IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA SUB-REGISTRY]
AT ARUSHA

CRIMINAL APPEAL NO. 142 OF 2022

(Originating from the Resident Magistrates' Court of Arusha, Criminal Case No. 199 of 2020)

MICHAEL EDSON MSOKWA _____ **APPELLANT**

VERSUS

THE REPUBLIC _____ **RESPONDENT**

JUDGMENT

10th & 24th November, 2023

BADE, J.

The appellant was aggrieved by both conviction and sentence imposed on him by the Resident Magistrates' Court of Arusha (hereinafter the "trial court"), dated 01/09/2022. He has preferred this appeal in quest to have the conviction quashed and sentence set aside. According to the trial court record, the appellant was facing four counts' charge, namely: Abuse of Position, contrary to section 31 of the Prevention and Combating of Corruption Act, No. 11 of 2007; two counts of Forgery contrary to section 333, 335(a) and 337; and Stealing by Person in Public Service contrary to section 258(1), 265 and 270, all of the Penal Code Cap. 16 [R.E 2002] (hereinafter "Cap. 16"). He was convicted on all four counts and sentenced accordingly.

In the 1st count, he was sentenced to pay a fine of TZS 1,000,000/= or serve a term of one-year imprisonment. In the 2nd, 3rd and 4th counts, he was sentenced to serve a term of one year imprisonment in each count. The sentence in respect of the last three counts ran concurrently.

The background facts of the case leading to the appellant's conviction and sentence, culminating this appeal can be recapped as follows: Michael Edson Msokwa, the appellant herein was employed by the Ministry of Natural Resources and Tourism, in the wildlife conservation department. From 2013 to the time he met the fate, he was prosecuting cases involving government trophies at the Kikosi Dhidi ya Ujangili (KDU), in the Northern Zone, based in Arusha.

Pascal Mathew Mhina (PW1) was the head officer at KDU Arusha, whereas the appellant was his assistant. On 23/12/2015, the duo received information from an informer that there was a European citizen, who was keeping wild animals in his camp at Manyara ranch in Monduli district. They sent park rangers to inquire the matter. The European citizen was later identified as Allan John Van Herder (PW3). He was arrested for being found keeping wild animals. He was arrested in possession of one caracal, two owls, and a rifle (gun). He was taken to KDU offices in Arusha. On 24/12/2015, he was bailed by the camp director, Sunday Evance after being required to deposit a cash bond of USD 5,000.

According to the prosecution evidence, the cash bond was received by the appellant and a receipt acknowledging the cash bond was issued to PW3. The said acknowledgment was admitted as exhibit P4. PW1 after deliberations with the appellant, mutually agreed that there was no offence to charge PW3 because he was just an employee of the ranch where the alleged trophies were found. PW1 ordered the release of PW3 as well as the cash bond that he had deposited at KDU, in possession of the appellant. PW1 also ordered that PW3 be handed back the gun. All the orders were directed to the appellant to execute.

The appellant inquired PW3 to report back to KDU offices on 28/12/2015, and later on 04/01/2016. After reporting on 04/01/2016 accompanied by John Beatus Kasegenya (PW4) who is also PW3's lawyer, PW4 informed PW3 that he was required to pay USD 1000. PW4 advised PW3 to admit the offence, which he did. After the admission, he was ordered to pay a fine of USD 3000, which PW4 paid to the appellant. PW3 also signed the compound form No. 19336, which was admitted as exhibit P2 collectively. He was issued with a receipt of the fine of TZS 4 million that he paid. The exchequer receipt had serial number 13612557, dated 11/01/2016, which was admitted as exhibit P5. On 28/04/2016 PW3 was ordered to go to KDU offices where he was handed over the rifle. Since he was not given a receipt in respect of the USD 5000 that was deposited

as a cash bond, PW3 reported the matter to the PCCB. PW3 was terminated from employment for reporting the matter to PCCB.

After the matter was reported to the PCCB, Adamu Bakari Mbwana (PW2) was assigned the case file to investigate. In his investigation he referred several documents, including PW3's case file at KDU (exhibit P3), counter file book (exhibit P6), handling form/dispatch form (exhibit P8 collectively), exchequer receipt number 13612401-136112600 (exhibit P9), a letter from KDU directed to PCCB (exhibit P10), handwriting expert report which proved that exhibits P2, P4 and P5 bore the appellant's handwriting. PW2 also recorded the appellant's cautioned statement (exhibit P12), and interrogated PW1 and PW4.

