IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 24 OF 2020

(c/f District Court of Hanang' District at Katesh, Economic Case No. 4 of 2017 dated 13th May, 2019 before Hon. A. Shao, RM)

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

DISMAS S/O MEDARD BAYI .....1ST RESPONDENT

MKONJERA S/O PHILEMON MKONJERA .....2ND RESPONDENT

WINFRED S/O KYAMBILE.....3RD RESPONDEN

JUDGMENT

15/12/2020 & 24/03/2021

GWAE, J

Dissatisfied with the decision of the Hanang' District Court delivered on the 13th May 2019, the appellant, Director of Public Prosecutions has now appealed to this court armed with the following grounds;

1. That, the trial magistrate erred in law and fact for acquitting the three respondents by his failure to properly analyse the prosecution evidence hence landing on erroneous decision
2. That, the trial magistrate erred in law by relying on the hearsay evidence which was contained in the document tendered and admitted as DE1

3. That, the trial magistrate erred in law for failure to consider properly the testimonies of prosecution witnesses and exhibits

One **Dismas Medard Bayi, Mkojera Philemon Mkojera** and **Winfred Kyambile** appearing in this appeal as the 1st, 2nd and 3rd respondent respectively were together and jointly charged with one **Elia Motaja Mwandeya** (4th accused before the trial court now deceased) and one **Magreth Zacharia Baynit** who was the 2nd accused. There were five counts in the charge leveled against the respondents and two others.

In the 1st count, the 1st and 2nd respondent and another person, 2nd accused person were charged with an offence of use of documents intended to mislead the Principal contrary to section 22 of the Prevention and Combating of Corruption Act, No. 11 of 2007 whose particulars were; that, the 1st and 2nd respondent on the 12th December 2013 at the Offices of Hanang District Council within Manyara Region being employees at Hanang District Council as Head of Procurement, Unit Assistant Procurement Officer and Head Health Officer respectively knowing and with intent to defraud or deceive their principal namely; Hanang' District Council did prepare issue cheque No. 180802 dated 12th December 2013.

In the 2nd count, the 2nd respondent and 4th accused were charged of an offence of use of documents intended to mislead principal c/s 22 of the

Prevention and Combating of Corruption Act, No. 11 of 2007, particulars being the 2nd and 3rd respondent on the 10th June 2013 at the Offices of Hanang District Council within Manyara Region being employees of Hanang District Council as Health officer and store keeper respectively knowingly and with intent to defraud or deceive their principal namely; Hanang District Council did prepare issue voucher No. 0173102 containing false material particular relating to their principal's affairs purporting to show that five (5) motor vehicles tyres and five tubes were bought worth 3, 142,500/= were used in Motor vehicle T. 527 ABN, the fact they knew to be false and which to their knowledge it was intended to mislead their principal

Equally, in the 3rd and 4th count, the 3rd respondent was charged with the same offence in both counts namely; use of documents intended to mislead principal c/s to section and law (supra), the 3rd respondent employed by Hanang' District Council as District Medical Officer did use two requisitions for stores containing false material particulars with effect that five tyres and tubes were needed for the M/V with Reg. No. T. 427 ABN on the 27th December 2012 and 22nd March 2013, the fact which he knew to be false intended to mislead the principal.

As to the 5th count, all respondents and two others were charged with an offence of occasioning loss to a specified authority c/s paragraph 10 of the 1st

schedule and section 57 (1) and 60 (2) both of the Economic and Organized Crime Control Act, CAP 200 Revised Edition, 2002, particulars of the offence being that on the diverse dates between 2012 at the Offices of Hanang' District Council within Manyara Region, by reason of their willful act, the respondents and two other persons did cause the said Council to suffer pecuniary loss of Tshs.7,442,489/=

It is evident from the record that, the 4th accused passed away on the 17th January 2019 before he entered his defence and the case before him therefore abated under section 224 of the Criminal Procedure Act, Cap 20 Revised Edition, 2002.

During preliminary hearing, there were facts which were admitted by accused persons now respondents, these were; that between 2012 to 2014, the motor vehicle with registration no. T. 527 ABN was grounded and that the said tyres and tubes were purchased for the use of the said grounded motor vehicle that, the 4th accused signified to have received five tyres and five tubes for motor vehicles T. 527 ABN and that the respondents' statements were recorded by the PCCB's Officials after they had been procedurally cautioned. According to the memorandum of fact presented by the Prosecution, there was only fact that was seriously disputed that is issue vouchers exhibiting that 10 tyres and 10 tube

were used by Motor Vehicle T. 527 ABN were unlawful acts intended to mislead the respondents' principal.

