IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

CRIMINAL APPEAL NO.01 OF 2021

BITA MAGAI HITLER.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of Singida District Court, Singano-SRM)

Dated the 27th of November, 2020

In

Economic Case No.6 of 2019

.....

JUDGMENT

16thAugust&2nd September,2022

MDEMU, J.:

In the District Court of Singida, the Appellant, who was the 3rd Accused person, Elikana Lubango Isanzu and Emmanuel Alexander Mawi, the then 1st and 2nd Accused persons respectively were jointly and together charged with three counts of abuse of office, embezzlement/ appropriation and occasioning loss to a specified authority for the first, second and third counts respectively. All the three counts were in contravention of the provisions of sections 31 and 28(1)(3) of the Prevention and Combating of Corruption Act, No.11 of 2007, in the first and second counts and Paragraph 10(1) of the 1st

Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap.200.

According to the particulars of offence and the evidence on record, the Appellant and the then 1st and 2nd Accused persons were employees of Singida District Council and the Ministry of Health respectively. Between 18th to 24th of October, 2014, the Council and the Ministry organized a campaign on measles Rubella to be coordinated and run by the Appellant and the then 1st and 2nd Accused persons. their duties in the said campaign were mainly for coordination, supervision and distribution of vaccination and finally prepare a report to that effect. It is in the execution of such duties they parted away with Tshs.14,660,000/= through preparation of double payment list, hence abuse of office, embezzlement and occasioning loss to the specified authority, the Ministry of Health.

To the conclusion of trial upon hearing eight prosecution witnesses and three defence witnesses, the learned trial Magistrate found the prosecution to have proved the case beyond reasonable doubt the second count on embezzlement and appropriation thus convicted the Appellant and the then 1st and 2nd Accused persons and sentenced them to a fine of Tshs.500,000/- each or six months prison term in default thereof. Counts relating to abuse

of office and that of occasioning loss to a specified authority were not proved. This was on 27th of November, 2020. The Appellant still considering himself innocent, challenged the said conviction and sentence on the following three grounds of appeal:

1. *The trial court erred in law and fact to convict and sentence the Appellant while the Respondent herein failed to prove their case beyond reasonable doubt.*
2. *The trial court erred in law and fact for not analyzing the evidence adduced by the Appellant.*
3. *The trial court erred in law and fact to convict and sentence the Appellant basing on weak and contradictory evidence adduced by the Respondent's witnesses herein.*

On 20th of July, 2022, Mr. Robert Owino, Learned Advocate and Ms. Bertha Kulwa, Learned State Attorney for the Respondent Republic, appeared before me to argue the appeal. It was however agreed, and an order was made to that effect that, the appeal be disposed by way of written submissions. Parties duly complied.

Submitting jointly in the first and third grounds of appeal in written submissions filed on 2nd of August, 2022, learned counsel for the Appellant stated that, the trial magistrate never satisfied herself that the prosecution case was proved beyond reasonable doubt before assuming conviction responsibility before her. In his view, the trial magistrate having noted in her judgment that the alleged double payment list was not prepared by the Appellant and that, it was prepared for reporting and record keeping only, would not in return use the same evidence that the double payment list intended for embezzlement and misappropriation. He thus cited the provisions of section 114 of the Evidence Act, Cap.6 and the case of **Edward Dick Mwakamela vs. Republic [1987] T.L.R. 122** elaborating that, the offence of embezzlement and misappropriation was not proved beyond reasonable doubt.

Submitting further in these two grounds of appeal, the leaned counsel observed that, the Appellant never admitted in his caution statement to have prepared the double payment list. He added that, such list (P1) got in evidence through public prosecutor and not PW1 thus violating principles stated in **Haruna Mtasiwa vs.Republic, Criminal Appeal No.208 of**

2018 (unreported) that, State Attorneys are not legally competent to tender a document in court.

