IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 4O OF 2022

(Originating from District Court of Kiteto in Criminal Case No. 52 of 209 dated 23rd November 2022)

NORBERT IGAGALA LUBEBA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

12/7/2023 & 12/9/2023

BARTHY, J.

The above-named appellant was arraigned before District Court of Kiteto (hereinafter referred as the trial court), charged with three counts. On the first count, he was charged with use of documents intended to mislead the principal contrary to section 22 of the Prevention and Combating of Corruption Act, No.11 of 2007 (hereinafter referred to as the PCCA).

In relation to this offence it was alleged that, the appellant on 7/7/2016 at Boma Primary School in Kiteto District within Manyara Region, with intent to deceive his principal, the District Educational Officer, he knowingly prepared and use false document namely "muhtasari wa Kikao

cha walimu" (minutes of teachers' meeting) dated 7/7/2016 containing false material particulars purporting to show that the meeting has been convened to approve expenditure and withdrawal of five million Tanzania Shillings (Tsh. 5000,000/=) from Boma Kiteto Primary School capitation account No. 5013800045 to be paid to 23 teachers of the said school, a fact he knew to be false and which to his knowledge was intended to mislead the principal.

On the second count, the appellant was charged with the offence of abuse of position contrary to section 31 of the PCCA. It was alleged that on 7/7/2016 at Boma Primary School in Kiteto District within Manyara Region; the appellant being employed by Kiteto District Council as a teacher, in discharge of his duties, he intentionally abused his position by preparing a false payment list containing names of teachers to be paid a sum of Tsh. 217,391.30/- each, for the purpose of obtaining an undue advantage amounting to Tsh. 5,000,000/-.

On the third count, the appellant was charged with the offence of embezzlement and misappropriation contrary to section 28(1) of the PCCA. It was alleged that, on 8/7/2016 at Kibaya area in Kiteto District within Manyara Region, the appellant being the employee of Kiteto District Council

as a teacher, he fraudulently misappropriated a sum of Tsh. 5,000,000/- which was under his control as an acting head teacher of Boma Primary School.

The appellant pleaded not guilty to each count; hence full trial ensued. In attempt to substantiate the case, the prosecution called a total of 15 witnesses and tendered 18 exhibits. On the other hand, the defence side marshalled four witnesses to refute the allegation.

After hearing the parties, the trial court was satisfied that the case against the appellant was proved beyond reasonable doubt. The appellant was therefore convicted and sentenced as follows; for the first count to pay the fine of Tsh. 5,000,000/- or serve two years imprisonment in default; for the second count to pay the fine of Tsh. 100,000/= or serve one year imprisonment and for the third count to pay the fine of Tsh. 100,000/= or to serve one year imprisonment in default. The sentences which were ordered to run in consecutive.

The appellant was not amused with both the conviction and sentence imposed against him; he therefore preferred the instant appeal with five grounds of appeal as follows;

1. *That the Honourable trial magistrate erred in law to hear and determine this case which was prosecuted contrary to section 57 of the Prevention and Combating of Corruption Act [CAP 329 R.E. 2022]*
2. *That, the proceedings of the criminal case No. 52 of 2019 of the Kiteto District court is tainted with illegalities.*
3. *That, the prosecution failed to prove its case beyond reasonable doubt.*
4. *The appellant was denied of his right of fair hearing.*
5. *That, the trial magistrate failed to analyze evidence.*

By parties' consensus the appeal was disposed of by way of written submissions in which the appellant was represented by Mr. Pastory Florence Kong'oke learned advocate and the respondent was represented by Mr. Leonce Bizimana and Ms. Rose Kayumbo learned state attorneys.

Submitting on the first ground of appeal, Mr. Kong'oke argued that, in terms of section 57 of the PCCA, it requires the offences which the appellant was charged with, to be tried after obtaining a consent from the Director of Public Prosecutions (to be referred to as the DPP).

He further submitted that, in the instant matter there is no evidence that the consent was obtained. As in the record of the trial court never showed the prosecution presented the consent before the court.

Mr. Kong'oke contended that, such omission makes the proceedings and the judgment of the trial court illegal. His argument was reinforced with the decision of the Court of Appeal in the case of **John Julius Martin & another v. Republic**, Criminal Appeal No. 42 of 2020 (Unreported) where the court held that, it is not enough for the consent document to just be filed in the court's file, rather it requires the consent document to be endorsed by the trial court.

