REPUBLIC, Criminal Appeal No. 160 of 2005 (CAT Unreported)** the Court of Appeal Held that, **failure to comply with the mandatory requirement of Section 214(2)(a) of CPA, is the fundamental irregularity that cannot spare the proceedings and Judgment.**

Guided by the above authorities, and given the fact that, the proceedings of the trial court are conspicuous suffering from incurable irregularities, this court, without much ado is constrained to declare the proceedings that were conducted by the second (Mwaikambo, Rm) and third (Tarimo, RM) Resident Magistrates, a nullity. Consequently, the judgment, conviction and sentence are hereby set aside for resulting from nullity proceedings.

Having so decided, the only task this court remained with, is what is the proper order to give in the circumstances. The learned State Attorney, informed this Court that, she supports conviction and sentence on the available evidence on record save that the irregularities on the proceedings are incurable. She urged this Court to order a retrial while on the other hand the Counsel for the appellant had a different stance on this, and urged the Court not to order a retrial as according to him, retrial

would be unfair to the appellant who has so far served part of the sentence.

This court has given due consideration to the rival arguments by both counsel. Equally this court has taken into account the offences with which the appellant (her co- accused persons) were charged with, it is of the considered opinion that retrial order will do more justice to the case than not. In the event, this court orders a retrial of the appellant and her co-accused persons in the District Court of Temeke before another magistrate with competent jurisdiction to try the matter. As to the part of sentence served as raised by her counsel, just in case of conviction same should be taken into account during sentencing.

It so ordered.

Dated at Dar es salaam this 20th day of June 2018.




S.M. MAGOIGA,

JUDGE.

20/06/2018.