

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL NO 122 OF 2018

(Arising from Criminal Case No. 2 of 2017 of the Resident Magistrate Court of Shinyanga at Shinyanga)

WLLIAM SIMON NGONDOLA@ WILLIAM NGONDOLE ..APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

Date of the last Order: 14/1/2020

Date of the Judgement on 13/3/2020

E. Y. MKWIZU, J.

William Simon Ngondole @ William Ngondole, the appellant herein has preferred an appeal to this Court against the judgment of the Resident Magistrate Court of Shinyanga in Criminal Appeal No.2 of 2017. The appeal is predicated on four grounds of appeal contained in the original petition of appeal and one additional ground contained in a supplementary petition filed on 18th March, 2019.

The facts from which the instant appeal has been instituted are not complex. In the Resident Magistrate Court of Shinyanga at Shinyanga, the appellant was charged for obtaining money by false pretense in 16 separate counts contrary to **section 301 and 302 of the Penal code**

(Cap 16 R.E 2002), stealing by agent contrary to **section 273(b) of the Penal Code (Cap 16 R.E. 2002)** in the 17th count and personation in the 18th Count contrary to **section 369 (1) of the Penal Code (Cap 16 R.E 2002)**.The appellant denied the charge. The prosecution called four witnesses and tendered 2 exhibits.

The prosecution's evidence was to the effect that on unknown date appellant had introduced himself to PW1 one Dotto Suleiman Ndaike and PW2 Adam Ibrahim that he is an employee of Acacia while PW2 introduced to the appellant as a Gas Engineer. Knowing each other, appellant told PW2 that he owns motor vehicles namely Two Toyota land cruiser, two fusso, two Toyota Hilux, and two hand rollers which he got from acacia in liu of his claims against the Acacia and is on the process of disposing them. Being interested PW2, agreed to buy from the appellant, one Toyota land cruiser, two fusso, two Toyota Hilux, and two hand rollers. PW2 and the appellant agreed that payment would be made by installments and final calculation will be done on release of the motor vehicle by acacia mining .PW2 elaborated that the payments to the appellant were made through CRDB Bank, M-Pesa and cash. And that between the year 2015 and 2016 he managed to pay the appellant a total

of 35,172,000/=.PW2 reported the matter to the police after appellant had failed to deliver the said motor vehicle as agreed.

PW3 is the police investigator, she investigated the matter, collected the evidence and exhibits and prepared the charges against the appellant.PW4 is an officer from Buzwagy Gold mine (Acacia) His testimony was in respect of the fact that the appellant was not an employee of Buzwagy Gold mine (Acacia in the year 2015 and 2016. Talking properties' disposition procedures by acacia company,PW4 stated that, the disposition of properties is normally done by engaging an auction company and if is done internally, the commercial dept department is used to auction the properties. A mere individual employee cannot be involved in disposing off the company's properties. On his part, appellant denied the allegation.

Having considered the prosecution evidence and the applicant's defence, the learned trial magistrate acquitted the appellant on the 17th count. He, however, found the appellant guilty on the rest of the counts and upon conviction, appellant was sentenced to 2 years imprisonment in the 1 to 16th counts and one-year imprisonment on the 18th Count. The sentence was ordered to run consecutively. The appellant is aggrieved of the decision by the trial Court hence this appeal.

When the appeal was called on for hearing, the appellant had the services of Mr. Audax Constantine learned counsel. On its part, the respondent/Republic was represented by Ms Immaculate Mapunda learned State Attorney.

Submitting in support of the appeal, Mr Audax submitted that, on 18th October 2017 a trial magistrate Hon. N. Gasabile RM, disqualified herself from trying RM Criminal Case No. 02/2017 and a case file was sent to the Resident magistrate in charge for necessary steps. But on 11th April 2018 the said trial Resident Magistrate, N. Gasabile resumed the trial of the case and recorded evidence of PW3, WP 4955 D/C Jovitha without assigning any reason. He cited a decision of the court of appeal in the case of **Priscus Kimaro V. Republic**, Criminal. Appeal No 301 of 2013 CAT (Unreported) a case which was quoted with approval in **Mashaka Pastory Paulo Mahengi @ Uhuru & others V. Republic Criminal Appeal No. 61/2016 C.A** (Unreported) page 8 arguing that when a case is partly heard by a magistrate, whoever takes over as a judicial officer must assign reasons for doing so. He invited this court to exercise its revisional Power under **S. 373 of the CPA** to nullify & set aside the alleged proceedings.