Making reference to the decision of **John Julius Martin & another v. Republic** (supra) Mr. Kong'oke was firm that having the proceedings and judgment of the trial court being nullity; the options is to order trial *de novo* or to release the appellant.

He further argued that, should the court orders trial *de novo* there is the danger for the prosecution to fill in the gaps left in their evidence. To this arguments he referred to the appellant's objection against admission of exhibit PE3 which the prosecution had no opportunity to rejoin, but the trial court went ahead to admit the same.

Mr. Kong'oke also referred to admission of exhibit P17 whose maker was unknown, but the same was admitted by the court. He also pointed out that, there was no chain of custody of all exhibits tendered by PW14 as the witness moved a lot from Kiteto to Babati then to Arusha and later to Babati.

He further submitted that, there was neither paper trail nor oral account given to establish a chain of custody. He claimed there was no compliance of law in dealing with those exhibits. He thus urged the court to release of the appellant.

On reply submission as written by Mr. Leonce Bizimana and Rose Kayumbo learned state attorneys for the respondent, they readily conceded with the appellant's contention that the matter before the trial court was prosecuted contrary to the requirement of section 57 of the PCCA.

It was their submission that, the offences with which the appellant stood charged had to be instituted after obtaining written consent of the DPP. Whereas, in the instant matter the appellant was prosecuted without the consent of the DPP.

The respondent argued that, since there was no consent of the DPP as required, the trial court acted without jurisdiction and everything

conducted was the nullity. To buttress their argument, the learned stated attorney referred to the cases of **Ramadhani Omary Mtiula v. Republic** Criminal Appeal No. 62 of 2019, **John Julius Martin & another v. Republic** (supra) **Leagan Siame v Republic**, Criminal Appeal No. 61 of 2022, High Court of Tanzania at Sumbawanga (unreported).

Basing on these case authorities, the respondent was in agreement with the appellant's counsel to invite the court to nullify the trial court's proceedings and decision.

However, on respondent's side they had a different view regarding the way forward should the court find the trial court acted on nullity. While agreeing with the decision of the court in the case of **John Julius Martin & another v Republic** (supra), the respondent urged the court to order trial *de novo* on the reason that, there were no gaps to be filled in.

Responding on the contention that exhibit PE3 was improperly admitted, the respondent contended that, if the exhibit is improperly admitted the remedy is to expunge the same from the record.

To this argument the reference was made to the case of **Zheng Zhi Chao v. The Director of Public Prosecutions,** Criminal Appeal No. 506 of 2019 (unreported).

The respondent further argued that, in this case there is strong evidence against the appellant. Also, on the claim that there was no chain of custody with respect of the exhibits tendered by PW14, it was the respondent argument that, despite the fact that there is no paper trail for chain of custody, but there was an oral account for same from PW15.

The respondent stated, the chain of custody can be established by oral account, provided that the respective evidence is credible and probable. To prop their argument, the respondent referred to the case of **Omary Said @ Athumani v. Republic**, Criminal Appeal No. 58 of 2022 (unreported).

The respondent urged the court to quash and set aside the proceedings and judgment of the trial court and order trial *de novo* and the appellant be under custody pending a new trial.

On rejoinder Mr. Kong'oke essentially reiterated his arguments he made on his submission in chief.

Having gone through the parties' rival submissions and the records of the trial court in respect of the first ground of appeal, in determining the merit or otherwise of this appeal, I will dwell with first ground of appeal, since it is capable of disposing of this appeal.

Thus, the issue for determination is whether the trial court lacked jurisdiction to entertain the matter for want of consent from the DPP. If the issue is answered in affirmative, what should be the way forward.

As pointed out before, the appellant stood charged with three counts before the trial court. The said counts fall under sections 22, 31 and 28(1) of the PCCA respectively. In terms of section 57 of PCCA prosecution of offences other than those which fall under section 15 of PCCA, they require consent of the DPP.

The fact that the appellant was not charged with offences under section 15 of PCCA, then it was mandatory to have the consent of the DPP prior the prosecution of the case.