In the second ground of appeal his view was that, there was want of proper analysis of evidence on the side of the trial magistrate. He had this observation because, according to PW7, DW1 and DW2, the Appellant was an accountant in the Ministry of Health and all dispatches regarding expenditure in the campaign was overseen by Elizabeth Ryoba, an accountant in the council. He thought, under the premises, had the trial Magistrate looked the whole evidence and analyzed properly would have concluded that, the Appellant's case was not proved beyond reasonable doubt. He cited in this the case of **Jonas Nkize vs Reublic [1992] T.L.R. 213**; **Joseph Makunze vs. Republic [1986] T.L.R. 44** and specific on offences under the provisions of section 28(1) of the PCCB Act, the case of **Andrew Gwandawe Sule vs. Republic, Criminal Appeal No. 53 of 2016** (unreported) was cited insisting that, the case against the Appellant was not proved by the prosecution beyond reasonable doubt.

In reply, the Respondent Republic filed their written submissions on 16th of August, 2022. They did not resist the appeal. In all, all the three grounds of appeal were argued as one. Ms. Bertha Kulwa who filed the said

written submissions was of the view that, conviction of the Appellant and the then 1st and 2nd Accused persons banked on exhibit P1 "*marejesho ya fedha za kampeni shirikishi ya chanjo ya surua na Ribella".* In her submissions, this was the document containing double lists and is the same leading to the embezzlement of Tshs. 14,660,000/= subject of the charge. She thus submitted that, as the learned trial magistrate concluded that the said documents(P1) was for record keeping, it wasn't safe again to base conviction on that weak evidence. Citing the case of **Yusuph Simon vs. Republic, Criminal Appeal No. 240 of 2018** (unreported), the learned State Attorney observed that, the said discrepancies in the prosecution case makes the prosecution case a flop one. She thought therefore the prosecution case was not proved, the reason of not supporting conviction.

That being the position of the parties in their written submissions and having taken into account the evidence on record, the three grounds of appeal, as observed by the learned State Attorney, are merged into one, that is, the prosecution case was not proved beyond reasonable doubt. As observed by the two learned counsels, for the offence of embezzlement and misappropriation to succeed in the circumstances of this case, it has to be established beyond reasonable doubt that exhibit P1 being double pay list

was prepared by the Appellant dishonestly and fraudulently within the meaning of section 28 (1) of the PCCB Act. For easy of reference, the section is reproduced as hereunder:

> *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.*

Going by the above position of the law, the question is whether exhibit P1 a double list of payment was prepared fraudulently or dishonestly by the Appellant herein. In other words, the Appellant, through exhibit P1, parted away with Tshs. 14,660,000/=, being part of funds allotted for Measles/Rubella campaign. According to the evidence, specific at pages 11 and 12 of the proceedings, it is stated by PW1 that:

> *After inspecting the documents, I discovered that same documents were used in retiring on two occasions a sum of*

Tshs. 14,660,000/=(were used more than once). The investigation and the witnesses revealed that, they were directed to prepare two documents. One for sending the report while the other was for safe keeping at the office-as evidence of payment/report given. It was the acting DMO and the secretary who prepared the reports and they submitted them to the ministry accountant- Bita Magai who inspected them and forwarded them to the Ministry of Health.

In the foregoing evidence, the Appellant was not the maker of the said double list of payments (P1). Even when he was the one, yet there is no evidence of dishonest or fraudulent because according to PW1, the double list of payment was for payment and the other for record keeping as evidence of payment. In the case of **Andrew Gwandawe Sule vs. Republic** (supra) cited to me by the counsel for the Appellant, at page 10 of the judgment, it was observed that:

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.....

In the instant appeal, as said, there is no evidence that the Appellant dishonestly or fraudulently misappropriated any money allotted for the campaign or converted the use of any entrusted campaign funds to his own gain. Upon finding that the double list of payment was prepared purposely one for payment and two as record for evidence of payment, the learned trial Magistrate wouldn't have come to a finding that the Appellant was dishonest or acted fraudulently as to misappropriate Tshs. 14,660,000/= for personal gain or even that there was any fund allotted for campaign got converted by the Appellant for his own use.

On this account, and as observed by the two counsels, the prosecution case was not proved beyond reasonable doubt. The remedy is to allow the appeal, as I hereby do. The conviction and sentence is thus quashed and set aside.

It is so ordered.

Gerson J. Mdemu
JUDGE
2/9/2022

DATED at **DODOMA** this 2nd day of September, 2022

Gerson J. Mdemu
JUDGE
2/9/2022