In his investigation, PW2 gathered that the appellant received USD 3000 from PW4 without issuing a receipt. He also received USD 5000 as a cash bond, which he never returned to PW3. According to PW2, the said USD 8000 was not paid to the Government as per the laws, the appellant used the same for his personal gains. He also discovered that the exchequer receipt issued to PW3 was forged as it did not form part of the exchequer receipts issued by the Government for revenue collection referring to exhibit P9 and testimonial accounts of PW5, PW6, PW7, and PW8, who narrated how the exchequer receipt books are collected from

the Government (Ministry of Finance) to reaching the accounts departments.

In his sworn evidence, the appellant denied having received the sum of money from anyone including PW3 and PW4. He admitted that PW3 was arrested for unlawful possession of a Government trophy, but he was later released for being short of evidence to prove the offence. The appellant firmly denied the allegation that PW3 admitted the offence and that he paid a fine. He also denied to have issued any receipt or acknowledgment letter to PW3. The appellant also disowned the signature subject to a handwriting expert report (exhibit P11). In his defense, the appellant accounted that he did not receive the cash bond that bailed PW1, the same was kept by PW1.

After a full trial, the trial magistrate was sufficiently convinced that the charges against the appellant were proved to the hilt. He was convicted on all four counts and sentenced as above hinted. Irked by both conviction and sentence, the appellant has preferred this appeal on the following grounds, *verbatim*:

a) *That, the trial court erred in law and fact by convicting and sentencing the Appellant on the case which was not proved beyond reasonable doubt;*

b) That, the trial court erred in law and fact by contradicting itself on its decision and the evidence on record;

c) That, the trial court erred in law and fact by failure (sic) to evaluate the evidence adduced on record and ended by convicting and sentencing the Appellant; and

d) That, the trial court erred in law and facts (sic) by convicting and sentencing the Appellant relying on the prosecution evidence which was obtained by violating the law and procedure.

By leave of the Court, on 03/07/2013, counsel for the appellant lodged two additional grounds of appeal, couched in the following terms:

a) That, the trial magistrate erred in law and in fact by convicting and sentencing the Appellant basing on the exhibit which was not read before the court during trial; and

b) That, the trial magistrate erred in law and fact by convicting and sentencing the Appellant without explaining to the Appellant why she took over and proceeded with the case.

At the hearing of the appeal, the appellant was represented by Messrs Fridolin Bwemelo and Lugakingira, learned advocates while the respondent Republic, was represented by Mr. Mahfoudh Mbagwa, learned State Attorney. Hearing of the appeal proceeded *viva voce*.

Mr. Bwemelo dropped the second ground of the supplemented grounds, renaming the 1st supplemented ground as the 5th ground of appeal to the original petition of appeal. He also argued the 1st and 2nd grounds of appeal conjointly, contending that the evidence adduced in the trial court did not prove the case against the appellant beyond reasonable doubt because the prosecution evidence was contradictory and inconsistent. He pointed out some of the contradictions intimating that PW1 stated that the appellant received TZS 54million from Allan John. He also received USD 5000 from Allan as a cash bond, making reference to page 13 of the typed proceedings. He added that PW2 testified that Allan John paid TZS 4 million and was issued with a receipt. PW2 further stated that the appellant received USD 3000 from Kasegenya who was counsel for the complaint, as well as USD 5000 as bail bond referring to page 18 of the typed proceedings.

In Mr. Bwemelo's view, the prosecution evidence was not clear on the amount complained to have been received by the appellant. Further, PW2 testified that the receipts issued to PW3 were signed by two different persons, making reference to page 19 of the typed proceedings. In tandem with the above, Mr. Bwemelo added that there was no explanation from the handwriting expert whether he made an analysis of the handwriting of both persons who signed to verify the person who wrote

and signed the documents. He maintained that the report was only in respect to the handwriting of the appellant.