On the 2nd ground of appeal, Mr Audax challenged the charge sheet on its failure to comply with section 135 (a) (iv) and form No 12 of the second schedule to the Criminal procedure Act Cap 20 R:E 2002 .He said on counts 1 to 16 the charge sheet failed to disclose a person whom the appellant was working for in selling the properties mentioned in each count. As regards count No 17 in which the appellant was charged with stealing by Agent c/s 273 (b) of the Penal Code, element of stealing was not disclosed in the particulars of the offence contrary to section 135 (a) (iv) read together with form number 21 of the 2nd schedule to the CPA.

And on the offence of personation in the 18th count, Mr. Audax stressed, the particulars of the offence failed to indicate the person to whom appellant falsely represented to. He was of the view that, in all 18 count, there was an omission of disclosing essential ingredients creating the said offences. He referred this court to the case of **Sammwel Marwa Roswe @ Masaba V. The Republic**, Criminal Appeal No. 220/2014 Mwz and **Amiri Juma Shabani & 2 Others V. Republic, Criminal Appeal 290/2015** (CAT) Arusha (All unreported) where, he said, the court of appeal emphasized on the need of the charge sheet to disclose essential ingredients of the offence so as to enable the appellant to marshal his

defence. He urged the court to find that the appellant was denied a fair trial.

In ground No 3, Mr. Audax complained of the procedure taken by the trial magistrate in relying on exhibit PE1 and PE2 which were wrongly tendered by the prosecutor and after admission, their contents were not read and explained to the accused person. He cited the case of **Thomas Ernest Msungu @ Nyoka Mkenya V. Republic**, Criminal Appeal No. 78/2012 and **Jumane Mohamed & 2 Others V. The Republic**, Criminal Appeal 534/2015 (All unreported) to bolster his argument.

Submitting on the 1st ground of the supplementary petition of appeal on the inconsistency and contradicting evidence by the prosecution's witnesses. Mr. Audax submitted that, PW1 testified to the effect that, on 18th and 21st December, 2015 the victim (PW2) paid to the accused person a total sum of 24,000,000 Tsh through CRDB Bank whereas PW2 who is the victim said he paid to the appellant a total of Tsh. 35,172,000 through M-PESA and that he did so between the year 2016 and a total of 22,000,000 was paid in cash to the accused now appellant at Kahama.

Referring to pages 17 to 19 of the proceedings, Mr Audax pointed another contradiction. He said, PW2 (victim) had told the court that it was PW1 who introduced to him that the appellant was Acacia mining employee where as PW1 told the trial court that it was one William who introduced himself as an Acacia Employee. Mr Audax contended further that, the pointed contradictions go to the root of the case. He cited the case of **Augustino Lodaru V. Republic**, Criminal Appeal No. 90/2013 (unreported). He called upon the court to find that PW1, & PW2 were not credible witnesses.

As regards variance between charge sheet and evidence, it was Mr Audax's submission that, **first**, PW2's evidence in respect to the first 16 counts is to the effect that appellant was given a total of Tsh 35,172,000 for buying properties mentioned in the respective counts. The charge sheet does not stretch to that figure. **Second**, it was alleged in all 16 counts that appellant represented himself as an Acacia Mining employee but PW4 Isack Kalote, Organization Officer introduced himself as working with Buzwagi Gold Mining (Acacia) at Kahama and that in the year 2015 and 2016 they had no employee by the name of William Ngondola. He urged the court to find that Acacia Mining and Buzwagi Gold mines are two different entities.

Third, stated Mr. Audax, in the first 16 counts and the last 18 count there is a mention of places where the offences were committed but, in the evidence, prosecution failed to indicate any of the place where the alleged offences were committed. He said, there is no proof as to whether those offences were committed at all. He cited the case of **Justine Kakuru Kasusura @ John Laizer Vs The Republic**, Criminal Appeal No. 175/2010 Court of Appeal (unreported), stressing that, it cannot be said that the case was proved against the accused person with variance between charge sheet & the evidence .

