IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TABORA DISTRICT REGISTRY)

AT TABORA

CRIMINAL APPEAL NO. 40 OF 2023

(Arising from Corruption Case No. 03 of 2022 in the District Court of Igunga)

ANDREW PETER @ ANDREW RUTABAGISHA @ ANDREW JOSEPH RUTABAGISHA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 30/10/2023
Date of Judgment: 20/11/2023

KADILU, J.

In the District Court of Igunga, the appellant was charged with three counts. First, the use of documents intended to mislead the principal contrary to section 22 of the Prevention and Combating of Corruption Act (PCCA). It was alleged that between 23/10/2015 and 26/10/2015 at Mbutu Ward within Igunga District in Tabora Region, the appellant being an employee of Igunga District Council as Ward Education Coordinator for Mbutu Ward, hence an Assistant Returning Officer for Mbutu Ward in the 2015 general election, he knowingly and with intent to defraud used a letter relating to his principal's affairs containing a false statement purporting to show that eight hundred thousand Tanzanian shillings (TZS. 800,000/=) were paid for building eight (8) election polling stations which to his knowledge was intended to mislead his principal.

In the second count, the prosecution alleges that between 23/10/2015 and 26/10/2015 the appellant knowingly and with intent to defraud, used a letter purporting to show that two hundred thousand Tanzanian shillings (TZS. 200,000/=) were paid for Mbutu Councilors' election results expenses which, to his knowledge was intended to mislead his principal. The third count was embezzlement and misappropriation contrary to section 28 (1) of the PCCA. The prosecution alleges that between 23/10/2015 and 26/10/2015 at Mbutu Ward within Igunga District in Tabora Region, the appellant being an employee of Igunga District Council as Ward Education Coordinator for Mbutu Ward, hence an Assistant Returning Officer for Mbutu Ward in the 2015 general election, fraudulently misappropriated the sum of one million Tanzanian shillings (TZS. 1,000,000/=) which was under his control as a public officer for smooth running of the 2015 general election within his area of supervision in Mbutu Ward.

At the hearing of the case before Igunga district court, when the charge was read over to him, he pleaded not guilty to all three counts hence, a full trial was conducted. After having heard the evidence for both sides, the trial court acquitted the appellant of the first and third (*sic*) counts and was convicted for the second (*sic*) count of embezzlement and misappropriation contrary to section 22 (*sic*) of the Prevention and Combating of Corruption Act, No. 11 of 2007. He was sentenced to pay a fine of five hundred thousand Tanzanian shillings (TZS. 500,000/=) or twelve (12) months imprisonment in default. The decision angered the appellant. He preferred an appeal to this court on the following grounds:

1. *That, the learned trial Magistrate erred in law and facts for convicting the appellant while the prosecution failed to prove the vital elements of the offence.*
2. *That, the learned trial Magistrate erred in law and facts to find the appellant guilty of the offence charged based on weak prosecution evidence which did not establish the offence beyond a reasonable doubt.*
3. *That, the learned trial Magistrate erred in law and facts for failure to consider properly and evaluate the appellant's evidence in defence which was reasonable and justifiable enough to show that the charge was not proved.*
4. *That, the learned Magistrate erred in law and facts in its evaluation and analysis of evidence by according undeserving weight on the shaky prosecution evidence.*

He prayed the appeal to be allowed, the conviction and sentence of the trial court to be quashed and set aside. When the appeal was called on for hearing, the appellant was represented by Mr. Kelvin Kayaga, Advocate whereas the respondent was represented by Mr. Steven Mnzava assisted by Ms. Suzan Barnabas, both State Attorneys. Before submitting on the filed grounds of appeal, Mr. Kelvin prayed to add three (3) grounds of appeal namely:

1. *That, the learned trial Magistrate erred in law by raising a new issue in the course of composing judgment without affording the parties an opportunity to address the court on it.*
2. *That, the learned trial Magistrate erred in law and facts by relying on the exhibits which were tendered with a broken chain of custody.*
3. *That, the judgment of the trial court is materially defective for the conviction is not supported by factual findings of the court.*

Mr. Kelvin started with the last ground of appeal and submitted that, while on page 12 of the judgment the appellant was acquitted of embezzlement, the trial Magistrate convicted him for it as shown on page 13 of the same judgment. The learned Advocate added that section 22 of the PCCA is about the use of documents intended to mislead the principal, but the trial Magistrate convicted the appellant for embezzlement under section 22 of the PCCA, which is wrong. He argued that the only count for which the appellant was convicted, was not supported by the reasoning of the trial court so, that ground alone suffices to dispose of the appeal.

