

**IN THE HIGH COURT OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA**

HC. CRIMINAL APPEAL No. 51 OF 2020

(Original Criminal Case No. 87 of 2018 of the District Court of Bukombe, at Bukombe)

REDEMPTA NYAONGE FAUSTINE ----- APPLICANT

VERSUS

THE REPUBLIC ----- RESPONDENT

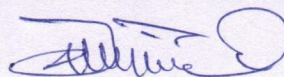
JUDGMENT

12th August, & 15th October, 2020

TIGANGA, J

Before the District Court of Bukombe, at Bukombe, the appellant stood charged with seven counts, one of them was conspiracy to commit an offence contrary to section 32 of the Prevention and Combating of Corruption Act No. 11/2007, two counts for use of documents intended to mislead the principal contrary to section 22 of the Prevention and Combating of Corruption Act No. 11 of 2007, in the second and third counts. Three counts for embezzlement and misappropriation contrary to section 28 (1) of the same law, that is in the fourth, fifth, and sixth counts, while last, is the offence of forgery contrary to section 333, 335 (a) and (d) (i) and 337 of the Penal Code [Cap 16 R.E 2002] now [R.E 2019] in the seventh count.

In that case the appellant was charged together with others namely Adam. S. Nyoni who was charged in the 1st, 2nd, 3rd, 4th, 5th and 7th counts,



Felician Manoli Shelembi who was charged in the 1st count only, Godfrey Said Mwiwa, who was charged in the 1st and 6th counts only and the appellant herself Redempta Nyaonge Faustine who stood charged in the 1st, 3rd, 4th and 7th counts only.

In all counts, the then accused persons who were employed by Mbogwe District Council within Geita Region in the capacity of Accountant, pharmacist, Acting District Medical Officer and cashier respectively conspired together to commit the offence of embezzlement and misappropriation of fund in the 1st count.

While the 1st accused was on 04/03/2015, being an Accountant, with intent to defraud or deceive his principal used a voucher No. 30/5 dated 04/03/2015 of Tshs 8,980,000/= showing that the money was used as per diem, fuel expenses and repair of 14 dispensaries and health centers while knowing it to be false with intent to mislead his principal.

The particulars shows that Adam Calistus and the appellant did also the same on dates between March and May 2015 in which they were blamed to have used the ghost payment voucher No. 35/5 dated 29/04/2015 for 8,980,000/- as the costs of per diem, fuel, and repairs of 14 dispensaries and health center, with intent to mislead their principal.

While in 4th count the two accused were charged to have on diverse dates between the 1st March and 30th April 2015 embezzled Tshs. 8,980,000/= through ghost payment voucher No. 35/5 dated 29/4/2015 which was entrusted to their custody as public officials. The 5th and 6th counts concerned Felician Manoli Shelembi and Godfrey Mwiwa

respectively, also for embezzlement of various funds. While in 7th counts according to the particulars, it charges the 1st accused and the appellant to have forged voucher No. 35/5 and 30/5 purporting to show that Alcard Fidelis, Erick Aaron and Edward Cleoplace did sign and receive Tshs. 910,000/= each, the fact they knew to be false.

After full trial, the trial court acquitted all accused person in respect of the 1st, 2nd, 4th, 5th, 6th and 7th counts due to the failure of the prosecution to prove the charges beyond reasonable doubt. However, Adam Calistus Nyoni and the appellant were found guilty and convicted in respect of the 3rd count which charged them with use of document to mislead the principal, contrary to section 22 of the Prevention and Combating of Corruption Act No. 11 of 2007. They were consequently sentenced to pay fine of Tshs. 500,000/= or to serve two years imprisonment, in the alternative.

Aggrieved by that decision, the appellant lodged the Notice of Appeal in time and appealed within time by filing three grounds of appeal as follows:-

- i. That the trial Magistrate erred in law and fact to convict the appellant by holding that the prosecution had proved their case beyond reasonable doubt against the appellant, in respect of the 3rd count.
- ii. That the trial Magistrate erred in law and facts by failing to properly consider and analyse the evidence adduced by the appellant in her defence.