Further, material witnesses were not called by the prosecution to testify, referring to the handwriting expert, to explain how the handwriting analysis was done and the scientific method employed. He stressed that failure to summon the handwriting expert made the gaps unfilled. Mr. Bwemelo being aware that the prosecution is not bound to call a specific number of witnesses, he insisted that the witnesses who were not summoned were important to prove the case. To bolster his argument, he relied on the case of **Maulid Hamis @Mrisho vs Republic,** Criminal Appeal No. 216 of 2016 (unreported).

Counsel for the appellant also faulted exhibit P5, which was inconsistent with the witnesses' evidence because it showed that PW3 paid 4million while PW2 said that PW3 paid USD 8000 which is equivalent to TZS 16 million. He referred page 20 of the typed proceedings. He insisted that the pointed-out inconsistencies are self-proof and that the case was not proved on the required standard, relying on the authority in **Abdallah Mussa Mollel @ Banjo vs DPP**, Criminal Appeal No. 31 of 2008 (unreported).

Submitting on the 5th ground of appeal, Mr. Bwemelo averred that some of the documentary exhibits admitted in evidence were not read out

in court after being admitted as exhibits. He made reference to exhibits P1, P2, P9 and P12. Failure to read documentary exhibits after being admitted in evidence is fatal, he stressed. To augment his contention, counsel for the appellant referred the following Court of Appeal decisions: **Hatari Masharubu @Babu Ayubu vs Republic**, Criminal Appeal No. 590 of 2017 and **Andrea Augustino @ Msigalla vs Republic,** Criminal Appeal No. 365 of 2018 (both unreported).

Elaborating on the 4th ground of appeal, Mr. Bwemelo accounted that the two witness statements that were tendered did not conform to the dictates of the law as there were no reasons put to the fore for relying on the statements. He specifically relied on section 34B(2)(a) of the Evidence Act, Cap. 6 [R.E 2019]. In addition, the said statements were not marked as exhibits nor were they cleared for admission. He referred page 45-46 of the typed proceedings. On the importance of tendering witness statement and how the exercise should be done, learned counsel for the appellant relied on **Chukwudi Dennis Okechukwu and 3 Others vs Republic**, Criminal Appeal No. 507 of 2015 (unreported). It was the counsel's view that the court was wrong to rely on the witness statements in convicting the appellant.

Expounding the 3rd ground, counsel for the appellant asserted that the evidence by PW2 is to the effect that the documents that the

complainant had were government documents, meaning that they were not forged documents. He argued that the appellant's testimony was to dismantle the gap but that evidence was not considered, hence the decision was arrived at without such evidence being considered. The trial magistrate in the judgment insisted that there was forgery while the witnesses testified that they were public documents. On the totality of his submission, counsel for the appellant prayed that the appeal be allowed by quashing the appellant's conviction and setting him at liberty.

On his part, Mr. Mbagwa supported the appeal. He contended that the trial magistrate did not evaluate the evidence properly, hence an erroneous decision was arrived at. He insisted that PW3 testified that when he went to sign the compound form, he signed before the appellant and PW1. In that respect, Mr. Mbagwa was of the view that PW1 was involved in the commission of the offence allegedly committed by the appellant. It was the learned State Attorney's view that there were doubts because the person alleged to be involved in the commission of the offence was brought into court to testify as a prosecution witness.

Further, during the hearing, the appellant was charged with stealing USD 8000. The evidence was to the effect that USD was paid by Sunday Evance, the manager of PW3 while USD 3000 was paid by PW4. When cross-examined, PW3 stated that the said USD 3000 that was paid on his

behalf, he was unaware of, but such evidence was not scrutinized by the trial magistrate. The evidence led by the prosecution further showed that the USD 8000 paid to the appellant belonged to PW3, Allan John. But the testimonies in court suggested that USD 5000 was deposited by Sunday Evance, who by all intents was the one to whom the money should have been repaid. It was upon the said Sunday to testify because there was no evidence suggesting that PW3 ever gave USD 5000 to the appellant.

On tendering and admission of witness statements, Mr. Mbagwa supported the submission by counsel for the appellant that the prosecutor cannot tender the witness statement of witnesses who are not in court. He insisted that the witnesses should have been summoned. On the account that the appellant was charged with stealing by servant, the learned State Attorney admitted that the charge is not supported by the evidence adduced because the charge shows that the appellant stole USD 8000 while the evidence adduced shows that the amount obtained was USD 5000. Mr. Mbagwa concluded by supporting the appeal, insisting that the same be allowed.

