

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MWANGESI, J.A., KWARIKO, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 358 OF 2019

THE REPUBLIC.....APPELLANT

VERSUS

1. CHARLES ABEL GASIRABO @ CHARLES GAZILABO	} RESPONDENTS
2. SEIF MOHAMED KABULA		
3. TAHERALI SAUJAUDIN TAHERALI		
4. ALLOYCIOUS GONZAGA MANDAGO		

(Appeal from the Ruling of the High Court of Tanzania, the Corruption and Economic Crimes Division at Dar es Salaam)

(Matupa, J)

Dated the 25th day of July, 2019

In

Economic Case No. 03 of 2019

JUDGMENT OF THE COURT

31st October & 15th November, 2019

KEREFU, J.A.:

The respondents herein stand charged jointly and severally with twenty one (21) counts for the offences of conspiracy, forgery, uttering false documents contrary to sections 333, 335(a), 337, 342 and 384, of the Penal Code, [CAP 16 R.E. 2002], respectively; carrying on business without holding a valid license contrary to sections 3 (1) (a) and 19 (1) (a) of the Business Licensing Act, [CAP 208 R.E. 2002]; failure to register as value added tax payer contrary to section 44 (1) (a) of the Value Added Tax Act, Cap. 148

R.E. 2002; failure to pay tax contrary to section 83 (a) of the Tax Administration Act, No. 10 of 2015 and section 105 (a) of the Income Tax Act, No. 11 of 2004; money laundering contrary to section 12 (c) and 13 (a) of the Anti-Money Laundering Act, No. 12 of 2006 and occasioning loss to a specified authority contrary to Paragraph 10 (1) of the First Schedule to, and sections 57 (1) and 60 (2) of the Economic Organized Crime Control Act, Cap. 200 R.E 2002.

It is alleged that, between 1st May, 2011 and 23rd August, 2013, the respondents herein conspired and architected a syndicate of conducting business illegally and evading taxes due to the Tanzania Revenue Authority (TRA). In order to make their syndicate practicable, the respondents assumed the ownership of the company known as JAMBO PRODUCTS (T) LIMITED (the Company) by preparing forged Certificate of Incorporation No. 2653083 dated 16th May, 2011; Memorandum and Articles of Association (MEMART) signed on 4th June, 2011; Taxpayer Identification Number (TIN) 113-528-328 dated 27th June, 2011; Certificate of Registration for Value Added Tax (VRN) 40-280661-S dated 27th June, 2011; Business License number B. No. 01271893; letters of introduction from the local Government and Board Resolutions. The respondents presented the said forged

documents to the African Banking Corporation (T) Limited (BancABC) for purposes of opening a bank account. On 23rd August, 2013, they managed to open the said bank account No. 1327835510 in the name of the Company. The signatories to the said account were changing from time to time. On 23rd August, 2013 the signatories were the first respondent and one Steven Norman Shemsanga. However, later, changes were made to make the second respondent the sole signatory up to 20th December, 2015 when the third respondent took over and became the sole signatory. Through the said account and the forged company, the respondents between 1st May, 2011 and 31st December, 2016 operated businesses in hardware, building materials, stationeries and other related businesses to different individuals and organizations.

It is also alleged that, the TRA and the Prevention of Corruption and Combating Bureau (PCCB) received information that the respondents purported to be the owners of the Company and they are conducting business without license and are not paying taxes to the TRA. The investigation was launched on the matter, where it was discovered that, the respondents have never applied and obtained Business License from any authority and all documents they are using to operate the said business are

forged documents. That, through the said forgery, the respondents have received and accumulated a total of TZS. 9,411,670,504.40 and have not paid their income returns for the period of 2014 – 2016 to TRA as required by the law. The investigation further revealed that, the respondents evaded tax at the tune of TZS. 505,807,240/=. Being aware that the money was obtained illegally, the fourth respondent purchased a house on Plot No. 2 Block "D" Njiro, Arusha with Title No. 13107 from John Msilongelwa Kiyeyeu and to hide his identity and the truth of the matter, he registered the same in the name of Margareth Kobelo Gonzaga and the money was paid through account No. 01J2035381900 maintained at the CRDB Bank in the name of Victoria John Kiyeyeu the wife of the John Msilongelwa Kiyeyeu. That, due to the said acts by the respondents the Government has suffered loss of TZS. 505,807,240/=.

Following those allegation, the respondents were arrested and arraigned in court to answer their charges. However, the respondents pleaded not guilty to the charge. Hence the trial commenced.

