IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

DC. CRIMINAL APPEAL NO. 53 OF 2016

(Originating from Karatu D/Court, Criminal Case No. 43 of 2015)

ANDREA GWANDAWE SULE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MAIGE, J

The appellant named above was charged with and convicted of the offences of abuse of position contrary to section 31 of the Prevention and Combatting of Corruption Act, Act No. 11 of 2007 ("the PCCBA") and embezzlement and misappropriation contrary to section 28 (1) of the same Act. He was sentenced to fine of **TZS 500,000/=** for each of the offences and in default, custodian sentence of three years for each. The appellant is aggrieved by the decision. In his memorandum of appeal, he has raised three grounds which in essence question the correctness of the assessment of evidence by the trial magistrate.

It was alleged in respect to the first account that; on 13th day of May 2013 at Upper Kitete Secondary School within Karatu District in Arusha, for the purpose of obtaining an undue advantage for himself, the appellant intentionally abused his position in the discharge of his functions by misappropriating a sum of Tanzania Shillings eight million one hundred eighty two thousands only 8, 182, 000/= without approval of the school board; and on the 2nd count, it was alleged that on the same date and within the same place, the appellant being the headmaster of Upper Kitete Secondary School, fraudulently converted for his own use, the sum of Tanzania shillings eight million one hundred eighty two thousands only (8, 182, 000) the property of Karatu District Council which was entrusted to him for finishing the construction of one classroom at Upper Kitete Secondary School.

In the conduct of this appeal, the appellant was represented by Mariam Saad learned Advocate while the respondent by Grace Medikenya learned State Attorney. The appeal was argued way by way of written submissions which were filed within the scheduled time.

Arguing the appeal, Miss. Mariam started by making reference to Government Circular No. 13 of 2009 which stipulates that when schools are funded by either the Government or any other institution, the said fund cannot be given to an individual but through school bank account. Any withdrawal of the said money, the counsel further clarified, must jointly

involve signatories of the said account. In her humble opinion, it was impossible for the alleged amount to have been withdrawn by the appellant. She submitted further that, the respondent who had a burden of proof did not establish beyond reasonable doubt that; the said amount was personally withdrawn by the appellant from the school account.

There was nothing from prosecution evidence to establish that it was the appellant alone who withdrew the alleged amount from the School Development Account. Neither was there any evidence demonstrating how the said amount was debited into the school account, said the counsel. Relying on the authority in **John Makolobola vs. Republic** [2002] TLR 296, the counsel blames the trial magistrate in convicting the appellant basing on the weakness of the defense evidence. In conclusion, the counsel maintained that the charges against the appellant was not proved beyond reasonable doubt. She prays therefore that the appeal be allowed.

In rebuttal, Miss Grace was of the contention that the case against the appellant was proved beyond reasonable doubt. Through the oral evidence of PW1, PW2, PW3 and the documentary evidence in exhibit P1, the counsel submitted, the prosecution was able to establish that the Government through Karatu District Council, deposited into Upper Kitete Secondary School Bank Account at NMB Bank the sum of **TZS 8, 182, 000/=** for the purpose of building classroom at Upper Kitete Secondary

School. She submitted further that, there was irrefutable evidence in exhibit **P1** that the appellant was one of the signatories of the school bank account. Contrary to the submissions for the appellant, the learned state attorney contends that in accordance with the evidence in the withdrawal slip No. 02-12-017, it was the appellant who did withdraw the amount. This, the counsel submitted, is corroborated by the testimony of the appellant on cross examination appearing at page 17 of the proceedings. She submitted further that; though the fund was allotted for construction of classroom, there is irrefutable evidence on the record that the said classroom was not constructed. The counsel further placed reliance on the evidence in the caution statement of the appellant (exhibit P2) where he confessed that the money was deposited into school bank accounts and he utilized the same for different purpose.

The learned state attorney also drew the attention of the Court on the fact that the evidence of PW1, PW2 and PW3 was not challenged by way of cross examination. Relying on the authority in **Hamis Mohamed vs. Republic,** Criminal Appeal No. 297 of 2011 (unreported), she invite the Court to infer that the appellant admitted the probity of the said evidence.

The counsel further urged the Court to infer from the omission by the appellant to object admissibility of his cautioned statement that he was admitting the same to be correct. He relied on the authority in

NyerereNyague vs. Republic, Criminal Appeal No. 67 of 2010, CAT (unreported) where it was stated that;

> *"Unfortunately, the Appellant did not cross examine PW1 on this to shake her credibility. As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."*

She further referred this court to the case of **Paulo Maduka and Another vs Republic**, Criminal Appeal No. 110 of 2007 where it was stated that;

> *"The very best of witnesses in any criminal trial is an accused person who confess his guilty."*

On the issue of Government Circular No. 13 of 2009, she invited the Court to take into account the concession of the appellant in evidence of withdrawal of the money for her personal use without approval from the board. She finally prayed that the appeal be dismissed.

I have duly considered the rival submissions and examined the judgment and proceedings of the trial court. It is thus desirable to consider the appeal. The issue that will guide me in determining the appeal is whether or not the charges against the appellant was proved beyond reasonable

doubt. The position of law on burden of proof in criminal trials is settled. It is the duty of the prosecution to prove the guilty of the accused beyond any reasonable doubt. See for instance, **Joseph Makune vs. Republic** (1986) TLR 44. The guilty should not only be rational inference but more importantly the only rational inference that could be drawn from the evidence offered by the prosecution taking into account the defense offered if any.