On his **fourth** ground of Appeal of the initial petition of appeal, Mr Audax had a general complaint that the case was not proved beyond reasonable doubt. He contended that, prosecution's evidence indicated that there was an oral agreement between the appellant and PW2 for a sale of a motor vehicles namely two fusso, two Toyota Hilux, one Land Cruiser and two land Rover for the consideration of 35,172,000 Tsh. He said, if the allegation is founded on the breach of contract between the parties herein, then, PW1, was supposed to seek redress in Civil Court. He supported his

argument by the case of **Mahona s/o Bundala Vs Republic**, DC/Criminal Appeal 213/2015, H/C Tabora, Mgonya, J.

He finally prayed that the appeal be allowed. However, he was of the view that if the 1st ground of appeal succeeds the court should not be tempted to order retrial because the evidence on record is so weak that the charges were not proved beyond reasonable doubts and therefore retrial will be to allow the prosecution to fill in the gaps.

On his part, Ms. Mapunda learned State Attorney, opposed the appeal. Arguing on the first ground of appeal regarding Hon. Resident Magistrate disqualifying herself from the trial and featuring again in the same proceedings without any disclosed reasons, she said, the Magistrate had recused herself on her efforts to save the appellant and the reasons for recusal was stated at page 27 of the record did not prejudice the appellant.

On the complaints that the charge sheet is defective, it was Ms Mapunda's contention that, the charge sheet was not defective as in all 16 counts of **obtaining** money by false pretence, two necessary elements that appellant was given money by PW1 and the money was obtained through

false pretence were disclosed. The particulars of offence, said Ms Mapunda, informed the appellant of the charges tabled against him. She referred the court to the case of **Jamali Ali @ Salum V Republic**, Criminal Appeal 52 of 2017 (CAT) Unreported.

On the other hand, Ms Mapunda opposed the complaint that exhibits PE1 & PE2 were tendered by the prosecution and that its contents was not read and explained to the accused person. She explained that though at page 38, it is the prosecutor who prayed to tender the documents as exhibits, at page 39, PW3 gave explanation of the said documents. To Ms Mapunda, PW3 was a person with the knowledge of the said exhibit and therefore a proper person to tender them. She cited the case of **DPP VS Mirzai Pirbakhshi @ Hadiji & 3 Others**, Criminal Appeal No. 493/2016.

On the issue of the inconsistency & contradiction of the prosecutions' evidence. Ms Mapunda submitted that, PW2 managed to give clarification on page 19 of the record that the appellant was paid through CRDB Bank, M-PESA and cash. On who introduced the appellant to PW2, stated Ms Mapunda, both PW1 and PW2 explained how they came to know the appellant. PW2 at page 19 of the record, submitted Ms Mapunda, was

recorded to have said that Appellant was introduced to him by Dotto Selemani (PW1) that he was working with Acacia. It was Ms Mapunda's further submission that Appellant impersonated to PW1 & PW2. And as the appellant failed to cross-examine on this issue during trial, he is precluded from questioning it at this stage. The complaint is an afterthought, she stressed. The case of **Edumin Tobias Paul Vs Republic**, Criminal Appeal No.130/2017 was cited in this point. Ms Mapunda, finally stated shortly that, prosecution proved the case beyond reasonable doubt.

In his rejoinder, **Mr. Audax**, reiterated his submissions in chief on ground one in the supplementary petition and on the rest of the grounds of appeal.

I wish to begin with the second ground followed by 1st ground of appeal which in my view, if decided in the positive, are sufficient to dispose of the entire appeal for reasons which will unfold in the course.

As already pointed out, the second ground of appeal touches on the defective charge sheet. The contest was in three categories. The first category was in respect to counts 1 to 16th where appellant was charged

with obtaining money by false pretence. Second category was in respect of count No 17 on stealing by agent while third category was pegged on 18th count where the appellant was charged with personation c/s 369 (1) and 35 of the penal code. I will analyze each part separately.

It was Mr Audax's submission that in its 1 to 16 counts, the charge sheet failed to disclose as on whose behalf the appellant was selling the alleged properties. I think this complaint should not detain me here. I have traversed on the complained counts in the trial court's record. In Counts 1-16 of the charge sheet, the appellant was charged with obtaining money by false pretence contrary to section 301 & 302 of the Penal Code [Cap 16 R.E 2002]. It was alleged by the prosecution in the particulars of the offence that **one WILLIAM S/O SIMON NGONDOLA @WILLIAM NGONDOLE** on different dates and various places within Shinyanga Municipality, in Shinyanga region by false pretence and with intent to defraud obtained a total of Tshs 33.172.000/= from **ADAM IBRAHIM** purporting to be an employee of Acacia Mines and that he wanted to sell him two Toyota Hilux, two Pedestrian Rollers, one Toyota land cruiser and two fusso while knowing that it was false .