I have dispassionately gone through the trial court's record, indeed, there is consent of the DPP filed in the records of the trial court, but the same was never endorsed by the trial court.

Apart from the said consent not being endorsed, there is nowhere on record where it shows the prosecution side had informed the trial court about consent being filed nor being laid before the court for admission.

In the case of **John Julius Martin & another v. Republic** (supra) the Court of Appeal faced with an akin situation; when the certificate

conferring jurisdiction as well as the consent of the DPP to the subordinate court to try the economic offence were found on the record of the trial court but they were not endorsed. The Court of Appeal on page 8 observed thus;

> *"...because the instruments of the consent and certificate on page 3 of the record of appeal,* ***were neither endorsed as having been admitted by the trial court****,* ***nor does the record show that the documents were admitted****, the trial court tried the case without jurisdiction."* [Emphasis added].

In the instant matter, the purported consent found on records of the trial court was neither endorsed nor the record showing it was admitted during the proceedings of the trial court. It is therefore clear that, the trial court tried a matter without having the jurisdiction.

It is a settled law that, where a decision is reached by any court without jurisdiction, such decision is a nullity.

I therefore subscribe to the invitation made by the both parties to find that the proceedings and judgment of the trial court are nullity for lacking jurisdiction to try the case. Therefore, the conviction and sentence

imposed against the appellant are quashed and set aside for being stemmed from the nullity.

Having the first ground of appeal being answered in affirmative, the only question left to be determined by this court is, what should be the way forward?

On the way forward Mr. Kongóke had argued that, the appellant should be released rather than ordering a retrial which will give room for the prosecution to re-build their weak evidence. On the side of the respondent, they urged the court to order for retrial, since it will not prejudice the appellant.

Rightly as argued by both sides, there are two alternative orders that a court can make after nullifying proceedings and decision of the trial court depending on the circumstance of each case. These orders can either be trial *de novo* or to release the appellant.

The principles guiding the court on whether to order trial *de novo* or to release the appellant was expounded in the case of **Fatehali Manji v. Republic** [1966] E.A, 343, in where the court observed that, in granting the order for retrial, the court should ensure that the prosecution is not going to utilize the opportunity of a rehearing to better the prosecution

case by filling in the gaps in their evidence, to the detriment of the appellant.

In this matter, the appellant argued that there are serious gaps which the prosecution may take advantage to fill in the gaps in their evidence should the court order retrial. The appellant counsel pointed out to Exhibit PE3 which was not properly tendered. He also claimed there were exhibits which were tendered by PW14 without the chain of custody being established.

I have keenly gone through the record of the trial court and I have noted with concern there are several exhibits that were admitted and acted upon by the trial court without following a laid down procedure. This is clearly seen when the prosecution sought to tender exhibit PE1, there was an objection from the appellant's advocate. After hearing the parties in respect of the said objection, the trial court without addressing the rival arguments and assign reasons to its finding it proceeded to admit the same.

Also, exhibit PE3 which was heavily relied on by the trial court to ground the appellant's conviction, was admitted by the trial court in the like manner with exhibit PE1.

There were also several documents that were rejected by the trial court which followed the objections from the appellant's advocate, as seen on page 50 of the typed proceedings.

I have further observed that when the prosecution sought to tender exhibit PE10, the appellant's advocate objected its admission. Nonetheless, the court admitted it on the basis that its credibility would be addressed on the judgment. However, on the judgment of the trial court did not touch Exh. PE10.

In totality of the analysis above, I find that ordering a retrial would allow the prosecution fill in the gaps to the detriment of the appellant from the glitches pointed out above. There is reasonable belief that the documents which were rejected or improperly admitted will be tendered afresh after fulfilment of the requirements. Therefore, the argument by the respondent's side seeking this court to expunge exhibits which were not properly admitted will not suffice since the proceedings were nullity.

In the circumstance, I will not order retrial, rather, I will order the release of the appellant from prison unless otherwise lawful held.

It is so ordered.

Dated at **Babati** this 12th September 2023

G. N. BARTHY

JUDGE

Delivered in the presence of Mr. Leonce Bizimana and Ms. Rose Kayumbo learned state attorneys for the respondent and in the absence of the appellant and his advocate.

G. N. BARTHY

JUDGE