I have considered the grounds of appeal, the trial court record, and the submissions by counsel for the appellant and that of the learned State Attorney. It behooves me to determine the appeal in the manner the grounds of appeal were raised and argued.

Beginning with the 1st and 2nd grounds of appeal, both counsel for the appellant and respondent were unanimous that there were apparent contradictions and inconsistencies which rendered the prosecution evidence weak, hence the charge against the appellant was unproven.

The first contradiction is in respect of the amount of money that the appellant allegedly, received from PW3 and PW4. At the outset, Mr. Bwemelo on that account submitted that PW1 testified that the appellant received TZS 54 million from Allan John, referring to page 13 of the typed proceedings.

I have revisited the trial court record, and this being a Court of record, it has to ensure that the court record is cleared in order to avert perpetuating illegalities. It is true that at page 13 of the typed proceedings, during examination in chief, PW1 is recorded to have said that exhibit P2 (the compounding form and receipt) were in respect of TZS 54 million. However, upon revisiting the handwritten record, it does not correlate to the typed proceedings because the proceedings of the very same day reflect the fact that PW1 stated that the receipt was of TZS 4 million and not 54 million as appeared in the typed proceedings. There is no doubt that what is recorded in the typed proceedings appears to be nothing but typing errors. I hold this view because the handwritten proceedings are considered as the original record compared to the typed.

Understandably, the learned counsel for the appellant cannot be blamed for relying on the typed proceedings because he had no access to the handwritten proceedings, which are exclusively in the domain of the court. In the circumstances, the contention that PW1 stated that the appellant received TZS 54 million was highly misapprehended, it cannot fall among the contradictions.

That notwithstanding, there is no doubt that the amount allegedly received by the appellant was uncertain, considering the evidence adduced by the prosecution witnesses. The charge sheet shows that the appellant did steal USD 8000. PW1 testified in respect of the receipt (exhibit P2 collectively) which showed that the appellant was given TZS 4 million as a fine which was paid by PW3 after admitting the offence. PW1 also admitted receipt of USD 5000 as a cash bond for bailing out PW3. Although he did not clearly state whether that money was in the appellant's possession, he admitted that there was no form signed that showed that the cash bond was returned back to PW3 after the case file was closed.

PW2 on the other hand stated that in his investigation, he discovered that the appellant received USD 8000 equivalent to TZS 16 million but he issued a receipt of only TZS 4 million. For clarity, I let part

of PW2's evidence speak for itself, as reflected at page 18 of the typed proceedings:

"The suspect was bailed and ordered ***to pay a bond of 5000 USD which he did so*** *and given a rifle, it was on 08/02/2016... I discovered too that* ***the accused person received 3000 USD from the suspect lawyer*** *(sic) who was known as Kasegenya. 5000 USD was for bail, he was given the accused person (sic) suspect one Allan was bailed and 3000 USD was requested as a fine for the offence which Allan committed..."* (Emphasis added)

From the above piece of evidence, despite grammatical challenges, the evidence shows that the USD 5000 which was paid as a cash bond was received by the appellant. He also received USD 3000 which was paid as a fine. Proof of receipt of the said amount was the acknowledgment document, exhibit P4.

In his own evidence, the victim (PW3) testified that the USD 5000 paid as a bail bond, was paid by the company director, Sunday Evance to the appellant, who issued a receipt acknowledging receipt of that amount. He further accounted that on 04/01/2016, he went to KDU offices with his lawyer, John Kasegenya (PW4). PW4 entered the appellant's office and talked to him, then PW4 returned and informed PW3 that the KDU laws are so broad, so he was supposed to pay USD 1000. PW3 stated that he

did not know why he was supposed to pay USD 1000. Again on 12/01/2016, he reported at the KDU office where USD 3000 was needed by the KDU office, he paid it and was issued with a receipt of TZS 4 million. On 28/04/2016 PW3 was called to KDU offices to collect his rifle, he was not given a receipt of USD 8000 apart from that of TZS 4 million, so he decided to report the matter to the PCCB.