I wish to state on the outset that the complaint that the particulars of the offence did not state clearly whether the appellant was selling the alleged properties on behalf of acacia mines is uncalled for. All inferred element of the offence of obtaining money by false pretence were captured in the respective counts and in my view, enabled the appellant to understand the nature and seriousness of the offence with which he was charged. The particulars of the offence in all the first 16 counts informed the appellant among other important elements that he obtained the money from Adam ibrahim while "pretending to be an acacia Mines employee". The relevant part of the complained counts read:-

"PARTICULARS OF THE OFFENCE

*That **WILLIAM S/O SIMON NGONDOLA** @WILLIAM NGONDOLE ... by false pretence and with intent to defraud obtained a total of Tshs ... from **ADAM IBRAHIM** purporting to be an employee of Acacia Mines and that he wanted to sell him two Toyota Hllux, two Pedestrian Rollers, one Toyota land cruiser and Two fusso while knowing that it was false."*

The contentions by the appellant's counsel that the particulars of the offence in these counts should have shown that appellant was selling the alleged properties on behalf of acacia mines is not borne by the record and is not what the charge sheet itself envisaged.

On the second category of complaint over the charge sheet, Mr Audax submitted that, particulars of the offence on the charge of stealing by Agent c/s 273 (b) of the Penal Code premised in 17th count in the charge sheet did not disclose element of stealing and therefore was drawn in contravention to section 135 (a) (iv) read together with form number 21 of the 2nd schedule to the CPA. With due respect to Mr Audax's submission, the appellant was found blameless on this count. I don't see the validity so to say, of this complaint.

Again, Mr. Audax complained of irregularity of the 18th count. He said, particulars of the offence of personation in the 18th count did not indicate the person to whom appellant falsely represented. Let the particulars of offence in 18th count speak for themselves: -

"PARTICULARS OF THE OFFENCE

*That **WILLIAM S/O SIMON NGONDOLA**
@WILLIAM NGONDOLE on diverse date between*

*18th day of December,2015 and 17th April,2016
various places within shinyanga region ,did falsely
represented himself to be an employee of Acacia
mines.”*

Indeed, there is no dispute that the particulars of offence set forth in the 18th count in the present charge sheet do not disclose against whom the appellant falsely represented. In the case of **Amiri Juma Shabani & 2 others V. Republic**, (Supra) referred to by the appellant counsel, in a charge of armed robbery, the court was invited to find that, the charge sheet is defective for failure to disclose the person against whom the violence was used. The court of appeal in allowing the appeal, emphasized on the need to comply with the provision of **section 132 and 135 of the Criminal Procedure Act (Cap 20 R.E.2002)** and further that charge sheet should name a person against who the violence is directed. See also the cited case of **Samwel Marwa Roswe @ Masaba V. The Republic**, (Supra) on the same principle.

Coming to the case at hand, in the 18th count, the particular of the offence failed to name a person against whom the appellant falsely represented, this part of the complaint has merit and for that reason the 18th count is

defective. For the reason to be apparent here in after, I will not say anything on the conviction and sentence against the appellant on this count at this stage.

1st ground of appeal is fitted on the failure by the trial magistrate to assigned reason why she took over the trial after she had recused herself. No dispute that the trial of this case was handled by two different resident Magistrates in three different phases. As the record would reveal, trial was commenced on 19th June,2017 before N.Gasabile Resident Magistrate who recorded the evidence of two prosecution witnesses, Dotto Selemani Ndaike,PW1 and Adam Ibrahim,PW2.On 18th October,2017 Hon.N. Gasabile Resident Magistrate is recorded at page 27 of the proceedings to have disqualified herself from handling the case on the reason of her inability to convince the accused person to continue waiting while the prosecution were on the process of locating the exhibits which were tendered in court ,in another case. The file was then tabled before the Resident Magistrate in charge for necessary orders. The records is silent on what the Resident Magistrate in charge did. On 11/4/2018, N.Gasabile, Resident Magistrate resumed the trial and proceeded to take evidence of PW3,WP 4955 D/C Jovitha. No reason were assigned on why the

N.Gasabile, RM had again took over the trial. And no instruction whatsoever was given by the Resident Magistrate in charge to that effect. It was until 18/7/2018 C.Uiso Resident Magistrate took over again the trial. This time with reasons that the re assignment was due to the transfer of the trial Magistrate. The accused was properly addressed under S. 214 of the CPA. C.Uiso Resident Magistrate, recorded the evidence of PW4 Isack Loti, defence evidence and composed the judgement.