Upon hearing of evidence adduced by both sides, the trial court was of the view that, the prosecution has failed to prove the guilt of all accused persons now respondents, 2nd accused and the deceased in all counts on the ground that there was no audit report showing that the council suffered pecuniary loss in the financial year 2012/2013 and that the defence side has sufficiently explained how the tyres and tubes initially bought for the motor vehicle with Reg. No T. 527 ABN were eventually used by other motor vehicles owned by the same District Council due to emergency that arouse.

When this appeal was called on for hearing, the appellant was represented by **Mr. Halibu**, the learned state attorney assisted by **Mr. Isdory Kyando**, the learned prosecutor from Prevention and Combating of Corruption Bureau (PCCB) whereas **Mr. Joseph Mniko**, the learned advocate appeared representing all respondents. The parties' representatives opted to argue this appeal by way of written submission.

Arguing in support of this appeal in respect of the 1st and 3rd ground, the learned representatives for the appellant were of the opinion that, had the learned trial magistrate directed his mind properly in the cautioned statements of 1st respondent, 2nd accused 4th accused as well as the testimony of PW4, a driver

of motor vehicle with Reg. No. STJ 3574 who denied to have either been given tyres and tubes purportedly purchased for motor vehicle No. T. 527 ABN. According to the appellant's counsel, the 3rd respondent's version during defence that the tyres were fixed in other motor vehicles owned by the said Council was nothing but an afterthought. Embracing his submission, the appellant cited the case of **Ben uberi Mwamba v. Republic** (1984) TLR 172 and **Nurdin Akasha @ Habab v. Republic** (1995) TLR 227.

More so, the appellant's counsel argued that it was wrong for the trial magistrate to find that, the audit report was very essential in establishing the offences while there was a clear evidence by the prosecution side that 10 tyres and 10 tubes bought in two distinct times were not fixed in the Motor vehicle T. 527 ABN taking into account that the respondents had not paraded witnesses/drivers of the said motor vehicles alleged to have used the said tyres and tubes. They then urged this court to make a reference to section 110 TEA and judicial decision in **Vuyo Jack vs. DPP**, Criminal Appeal No. 334 of 2016 (unreported-CAT).

In the 2nd ground, the learned counsel for the appellant argued that it was a misdirection on the part of the trial court to rely on the exhibit D2, the 3rd respondent's reply letter to the District Executive Director, the letter whose contents were nothing but a mere hearing.

Resisting this appeal, the respondents' counsel vigorously argued that, the 1st and 3rd ground of appeal lack merit as the charge against the respondents was not proved to the required standard. He cited the Case of **Jonas Nkize v. Republic** (1992) TLR 213 adding that the DPP was not in position to plan for the defence on whom to call or not to call. He further argued that the audit report was very essential to establish the offence in the fifth count and that it was the testimony of PW2 that the tyres and tubes were truly purchased but the same were ultimately used to other motor vehicles in order to facilitate government program to operate smoothly as equipment were there. According to the respondents' counsel, the respondents acted innocently.

Regarding the 2nd ground, the respondents' counsel was of the opinion that the appellant failed to prosecute his appeal as he argued on the DE2 instead of DE1 as appearing in his petition of appeal without a leave of the court. He thus sought this ground be expunged and alternatively he argued this court to consider the DE2 exhibiting that the tyres and tubes were fixed in other motor vehicles owned by the respondents' employer and that the DE2 is not hearsay evidence.

In his rejoinder, the appellant merely reiterated that DE2 entails a hearsay evidence contrary section 62 (1) of TEA which requires all oral evidence must be, in all cases, direct. He added that the respondents were guilty since the tyres

and tubes purportedly issued to Mathayo Bura through the issue voucher signed by the said Bura for Motor Vehicle T. 527 ABN while he was not issued with the same and the same were not fixed in the said motor vehicle and no evidence to that effect. According to the appellant's counsel, a guilty mind of the respondent was revealed by their acts (actus reus).

Having briefly explained what transpired before the trial court and this court, now, it is for determination of the appellant's grounds of appeal aforelasted.

Regarding the 1st and 3rd grounds on the analysis of the evidence adduced by the prosecution as well as the defence. Since many of the facts were admitted and the evidence of both sides does not dispute on the requisition, purchase and supply of 10 tyres and 10 tubes at different times was for the motor vehicle with Registration No. T. 527 ABN and the fact that at the time of purchase of the said equipment the said motor vehicle was undisputedly grounded or defective. It is therefore the duty of this court as the 1st appellate court to re-asses the evidence on record, both oral and documentary. The prosecution evidence particularly that of PW2 and (PE7-statement of the 4th accused person) is not directly implicating the respondents except the 2nd accused and deceased, 4th accused who died on the 17th January 2019 before he entered his defence.