On his part, PW4 testified that although he did not witness while the bail bond was being paid or received, he, however, stated that it was the appellant who received the USD 5000. On 04/01/2016, he accompanied PW3 at KDU offices, where he advised him to admit the offence so that he could pay a fine. After admitting the offence, he was informed that the fine for the offense was USD 3000, at which point he communicated with the office management, and Sunday Evance approved the said amount, which PW4 paid to the appellant as the fine. The receipt was not issued on that date, but it was issued later when PW3 was called at the KDU offices for the purpose of clearing the case file and collecting the gun. From the above set of evidence, the prosecution evidence was contradictory in the sense that PW1 and PW4 were unanimous that it was Sunday Evance who paid both the bail bond of USD 5000 and the fine of USD 3000, which he paid through PW4. However, PW2 (the investigator)

and PW3 (the victim), testified that it was PW3 who paid the whole of USD 8000 to the appellant.

On further reflection, there is another USD 1000 which PW3 claimed to have paid through PW4, which none of the prosecution witnesses testified about. From the prosecution evidence, there were apparent contradictions in the following aspects:

First, the person who received the said USD 5000 as bail bond because exhibit P4 shows that the money was received in the presence of Gilbert Bobewe, the appellant, and PW3. Further, it was PW1's testimony that the deliberations that PW3 be bailed out after paying USD 5000, were made by him and the appellant. However, PW1 did not state clearly who received the bail bond, although he admitted that such money when received, must be kept in the accountant's office. He also admitted to having seen the receipts proving that such an amount was paid. However, he distanced himself from the offense, stating that the bail procedures were supervised by the appellant. Admittedly, there is appellant's evidence that PW1 being in charge of the KDU, had a mandate in everything that was being undertaken at the office. That considered the prosecution's evidence cannot be relied on to prove that the USD 5000 was paid to the appellant or was in his possession as PW2 and PW3 suggested.

Second, there were contradictions on the person who paid the alleged USD 8000. According to PW1, the bail bond was paid by Sunday Evance, PW3's director. PW3 and PW4 supported that version. PW2 in his investigation, discovered that the USD 8000 was paid by PW3. Such contradiction ought to have been resolved by the trial court because it would have resolved the controversy, who was to be refunded the bail bond as well as the alleged USD 3000 paid as a fine. Although PW3 claimed to have paid USD 3000 as a fine, that testimony contradicts the evidence by PW4, who stated that he paid the fine after the same was approved by the office, under the directives of Mr. Sunday Evance.

Third, there was a contradiction between the prosecution witnesses regarding the actual amount received by the appellant. While PW1 acknowledged receipt of USD 5000 by his office, PW2, and PW3 stated that the appellant was given USD 8000, equivalent to TZS 16 million. On his part, PW3 stated that there was another USD 1000 which was demanded by the KDU offices through PW4. On his part, PW4 testified to have witnessed payment of USD 3000 as a fine while exhibits P2 collectively and P5 show that PW3 paid a fine of TZS 4 million. Therefore, there was uncertainty regarding the actual amount received by the appellant.

Fourth, there were contradictions in the dates of specific events. PW2's evidence contradicted that of PW3 on the date, PW3 was handed over the rifle. On page 18 of the typed proceedings, PW2 was recorded to have said that PW3 was handed over the rifle on 08/02/2016 but on page 30 of the proceedings, PW3 stated that the rifle was handed to him on 28/04/2016.

Similarly, the prosecution relied on the handwriting expert report (exhibit P11) to conclude that it was the appellant who prepared various documents including exhibit P4 collectively. The evidence by PW2 was to the effect that the acknowledgment was prepared by two persons, Gilbert Bubowe and Michael Msokwa. However, exhibit P11, which is the handwriting expert report shows that all documents, including exhibit P4, were signed by one person, the appellant. The same applies to exhibit P2 collectively, (the compounding form which was also signed by PW3), which was one of the specimen samples taken for analysis by the handwriting expert. It is undesirable that according to exhibit P11 revealed that exhibits P2 and P4 were written and signed by one and the same person, the appellant. Hence exhibit P11 was doubtful for failure to distinguish the signatures of those who signed exhibits P2 and P4, incriminating the appellant alone.