It is obvious from the re- account of the events above that, Hon N.Gasabile, after having disqualified herself ,she was unable to take over the trial without further instruction or reasons. Her taking over without reasons, was,in my view contrary to section 214(1) of the CPA. Section 214 (1) of the CPA reads as follows:-

*"214.-(1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings **is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the***

trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial or the committal proceedings. [Emphasis supplied].

In the case of **Priscus Kimaro V Republic**, Criminal appeal No 301 of 2013 (unreported) the Court of appeal said:-

*" where it is necessary to reassign a partly heard matter to another magistrate, **the reason for the failure of the first magistrate to complete** the matter must be recorded. If that is not done, **it may lead to chaos in the administration of justice. Anyone, for***

*personal reasons could just pick up any file
and deal with it to the detriment of justice.*

This must not be allowed. “(Emphasis added)

See also **Mashaka pastory Paulo Mahengi @ Uhuru and 4 others Vs The Republic**, Criminal appeal No 61 of 2016 CAT (unreported)

The proceedings in our case, are silent on steps taken by the resident Magistrate in charge after Hon. Gasabile’s disqualification. This is so because, nothing on the records indicates what the Resident Magistrate in charge did after the return of the file for necessary orders. The case kept on adjourned before different Resident Magistrates until 11 /4/2018 when Hon.N.Gasabile took over again the trial. It is therefore uncertain whether justice was not compromised. In the case of **Ms Georges Centre Ltd v. The Attorney General & Another**, Civil Appeal No. 29 of 2016 (unreported). It was stated that:-

“... There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing, as suggested by Mr. Maro, the one

*who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. **Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised.***" [The emphasis is mine].

Indisputably, there is clear lack transparency in this case. After disqualification, Hon, Gasabille would have no authority or jurisdiction to proceed with the same trial without reasons. If this is to be allowed, definitely, may lead to chaos in the administration of justice.

In the quoted case above, the Court found that the omission to give reasons for the takeover was a serious irregularity. The proceedings from the stage of takeover to its conclusion, including the resultant judgment, were declared a nullity, quashed, and the

judgment set aside. See also the case of **Ally Juma Faizi @ Mpemba and another V. Republic**, criminal appeal No.401 of 2013 (Unreported).

As rightly submitted by Mr Audax, taking over the trial by Hon Gasabile, RM after she had disqualified herself from the trial, was without justification, and therefore contravened the provisions of section 214 (1) above. The consequences of which is to render the proceedings that followed there after a nullity, the judgement and sentence emanated there from inclusive as they were founded on the void proceedings.

I would have ordered a trial as per the directives in the decision of the erstwhile Court of Appeal for Eastern Africa in the case of **Fatehali Manji v. R** (1966) EA 343, which directs that a re-trial should be ordered when the original trial is illegal or defective. However, as correctly submitted by Mr Audax, the evidence on record is tainted with serious defects and if a retrial is to be allowed will enable the prosecution to go and fill in the gaps in the evidence at the trial. The pointed defects are as follows. **One**, exhibit PE1, the CRDB Bank slip and exhibit PE.2, Vodacom Print out were tendered and admitted in Court by the prosecutor without its contents being read and explained to the appellants. This was ground three of the

appeal. Mr Audax challenged the conclusion arrived at by the trial magistrate basing on exhibit PE1 and PE2 which were wrongly tendered by the prosecutor and after admission, their contents not read and explained to the accused person. In expelling this argument, the trial magistrate stated at page 7 of his judgement that the exhibits were tendered without objection from accused and therefore, the defence is nothing but an afterthought.