- iii. That the trial Magistrate erred law and facts by convicting the appellant without specifying the offence and the section of the law under which the appellant was convicted.

At the hearing of this appeal which was viva voce, the appellant was represented by Mr. Muhingo learned counsel, while the respondent Republic was represented by Ms. Magreth Mwaseba, learned State Attorney.

Mr. Muhingo learned counsel chose to argue the 1st and 2nd grounds together while the 3rd ground was argued separately. In respect of the 1st and 2nd ground of appeal, Mr. Muhingo, submitted that there is no evidence to prove the offence of using documents to mislead the principal.

He argued so because, according to him, the evidence shows that the appellant, who was just a cashier as reflected at page 82 of the typed proceedings, was given a voucher, cheque and other documents already signed by the officer responsible to authorise the payment. She was being given such a documents and her duty was to go to the Bank, take the money and effect payment according to the instruction, therefore she could not in her capacity effect ghost payment.

Mr. Muhingo further submitted that, even if it has been proved that there was such payment, the appellant was just given instruction, and therefore in her capacity she could not create ghost payment.

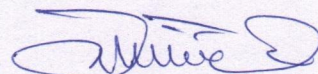
In his further arguments in support of these grounds, Mr. Muhingo submitted that, there is no evidence to prove that the appellant

participated in preparing the documents as there is no proof by handwriting experts. He further submitted that, had the court exercised due diligence, it would have discovered that the offence was not proved against the appellant.

On the 3rd ground of appeal he submitted that, at page 5, the last but one paragraph, the Magistrate did not mention the particular provision under which the appellant was found guilty and convicted. He submitted that is fatal to the proceedings and the judgment itself, for these reasons, he asked the court to allow the appeal and release the appellant from the charges.

Miss. Mwaseba, learned State Attorney supported the conviction and the sentence imposed. She started with the 3rd ground of Appeal in which she submitted that at page 7, the trial Magistrate cited the law upon which the appellant was charged. He prayed the court to dismiss the ground for lack of merits.

She just like the counsel for the appellant, combined the 1st and 2nd grounds and argued them together. She submitted that, the appellant does not dispute that she was a cashier and paid more than what the payees were entitled, that is why the trial Magistrate was satisfied that the case was proved beyond reasonable doubt. She was of the view that there was no need to bring the handwriting evidence as the issue was using the document to mislead the principal. She prayed in the end that the court finds that appellant was properly and rightly convicted and sentenced. She asked the appeal to be dismissed.

5 

In rejoinder, Mr. Muhingo submitted in respect of the 3rd ground that, the practice is that the Magistrate needs to mention the provision upon which the appellant was convicted, the content of paragraph 7, according to him does not show that.

In respect of the rest two grounds, the issue is whether the appellant was in a position to know that the amount which was in the voucher was properly written? He submitted that the case was not proved beyond reasonable doubt, as there is no proof that the handwriting is of the appellant. He prayed that in the end, the appeal be allowed as prayed. That marked the arguments by both parties, hence, this judgment.

Virtually, from the grounds of appeal and the arguments by the parties two issues are for determination and decision by this court.

- a) Whether upon analysis of both the prosecution and defence evidence, the offence in count number 3 was proved beyond reasonable doubt.
- b) Whether the trial court specified the provision of the law upon which the appellant was found guilty and convicted.

To start with, I will examine the provision of the law upon which the appellant was apparently convicted, that is section 22 of the Prevention and Combating of Corruption Act No. 11 of 2007 which for easy reference is hereby re produced.

*"A person who **knowingly gives to any agent** or an agent knowingly uses with **intent to deceive, or defraud his***

***principal**, any receipt, account or other document, such as voucher, a profoma invoice, an electronically generated data, or minute sheet, relating to his principal's affairs or business, and which contains any statement which is **false** or **erroneous** or **defective in any material particular** and which to his **knowledge is intended to mislead the principal**, commits an offence and shall be liable on conviction to a fine not exceeding seven million shillings or to imprisonment for a term not exceeding five years or to both.*"Emphasis Added.

From the law, for a person to be taken to have committed the offence under this law, the following ingredients must be established and proved.