From the evidence on record, some of the above contradictions would have been cleared by some of the key witnesses, had they been summoned to testify. These witnesses include Sunday Evance who is said to have given the USD 8000 to the appellant and Chrisantus Kitandala, the handwriting expert. Admittedly, Mr. Sunday's evidence was so crucial to clear the doubts of the amount received by the appellant and the owner/giver of the said amount. Similarly, Kitandala's evidence was crucial to ascertain whether it was the appellant who wrote and signed exhibits P2 and P4.

Be that as it may, the failure of the prosecution to summon some of the important witnesses would have prompted the trial court to draw adverse inference since if a party to the case opts not to summon a very important witness he does so at his detriment and the prosecution cannot take refuge under section 143 of the Evidence Act. On authority, the Court of Appeal in the reported case of **Azizi Abdallah vs Republic** [1991] TLR 71, held:

"...the general rule and well known rules is that the prosecutor is under prima facie duty to call those witness 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."

The above pointed out contradictions and inconsistencies cast doubts on the prosecution evidence, rendering it short to prove the charges against the appellant. Similarly, the prosecution for unjustifiable reasons failed to summon material witnesses. The omission, with respect, entitles the Court to draw an adverse inference. I therefore find merits in the 1st and 2nd grounds of appeal, which I proceed to allow.

I now revert to determine the 5th ground of appeal, which was the 1st supplemented ground. On that ground, the appellant's counsel faulted the trial, court for relying on documentary exhibits that were not read out after being admitted in evidence. For the avoidance of doubt, having perused the trial court record, I took note that some of the documentary exhibits were admitted in contravention of the procedure. As submitted by Mr. Bwemelo and conceded by the learned State Attorney, exhibits P2 collectively, P9, and P12 were not read out after being admitted in evidence.

It is settled law in our jurisprudence which is not disputed by the learned State Attorney that documentary evidence that is admitted in court without it being read out to the accused is taken to have been irregularly admitted and suffers the natural consequences of being

question that follows, is whether the remaining evidence can still sustain the appellant's conviction and sentence. This question leads me to the determination of the rest of the grounds of appeal.

Coming to the 4th ground of appeal, which specifically challenges the admission of the witness statements in terms of section 34B of The Evidence Act, Cap. 6 [R.E 2022] (hereinafter "TEA"). For ease of reference, section 34B (1) and (2) which govern the admissibility of witness statements provides:

"34B.-(1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written or electronic statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.

(2) A written or electronic statement may only be admissible under this section-

(a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;

(b) if the statement is, or purports to be, signed by the person who made it;

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence:

Provided that, the court shall determine the relevance of any objection;

(f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read."

Witness statements can only be admissible when the above conditions co-exist. The Court of Appeal decision in **Mwale Mwansanu vs Republic**, Criminal Appeal No. 105 of 2018 (unreported) made the following observation:

"For a witness statement to be admissible under this section all the conditions stipulated under Section 34B (2) must be met collectively. Our perusal through the record of appeal shows the conditions stipulated under section 34(2)(a)-(f) were not complied with or waived by the trial court and the reasons thereto."

The rationale of the above provision of the law was underscored by the Court of Appeal in the case of **Vicent Ilomo vs Republic**, Criminal Appeal No. 337 of 2017 (unreported), where it was held interalia that:

"We are aware that the admissibility of the said documents was not resisted by the counsel for the appellant during the trial, but there is nothing on record to establish first, that section 34B of the Evidence Act was fully complied with. In terms of the said provision, a court may admit a written statement of the maker of a statement where he cannot be called as a witness for various reasons, such as death, physical or mental illness or being outside the country and being impracticable to call him as a witness, or if the court is satisfied that all reasonable steps to procure his attendance have run futile or

where he cannot be found as unidentifiable or cannot attend by operation of law."