In the case of **Thomas Ernest Msungu @ Nyoka Mkenya V. Republic** Criminal Appeal No. 78 of 2012 (CAT-Arusha), the ballistic expert's report was produced by a public prosecutor and admitted in evidence without objection from the appellant and his fellow like what exactly happened in our case. On appeal the court of appeal had this to say at page 4 of the typed judgment; -

" ideally ,it is good practice that a document should be produced in evidence by its maker or other except where it is imposible to secure his attendance due to unforeseen circumstances such as those mentioned under section 34B (2) a of the evidence Act (Cap 6 R.E.2002)that is if he is dead or unfit by reason of bodily or mental

condition, etc. We say so because the maker or author will always be better placed to explain what the document is all about, the intricacies, if any, relating to the said document...

We are of the considered opinion that in the light of the circumstances under which the ballistic expert's report was produced and admitted in evidence, it was not safe to rely on it in convicting the appellant'

The facts of the case at hand at page 38 of the trial court's proceedings show that exhibits PE1 and PE2 were tendered by a prosecutor who is not a witness. The records at page 38 last paragraph and page 39 first two paragraphs reads:-

"Prosecutor: - Your honour, ***I pray to tender three CRDB Bank slips and Vodacom printout as exhibit in court***

Accused: the account number is mine and mobile number is mine. No objection

Court: Three CRDB bank slips received as PE1 and Vodacom printout as PE2.

Sgn; N. Gasabile-RM

11/04/2018"

It is incontrovertible, therefore that, the complained exhibits in this case were tendered by the prosecutor, that being the case, the principles enunciated in the case cited above applies squarely in our case. Like in the case above, the exhibits in our case was not tendered by the author or maker and no explanation was given as to why the maker were not called to testify. The rationale as stated by the court of appeal is that **the maker or author will always be better placed to explain what the document is all about, the intricacies, if any, relating to the said document.**

During preliminary hearing, the records tells that an officer from CRDB Bank was listed as one of the witness. This, in my view was a material witness as far as the exhibit PE1 is concerned. It is more so also, as it is this exhibit that tend to prove that appellant did receive the alleged money in execution of the agreement between him and PW2. In the case of **Abdallah v. Republic**, [1991] TLR 71 that:

"the general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts.

If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

As illustrated above, attendance of the CRDB officer and a maker of exhibit PE2 were not secured and the prosecution has not offered any explanation why. In the circumstances, I am of the strong view that prosecution's failure to call the pointed witness did dent the prosecution case, I am therefore entitled to draw an adverse inference as I hereby do.

As if that is not enough, Exhibit PE1 and PE2's were tendered and admitted in Court without its contents being read and explained to the appellants. This is fatal. In the case of **Jumane Mohamed & 2 others VS The Republic, (Supra)** the court of appeal citing with approval the case of **Robinson Mwanjisi and Others Vs Republic** (2003) TLR 218 it said that

"... failure to read a document after it is admitted as exhibit is fatal. A well-established practice is that after any document is cleared for admission and is actually

admitted as an exhibit, it should be read out to the accused person to enable him understand the nature and substance of the facts contained in it"

The records are silent on whether the exhibits were read out to the appellant. What is indicated is an elaboration given by PW3 on the said exhibits. PW3 is recorded at page 39 and 40 of the proceedings to have explained the sum of money which were deposited on diverse dates on the CRDB Bank Exhibit PE1 and mobile No.0757 766663 alleged to belong to the accused. Unfortunately, this version of the evidence do not tell from whom the money came from. All these could have been ironed out if the maker of the tendered exhibits were brought as witnesses. It is on this base, that I am convinced that, non-reading out to the appellant the contents of the alleged exhibits was a fatal irregularity in this case. It was therefore wrong for the trial magistrate to rely on the pointed exhibits to ground appellant's conviction.

It is for the above explained reasons, I am justified not to order a retrial as by doing so, in the circumstances of this case, will enable the prosecution to fill in the gaps in its evidence at the trial.

All said and done, I find merit in the grounds of appeal, hence I allow the appeal, quash the conviction and set aside the sentence. I further order an immediate release of WILLIAM **SIMON NGONDOLA @ WILLIAM-NGONDOLE** unless otherwise lawfully held.

It is so ordered.

DATED at Shinyanga this 13th day of March, 2020


E.Y MKWIZU
JUDGE
13/03/2020

Court: Right of appeal explained.

