IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 82 OF 2017

(C/f District Court of Mbulu Economic Case No. 2 of 2016)

BASILI BOAY SURUMBU..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Mwenempazi, J.

The appellant, Basili Boay Surumbu, was charged at the District Court of Mbulu at Mbulu, for two counts, one of stealing by servant contrary to section 258 and 271 of the Penal Code, (Cap. 16, R.E. 2002) and two of use of documents intended to mislead principle contrary to section 6 of the Prevention of Corruption Act (Cap.329 R.E 2002) read together with paragraph 1 and 2 of the first schedule thereto and section 57(1) and 60(2) of the Economic and Organized Crime Control Act (Cap.200 R.E 2002). He is alleged to have committed the offence between 21st day of September, 1999 and 19th day of January, 2000 at Gunyoda Village within Mbulu District in Manyara region.

At the conclusion of the trial he was convicted as charged and sentenced to one-year imprisonment for the first count and another one-year term of imprisonment for the second count the sentence which was to run concurrently. Aggrieved, he filed this appeal based on two grounds;

1. That the trial Court erred in fact and in law to convict the appellant on first count while the prosecution failed to prove the charge to the standard required by law.

2. That the trial Court erred in fact and in law to convict the appellant on second count while on the date when the appellant was charged the Prevention of Corruption Act (Cap.329 R.E. 2002) was no longer in operation and had already been replaced by another law.

At the hearing of the appeal, the appellant was represented by Mr. John J. Lundu learned advocate while the respondent/ Republic was represented by Ms. Janeth Maseru. The respondent prayed to proceed by way of written submission and upon acceptance by the counsel for the appellant the prayer was granted.

Submitting on the first ground of appeal the counsel for the appellant stated that the trial Magistrate failed to analyze evidence on record to show that the prosecution did discharge their duty in proving the guilt of the appellant. He pointed out some witness's evidence which left some reasonable doubt in prosecution. He started with evidence from PW2 who testified to the effect that the appellant supplied them cement and when he received, he signed in the ledger book. He noted further that the

witness stated that there were days when he did not go to work and on those days other people did his work and that there were days when the appellant asked him to sign for the cement bags which were supplied in his absence. He argued that the people who worked when PW2 was absent were not summoned by prosecution to ascertain whether they received cement bags on behalf of the appellant so the doubt remained unclear. Other doubt was in respect of PW3's testimony when he said he only signed the leger book only three times when he took 4 bags of cement however some days, he took 2 bags of cement. He did not show how many other days he received cement without signing. He further pointed out that according to PW5 and PW7 testimonies they alleged that the appellant stole 683 bags of cement but they did not explain as to how they came to that conclusion. He argued that it was the duty of the prosecution to prove the guilty of the accused and not the accused to prove his innocence, the accused's duty is only to raise reasonable doubt. In that regard he cited the case of ***Maazuruku Hamisi vs. Republic*** **[1997] TLR 1**. The counsel reasoned out that had the trial magistrate evaluated evidence on record properly the appellant would not have been convicted on the first count. He urged this court that if it evaluates the evidence afresh will see that the prosecution failed to prove the first count against the appellant.

With respect to the second ground of appeal the counsel submitted that when the appellant was charged with the second count the law used that is the Prevention of Corruption Act (Cap 329 R.E 2002) had been repealed by section 60 of the Prevention and Combating of Corruption Act No. 11 of

2007. Therefore, he argued that the appellant had been charged to have contravened a dead law as by then it was inoperative.

Submitting in reply the learned state attorney stated that with respect to the first ground of appeal the appellant was convicted basing on the bags of cement which the purported recipients in the book never signed to acknowledge receipt of the same. He further submitted that the book showed that 683 bags were issued but the recipients did not sign and that evidence was sufficient to prove the offence to the required standard.

With respect to PW2 testimony that there were days that PW2 did not go to work did not mean that PW2 received cement which he did not sign to acknowledge receipt. She argued further that it was irrelevant whether PW2 went to work or not because on the days when he did not go to work it means cement was issued to a different person so the exercise book could still have indicated a different name and that recipient could have signed. It could not have the name of PW2 without his signature. She added that it was irrelevant whether the appellant was asked to sign for the cement bags issued to his colleagues because the appellant was only convicted in respect of cement which the purported recipient never signed. For those reasons the counsel submitted that the first ground of appeal has no merit and ought to be dismissed.

With respect to the second ground of appeal the counsel submitted that it is true that the offence that the appellant was convicted was committed in the year 1999 and that the Prevention of Corruption Act which was

operating in the year 1999 was in 2007 repealed and replaced by Prevention and Combating of Corruption Act No. 11 of 2007. She argued that the appellant could not have been charged under the law which was not enacted when he committed the offence but the law which was in force at that time. She supported her argument with the provision of Section 32(1) of the Interpretation of Laws Act Cap 1 R.E 2002. In short, the provision suggest that the new enactment does not affect the previous operation of the enactment or anything dully done under that enactment repealed including liability, duty or obligation imposed or incurred prior to the repeal. She was of the view that the appellant ought to be charged as such under the repealed law because his liability was not affected by the repealing law. For that reason, the counsel prayed for the dismissal of the appeal.

Having regard to what was submitted above the issue for determination in this appeal are on two folds. First is whether the prosecution proved the first count on the standard required by the law and secondly is whether the prosecution was right in charging the appellant on the repealed law.

Starting with the first issue, the counsel for the appellant faulted the prosecution evidence by PW2 by arguing that his testimony that, "I do not know who signed to my behalf" meant he was not denying not to have signed he just doesn't remember and that to him was doubtful. The counsel also questioned the fact that the alleged John and Boay who were the appellant's colleagues were not summoned to ascertain whether or not they received cement bags in absence of the appellant. I must agree with

the learned state attorney that this was irrelevant because the issue was why the alleged people who were given cement did not sign to acknowledge receipt of the same. In this regard I find no merit in the first ground of appeal as the prosecution did prove the offence in the standard required by law.

Moving to the second issue as to whether the prosecution was right in charging the appellant using the repealed law the answer is absolutely not. Once the law has been repealed it stops being operational that means it cannot be used anymore. The word 'repeal' has been defined by the Cambridge Dictionary to mean **the act of removing the legal force of a law.** In light of that it was wrong for the prosecution to charge the accused using a dead law. The referred **section 32 of the Interpretation of Laws Act Cap 1 R.E 2002** has been misconceived by the learned state attorney to defend the use of dead law. What the section entails is that if an offence is committed and prosecution of the same has commenced and at that time the law changes it would not affect what had already been prosecuted. However, in the present case the prosecution commenced after the law was repealed so the prosecutors ought to have used the new enactment instead of the repealed one. A proper interpretation of this provision would be that the new enactment cannot have effect on the already prosecuted crime.

For the foregoing reasons, I do find merit in appellant's appeal on the second ground and I therefore allow the appeal to that extent, and quash

the conviction and set aside the sentence in so far as the second count is concerned. It is so ordered.

T. MWENEMPAZI

JUDGE

03/11/2020