Applying the above principles in the appeal at hand, according to the trial court record, on 23/11/2021, the Prosecuting Attorney notified the court that one of their witness Sunday Evance was unwell, therefore he could not attend and prayed for a hearing through a video link. The same applied to the other witness Chrisantus, who according to the prosecutor was in DRC Congo for a special task. The trial court succumbed to the prayer and fixed the case for hearing on 01/12/2021. On that day, neither of the two witnesses appeared nor a video link was prompted. In the stead, another witness (Abdiel Msangi) testified as PW8. It was fixed for hearing on another date, 08/12/2021. On that date, the prosecution prayed to serve the appellant with the witness statement. The appellant admitted reception of the statement and prayed for 10 days to reply to it. The matter was fixed for hearing on 20/12/2021. On that day, the prosecutor of the case prayed to tender the witness statement as an exhibit. The record shows the following transpired on that day:

*"**Miss Hellen:** For hearing, for the application (sic) which we were granted by this court. We didn't receive any objection concern (sic) from the accused; we pray to tender the witness's statement before this court.*

Court: *I hereby received (sic) them.*

Sgd: C. A. Chitanda-SRM

20/12/2021"

At this point, the prosecution prayed to close their case. From the foregoing prescripts, there was no reason advanced by the prosecution elucidating the whereabouts of the witnesses, whose statements were tendered in evidence and whether it was impracticable to trace them, or whether they were seriously sick in terms of part (a) of subsection 2 of section 34B (2) of TEA. In other words, part (a) which forms the basis as to why the witness statement has to be admitted instead of hearing the witness's evidence, was not complied with. Failure by the prosecution to lay a foundation of the whereabouts and why the statements were tendered instead of hearing the oral evidence of the witnesses whose statements were tendered, rendered statements illusory and of no evidential value.

That apart, the said statements were awkwardly admitted in evidence. The trial magistrate simply remarked, *I hereby receive them*, without more. In an actual sense, it cannot be said that the statements were admitted in evidence. The settled position in our jurisprudence is that when a document is sought to be introduced in evidence three important functions must be performed by the court; namely clearing the

document for admission, actual admission, and finally, ensuring that the same is read out in court. Echoing the stated principle, was the holding of the Court of Appeal in the reported case of **Robinson Mwanjisi and 3 Others vs Republic** [2003] TLR 218. In that case, the Court held as follows:

"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted before it can be read out, otherwise it is difficult for the Court to be seen not to have been influenced by the same."

Notwithstanding the above anomalies, the statements were tendered by the prosecutor, who could not be in a position to respond to questions when put on her regarding the statements, simply because she was not the maker of the said statements. The statements ought to have been tendered by Enock P. Marijani, purported to be the maker of the same. On the same token, the said statements did not feature in the court record as they were not labeled as exhibits after being admitted in evidence. There is no means they can be referred to as exhibits as they were not labeled. For the foregoing infractions regarding the admissibility of the witness statements, the said statements were improperly admitted in evidence. The resultant effect is to have them expunged from the court record, as I hereby do. The 4th ground of appeal is merited.

The last ground, which is ground three, will not detain me for obvious reasons that relate to the evaluation of evidence. In the preceding grounds of appeal, as I have endeavoured to demonstrate, the prosecution evidence fell short of proving the appellant's guilt. Having expunged the documentary exhibits, including the appellant's cautioned statement, the witness statements of Sunday Evance and Chrisantus Kitandala (the key witnesses), the receipt of the fine paid and the compound form and the exchequer receipt book, there is no other tangible evidence that can be relied upon to sustain the appellant's conviction. Weaknesses in the prosecution evidence as pointed out coupled with the glaring contradictions and inconsistencies in the prosecution evidence, militate me to find and hold that case against the appellant was not proved to the hilt.

Perpetrated by the above reasoning and the authorities placed reliance on, I entertain no doubt that the appellant's conviction and sentence were clumsily anchored because there was no sufficient evidence to justify the same. The prosecution evidence was full of contradictions that ought to be resolved in favour of the appellant, had the trial magistrate considered them. Having entertained doubts in the prosecution evidence, and considering the concession by the learned State Attorney, I find the appeal merited.

In sum the appeal has merits, and it is hereby allowed. I quashed the conviction and set aside the sentence imposed upon the appellant by the trial court. It is ordered that the appellant be set free forthwith unless he is otherwise lawfully held.

Order accordingly,

DATED at **ARUSHA** this **24th** day of **November 2023**

A. Z. Bade
Judge
24/11/2023

Judgment delivered in the presence of the Accused appearing in person, in chambers on the **24th** day of **November 2023**

A. Z. BADE
JUDGE
24/11/2023