Let me start with the first count which is abuse of position contrary to section 31 of the PCCBA. The relevant provision which establishes the offence provides as follows:-

> *"Any person who intentionally abuses his position in the performance or failure to perform an act, in violation of law, in the discharge of his functions or use of position for the purpose of obtaining an undue advantage for himself or for another person or entity, commits an offence and shall be liable on conviction to a file not exceeding five million shillings or to imprisonment for a term not exceeding three years or to both."*

An offense under section 31 of the Act, in my view, can be committed in two situations. First, by performing or failure to perform an act intentionally and in violation of the law; and two, intentional use of position for the purpose of obtaining an advantage be it personally or for another person. In both cases, guilt intention is an essential element. In this case,

both the charge sheet and the evidence are not clear as to which between the two scenarios the appellant's charge would fall in. In the judgment, it would appear to me, both the scenarios have been combined.

Let me first examine the case in relation to the first scenario. For a charge to stand under the first scenario, a person in occupation of a public office must have intentionally committed an act or omitted to perform an act in violation of the law. On this matter, I entirely agree with the counsel for the appellant that, there was no evidence adduced to establish the first element of the offence. Indeed, there was no evidence on the basis of which the trial magistrate would imply guilty intention by the appellant to make use of the money for payment of extra duty allowances to the school teachers.

The amount under discussion, it is not in dispute, was allotted to Upper Kitete Secondary School for construction of classroom. Equally not in dispute is the fact that the appellant utilized the same for payment of extra duty allowances to the school teachers. There has not been doubted in evidence that the amount was actually used for extra duty allowances. Perhaps, the issue here is whether in doing so, the appellant violated any law. It was upon the prosecution to so prove beyond reasonable doubt. The evidence by the prosecution through PW2, PW3 and PW4 was such that instead of being used for the intended purpose, the said amount was

used to pay extra money to the school teachers without there being approval from the school board. The prosecution evidence on that issue, Miss Grace is correct, passed unopposed. The Government Circular No. 13 of 2009 was exhibited as exhibit **P-1**. Item 2 of the Circular provides for the procedure for the use of the school fund in the following words;-

. MkuuwaShule

. Mhasibu

. Boharia.

It is apparent from the above provision that, the change of the use of the fund in question required approval from the school board. From the irrefutable evidence of **PW1**, **PW2** and **PW3**, the deviation of the use of the fund did not have any blessing from the board. With this evidence, the appellant was bound to adduce evidence that would raise a reasonable probability that the procedure was adhered to in the use of the fund. He has not dared so to do. He has just made a swipping testimony to have complied with the procured. From the evidence in totality, I agree with the trial magistrate that the procedure set out in the circular was not complied with. The deviation of the use of the fund was therefore in violation of the law. This element alone however does not establish the offence. The prosecution was to prove in the required standard that the deviation of the

use of money by the appellant was with deliberate intention to abuse his position. That element has not been established.

Turning to the second scenario, I agree with the counsel for the appellant that; the offense was not established in the required standard. In the first place, as I held in relation to the first situation, there was no proof of the essential element of guilty intention on the part of the appellant. Secondly, there was not adduced any evidence to establish that the deviation of the use of the fund was done for the purpose of obtaining an undue advantage on the part of the appellant or another person. I agree with the appellant's counsel that in accordance with the oral testimony of PW1 and DW1 together with the evidence in exhibit **P2**, the payment made to teachers does not in anyway suggest that it was for the purpose of obtaining undue advantage to the appellant or the said teachers. It is suggestive in exhibit **P2** that the same was paid for the extra duty service rendered by the said teachers to the school. In my opinion therefore, the first count was not established against the appellant beyond reasonable doubt.

This now takes me to the second count wherein the appellant was charged and convicted with the offence of embezzlement and misappropriation c/s 28 (1) of the Prevention and Combating of Corruption Act (supra). The section provides as follows;

"A person being a public official who dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as public official or allows any other person to do so, commits an offence, and shall be liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding seven years or to both."

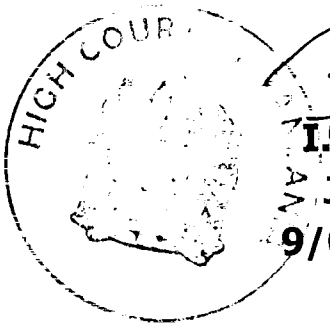
The offence under section 28(1) of the PCCB Act can be committed in two situations, namely, by dishonestly or fraudulently misappropriating or converting for his own use, any property entrusted to him or allows another person so to do. In this matter, there was not adduced any evidence to establish fraud or dishonest on the part of the appellant. Nor was there any suggestive evidence that the money in question was converted or misappropriated for the personal use of the appellant or any person whomsoever. To the contrary, there was concurrent evidence that the money in question was used to settle the extra duty allowances of the school teachers. In my view, non observance of the procedure in the use of the money cannot *ipso facto* lead to an inference that the same was made fraudulently or dishonestly.

From the foregoing discussions therefore, the appeal has merit. There was no sufficient evidence at the trial court to connect the appellant with the two offenses or either of them. The appeal is therefore allowed. The conviction of the appellant by the trial court is hereby set aside and the sentence thereof quashed.

It is so ordered.

I. MAIGE
JUDGE
9/01/2019

Judgment delivered this 9th day of January 2019 in the presence of the appellant in person and in the absence of the respondent.



I. MAIGE
JUDGE
9/01/2019