I am saying so simply because it was the 2nd accused who purportedly issued the tyres to the driver, PW2 and it is also clear through the statement of the 4th accused that he purported to have received tyres vide receipt voucher while in fact it was not true as he stated that he was merely told that the tyres and tubes were fixed in the motor vehicle (T. 527 ABN without ascertaining that fact.

Examining further the evidence of the PW2, it is amply clear that, the motor vehicle T. 527 ABN make Land Cruiser Hard top was grounded in the year 2012 but it started operating in the year 2013 or 2014 as per PE12 and the evidence of PW2 who duly signed the issue voucher (PE4) back dating it in order to establish that the same were issued on the 12th December 2013 while in fact the PW2 was not issued with the same.

I would entirely agree with the argument by the learned state attorney and a decision in **Nurdin Akasha @ Habab v. Republic** (1995) TLR 227 that the defence adduced by the 3rd respondent and exhibit D2 is an afterthought if his statement was procedurally tendered and admitted in evidence or caused to be tendered and admitted in order to challenge his defence. The cautioned statements of the 1st and 2nd respondent and that of two others were produced and admitted as PE6, PE5, and PE7 respectively however the statement of the 3rd

respondent was not produced despite the fact that during hearing it was plainly stated that the 3rd respondent's cautioned statement was recorded.

I however agree with the appellant's counsel that the 2nd respondent is criminally liable for use of documents in order to mislead his principal through the issue voucher No. 0173102 (PE8) duly signed by him (2nd respondent) on the 10th June 2013 by him. I am of that view for an obvious reason that, through his testimony admitted that the tyres and tubes in question were issued to T. 527 ABN but the same were not fixed to the said motor vehicle (See page 80 & 81 of the trial court's typed proceedings). By writing and signing in the issue voucher that the tyres and tubes were issued to motor vehicle with Reg. No. 527 ABN while in real sense the same were not issued for the said motor vehicle that means the 2nd respondent knew that fact to be false and of course with intent to defraud or deceive his principal, Hanang' District Council.

Therefore, I do not see how the 1st respondent and 3rd respondent would be criminally implicated through the said acts and omissions of 2nd accused who was either on the field or on temporary employment by using false document, Issue Voucher No. 180802 (PE) and those of the 4th accused person now deceased as well as those of the 2nd respondent who is now found guilty of the offence in the 2nd count.

Coming to the 2nd ground, that, the trial magistrate erred in law by relying on the hearsay evidence which was contained in the document tendered and admitted as DE1. Looking at the submission of the appellant's counsel is glaringly clear as argued by the respondents' advocate that, the appellant's argument is essentially on the exhibit D1-a letter from District Executive Director and not on the 3rd respondent's reply letter (DE2). The appellant had therefore changed his ground of appeal without a requisite leave of the court. That is legally wrong as doing so is equally to taking opponent party by surprise. For that reason, I thus consider the 2nd ground of appeal to have impliedly been abandoned.

That told and done, this appeal is partly allowed, the decision of the trial court acquitting the 1st and 3rd respondent is hereby affirmed whereas the trial court's decision acquitting the 2nd respondent in the 2nd count is hereby quashed and set aside. The 2nd respondent is thus convicted of the offence of use of documents intended to mislead the principal contrary to section 22 of the Prevention and Combating of Corruption Act No. 11 of 2007 (2nd count).

It is so ordered.

M. R. GWAE
JUDGE
24/03/2021

Court: Right of appeal to the Court of Appeal of Tanzania is fully explained.

M. R. GWAE
JUDGE
24/03/2021

PREVIOUS RECORD

Ms. Kasala; We have no previous record however we pray this court be pleased be punished in accordance with the law.

MITIGATION

2ND respondent. I pray for a lenient sentence on the following grounds; I am the first offender. **I** have a family comprised of eight children and four children whose father had passed away, I have my father who is old and dependent on me for his survival. More so I am suffering, I am now aged **sixty (60)** years.

SENTENCE

Having taken into account, the 2nd respondent is the first offender and the fact is he has dependents and circumstances that led to the commission of the offence by the 2nd respondent, I find just and fair to order the 2nd respondent to pay Tshs. **1,500,000/=** (say one million and five hundred thousand shillings) as a fine and in default thereto to serve five months period

THE HIGH COURT OF TA...

M. R. GWAE
JUDGE
25/03/2021