- i. That the Accused person used the documents, which includes receipt, Accounts, voucher, profoma in voice, electronically generated data, or minute's sheets.
- ii. The said documents must relate to the principal's affairs or business.
- iii. That the documents must contain any statement which is false or erroneous or defective in any material particulars.
- iv. That he must be with full knowledge of the statement of the document, as to the falsity, erroneous and defectiveness in any material particulars.
- v. That he must be with full knowledge that the documents are used with intent of deceiving or defrauding the principal.

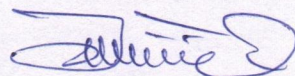
In this case, there is no dispute that the appellant was an employee of the victim, Mbogwe District Council, who in this case is taken to be principal. The appellant was a cashier and her main duty was to receive instruction and go to the Bank, take the money and pay to the respective payees.

In this matter, it seems from the record that the payments are initiated by the user department which in this case was a Health department, and after all the process of processing the money is over, the duty of the cashier is to prepare *a pay list* and pay the money to the respective payees.

This means, the cashier does not sign any document authorizing payment. However the payees are paid by her and are supposed to have received the money from her after signing the pay list.

After the money was received by the respective payees, and after they had signed the pay list, I believe the cashier has a duty of accounting to his/her employer that the money were paid to the respective receivers/payees, who are actually entitled. It is also a principle that she does so by submitting the pay list with the respective signatures as the proof of payment.

In this case, in respect of the 3rd count, the respective payees disputed to have received the money and to have signed on the pay list. Exhibit P1 collectively was tendered together with the prepared payment voucher and a pay list of the persons who allegedly received those payments. However, these documents "the pay list, were signed before the



appellant before the respective payees have received the money. These are the same persons who disputed to be so paid and signed on the same documents. In the circumstance therefore, it was expected that on her defence, the appellant would say something concerning the denial of the persons whom she said received the money from her but did not do so.

As already pointed out that, after paying the payees, the appellant submitted "the pay list" to her employer and made her to believe that the money was paid to the respective payee, that being the case, by the document, the pay list, the employer - principal was misled or deceived to believe that the money were paid to the proper persons while in fact they were not.

In law, a criminal case is taken to have been proved beyond reasonable doubt if the prosecution tendered or presented evidence which is strong enough against the accused person to leave only a remote possibility in his favour which can easily be dismissed. See **Magendo Paul and Another vs The Republic** [1993] TLR 219 CAT.

Further to that in **Chandrakat Joshubhai Patel vs The Republic** Criminal Appeal No. 13/1998, CAT - DSM, it was held inter alia that;

"Remote possibility in favour of the accused person cannot be allowed to benefit him. Fanciful possibilities are limitless and it would be disastrous for the administration of criminal justice if they were permitted to displace solid evidence or dislodge irresistible inferences against the accused."

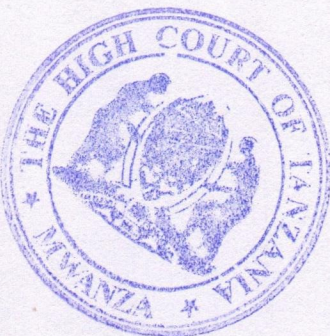
From the strength of the evidence as presented by the prosecution, as analysed herein above, I find the same to have proved the case in respect of the 3rd count against the appellant beyond reasonable doubts. This means that the trial Magistrate was justified to find the appellant guilty and convict him as it did; the first and second grounds fail for the reasons given.

Regarding the allegation that the trial court did not specify the provision upon which the appellant was found guilty and convicted, I find the judgment at page 5, 3rd paragraph from the bottom, the trial court held inter alia that;

"Therefore looking on evidence brought before this court I find that, they have managed to prove the 3^d count only of using document intended to mislead the principal c/s 22 of the prevention and combating of corruption Act No. 11 of 2007 for 1st and 4th Accused only"

I find this to be sufficient reference to the provision upon which the accused was found guilty and convicted. I therefore dismiss the entire appeal for the reasons given. It is so ordered.

DATED at MWANZA, this 15th day of October, 2020



J. C. Tiganga

Judge

15/10/2020