The learned Advocate prayed to argue all the grounds of appeal for the sake of convenience only. He stated that on the first ground of appeal, the ingredients of the charged offence were not proved. He gave an example of embezzlement whose essential element is conversion, but none of the prosecution witnesses proved conversion by showing that the appellant had used the claimed funds for personal benefit or gain. To support his argument, Mr. Kelvin referred to the case of ***DPP v Justina Patrick Gidohay***, Criminal Appeal No. 67 of 2020, High Court of Tanzania at Arusha.

The other complaint as presented by Mr. Kelvin is that on pages 9,11 and 12 of the judgment, the trial court raised three new points without giving the parties a chance to be heard. He mentioned the question of retirement of funds allegedly advanced to the appellant which was raised and resolved by the court *suo moto.* Mr. Kelvin argued that the issue of retirement was used to base the conviction of the appellant for embezzlement although the

parties were not heard on that point. He concluded that the trial court's conduct on that aspect has to be nullified for violating the right to be heard.

Submitting on the ground relating to the proof of the case beyond a reasonable doubt, Mr. Kelvin stated that the prosecution failed to discharge its duty as it failed to summon key witnesses namely, Alphonce Manyali and Masanja Magadula. According to him, the burden to call these witnesses was shifted to the appellant, something which is not proper. He explained that the trial court did not eliminate several doubts before deciding the case in favour of the prosecution. He stated as an example that, PW1 and PW2 did not testify that Public Address (PA) system was not in the polling station. They stated that the PA was not used to announce election results because attendance of members of the public was poor hence, the need to use the PA did not arise.

In addition, Mr. Kelvin contended that the case against the appellant was not proved beyond reasonable doubt because the appellant's spacemen of handwriting was not taken, but a handwriting expert report was admitted as exhibit P4 which was heavily relied upon by the trial court to base a conviction. He argued that evidence of PW1 and PW10 cast doubt on whether the tested specimen belonged to the appellant. The Advocate cited the case of ***Muzeyi v Uganda*** [1971] EA, 225 in which it was held that lack of specimen of handwriting is an incurable *lacuna*.

On his part, Mr. Steven replied that there was no difference between the charged offence and the one for which the appellant was convicted. He explained that the anomaly observed by Mr. Kelvin is a mere typing error that may be rectified by remitting the judgment to the trial court for correction, more so because the error does not go to the root of the matter. Nonetheless, Mr. Steven informed the court that the prosecution is in full support of the appeal as a forensic report that was used by the trial court to convict the appellant was tainted by illegalities. The learned State Attorney referred to page 80 of the trial court's proceedings on which it is shown that PW10 knew the appellant's handwriting even before conducting a scientific analysis.

Mr. Steven argued that the handwriting expert report was used by the court as conclusive proof of forgery by the appellant contrary to what the Court of Appeal stated in the case of ***Yusuph Molo v R.***, Criminal Appeal No. 343 of 2017 that, expert opinion is persuasive, not binding. He added that PW1 said that the author of the complained letters was not available to testify and PW9 explained that there was no evidence of the TZS. 200,000/= allegedly paid to the appellant. According to Mr. Steven, the appellant's name was also missing from the list of persons who received payments. He thus concluded that in the circumstances, the prosecution evidence was insufficient to justify conviction of the appellant.

Submitting on the chain of custody, Mr. Steven stated that the proceedings of the trial court are silent about how the handwriting spacemen

were obtained and where they were kept before being sent to the expert for scientific analysis. He joined hands with Advocate for the appellant in praying for the appeal to be allowed. By way of rejoinder, Mr. Kelvin urged the court that if it finds the error observed on the trial court's judgment to be a mere typo then, it should be disregarded instead of remitting the judgment to the trial court for rectification.

Given the submissions by the parties and the evidence on record, the issue that I am called upon to decide is whether the appeal is meritorious or otherwise. The learned State Attorney observed that the discrepancies in the prosecution evidence make the appellant's conviction unjustifiable. He therefore thought that the prosecution case was not proved beyond reasonable doubt. That being the position of the parties and having taken into account the evidence on record, the grounds of appeal may be summarized or rather merged into one, that is, the prosecution did not prove the case against the appellant beyond reasonable doubt.

It is undisputed that, for the offence of embezzlement and misappropriation to succeed in the circumstances of this case, the prosecution was supposed to establish beyond reasonable doubt that the appellant dishonestly or fraudulently misappropriated or converted for his use, any property entrusted to him or allows another person so to do. *See* the case of ***Andrea Gwandawe v R.***, DC. Criminal Appeal No.53 of 2016, High Court of Tanzania at Arusha. For ease of reference, section 28 (1) of the PCCA is reproduced as hereunder:

"A person being a public official who dishonestly or fraudulently misappropriates or otherwise converts for his use any property entrusted to him or under his control as a 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."

In the matter at hand, the question is whether the appellant parted away with TZS. 1,000,000/=, being the funds allotted for Mbutu Ward election expenses in the 2015 general election. According to the particulars of the offence, TZS. 800,000/= was for the construction or repair of eight polling stations whereas TZS. 200,000/= was for PA for announcing election results. In the trial court, there was no adduced evidence to prove fraud or dishonesty on 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 other person.

Based on the above findings, after the trial, the learned Magistrate acquitted the appellant of the two counts relating to the use of documents intended to mislead the principal contrary to section 22 of the PCCA. He, however, convicted him of embezzlement contrary to section 28 (1) of the same Act. In my considered view, the count on embezzlement was dependent on the proof of the first and second counts concerning obtaining the alleged money first, before the appellant could misappropriate it. Since there was no evidence that the appellant obtained the alleged funds, there was no way he could be held liable for misusing the money which did not come into his hands as a public officer.

Like the Advocates for the parties, I find that the trial Magistrate misdirected himself on this aspect. Upon finding that the appellant was not liable for using documents intended to mislead the principal, the learned trial Magistrate would not have come to a finding that the appellant was dishonest or acted fraudulently as to misappropriate TZS. 1,000,000/= for personal gain or even that there was any fund allotted for Mbutu Ward general election, but got converted by the appellant for his use to make him liable under section 28 (1) of the PCCA.

Section 22 of the PCCA provides that:

> *"A person who knowingly gives to any agent, or an agent knowingly uses with intent to deceive, or defraud his principal, any receipt, account or another document such as a voucher, a proforma invoice, an electronically generated data, minute sheet relating to his principal's affairs or business, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal, commits an offence and shall be liable on conviction to a fine not exceeding seven million shillings or to imprisonment for a term not exceeding five years or to both."*

In the instant appeal, the prosecution was of the view that between 23rd and 26th October 2015, the appellant used letters that contained false information to obtain TZS. 1,000,000/= from Igunga District Council for the construction or repair of eight polling stations and the PA costs. As shown earlier, the said letters were not proved as authored by the appellant hence, the trial court acquitted him on the counts relating to obtaining the TZS.

1,000,000/= fraudulently. It follows therefore that, the prosecution failed to prove that the appellant used documents to defraud his principal, or he fraudulently misappropriated the TZS. 1,000,000/= for his benefit.

It should also be recalled that this is a criminal case whereby the burden always lies on the prosecution and it never shifts in cases like the present appeal. In the case of ***Juma Hamis Kabibi v R.***, Criminal Appeal No. 216 of 2011, Court of Appeal of Tanzania at Mwanza, it was stated that:

> *"With respect, a criminal accusation ultimately stands or falls on the strength of the prosecution case. Where the prosecution case is itself weak, it cannot be salvaged from the tatters of the defence. It is quite plain that, false statements made by an accused person, if at all, do not have a substantive inculpatory effect and cannot be used as a makeweight to support an otherwise weak prosecution case. The fact that an accused person had not given a true account only becomes relevant, to lend assurance, in a situation where there already is sufficient prosecution material."*

From the foregoing analysis, I find no reason to differ from the views of Counsel for the parties that the prosecution failed to prove the case against the appellant beyond a reasonable doubt, the standard that is required in criminal cases. The remedy is to allow the appeal, as I hereby do. Both the conviction and sentence meted out against the appellant are thus, quashed and set aside.

It is so decided.

KADILU, M.J.

JUDGE

20/11/2023

Judgment delivered in chamber on the 20th Day of November, 2023 in the presence of Mr. Kamaliza Kayaga, Advocate for the appellant and Mr. Steven Mnzava, State Attorney for the respondent.

KADILU, M.J.,

JUDGE

20/11/2023.