The prosecution side opened its case by parading their witnesses. On 22nd July, 2019 when the trial was still in progress and the prosecution's second witness one Faraja Nyagawa (PW2) was about to tender the

investigation file (the exhibit) containing documents from BRELA, *to wit*, the Certificate of Registration of the Company, the MERMART and letters from the PCCB addressed to BRELA requesting them to produce the said documents, the defence side which was represented by Dr. Masumbuko Lamwai, Mr. Jamhuri Johnson and Mr. Dominicus Nkwera, all learned counsel resisted on the ground that, the intended exhibit suffer from a broken chain of custody as the same was not stamped and there was no evidence that it was dispatched to PCCB. The defence counsel also argued that, PW2 has not laid a proper foundation to show how she acquired the said exhibit and there was no exhibit Register availed to prove that fact. They also argued that, the tendering of such exhibit has contravened mandatory provisions of sections 8 (3) and 10 of the Prevention and Combating of Corruption Act, No. 11 of 2007 (the PCCB Act).

The counsel for the prosecution argued that, non- stamping of an exhibit is not a ground for not admitting it. He argued further that admission of exhibits in court is guided by relevancy, materiality and competence of a witness. It was the argument of the counsel for prosecution that, PW2 had clearly laid a proper foundation on how she obtained the said exhibit from BRELA. They further argued that, it was not proper for the counsel for the

respondents to raise that issue at that stage, because the question of chain of custody could only be established at the close of the prosecution case and not by one witness.

After hearing the argument of the parties, the learned trial Judge made a ruling, the subject matter of this appeal, where he ruled out that the PW2 is not a competent witness to tender the said exhibit. Aggrieved, the appellant has lodged this appeal with four (4) grounds, that:- *The Honourable trial Judge erred in law and in fact by holding that:-*

- a) Faraja Nyagawa (PW2) is not competent witness to tender the documentary exhibits she sought to tender;*
- b) PW2 has failed to lay a foundation on her competence by leading evidence of authentication before the witness had sought to tender the documents in court;*
- c) The witness (PW2) had not established a chain of custody that the documents ever passed through her possession; and*
- d) To reject the admission of the documentary exhibit contrary to the rule governing admissibility.*

At the hearing of the appeal, the appellant was represented by Mr. Ladislaus Komanya assisted by Ms. Mwahija Ahmed, Mr. Awamu Mbangwa and Mr. Christopher Msigwa, all learned Senior State Attorneys, whereas Mr.

Dominicus Nkwera, learned counsel appeared for the second respondent and Mr. Jamhuri Johnson, learned counsel appeared for the third respondent. Mr. Johnson also held brief for Ms. Cecilia Assey, learned counsel for the first respondent and Dr. Masumbuko Lamwai, learned counsel for the fourth respondent with instructions to proceed with the hearing of the appeal. It is noteworthy that no written submissions were filed by the parties and they, thus addressed the Court under Rule 106 (10) (b) of the Rules as amended by GN. No. 344 of 2019.

Submitting in support of the grounds of appeal, Mr. Mbangwa opted to abandon the fourth ground and argued the first and second grounds jointly. He submitted that, PW2 was a competent witness to tender the said exhibit and has clearly laid a foundation to that effect. To support his position he referred us to page 109 of the record of appeal, where PW2 testified and laid the said foundation before tendering it. Mr. Mbangwa argued further that, PW2 had sufficient knowledge on the said exhibit, as she at some point possessed and worked on it. That is why she was able to identify its unique features, such as, the file reference number and its contents. He said, that is the proper foundation as decided in **DPP vs. Mirzai Pirbakhishi @ Hadji & Three Others**, Criminal Appeal No. 493 of 2016 at page 8 (unreported).

He further emphasized that different people are capable of tendering exhibits before courts and the determining factor is for a person to have knowledge on the said exhibit. To buttress his position he referred us to our previous decision in **DPP vs. Kristina d/o Biskasevskaja**, Criminal Appeal No. 76 of 2016 at page 7 (unreported). He thus urged the Court to allow the first and second grounds.

Arguing the third ground, Mr. Mbangwa faulted the learned trial Judge for deciding that PW2 has not established the chain of custody. It was Mr. Mbangwa's strong argument that, the chain of custody could not have been established at that stage by only one witness. He said, the chain of custody is resolved at the end of the prosecution case, and not before. To bolster his point he referred us to the decision in **DPP vs. Kristina d/o Biskasevskaja**, (supra), where the Court had decided on this matter. He then prayed for the appeal to be allowed, quash and set aside the decision of the learned trial Judge and remit the file to the trial court to proceed with the trial.

In his reply submission, Mr. Johnson argued that, the decision made by the learned trial Judge is proper, because PW2 did not lay the foundation on how the exhibit landed into her hands. To emphasize on this point he

referred us to the decision in **Robinson Mwanjisi & Three Others vs. Republic**, Criminal Appeal [2003] T.L.R 218 at page 213 and argued that, in the process of laying the foundation for the said exhibit, PW2 started by tendering exhibit P1, which showed that PCCB sent the Notice to BRELA to produce the said exhibit under section 10 of the PCCB Act. He then argued that, under section 8 of the same Act, for a document or exhibit to be issued to PCCB there must be a receipt. He said, since PW2 did not produce any receipt to prove that the said document or exhibit was received by PCCB, PW2 was not a competent witness to tender that exhibit. Mr. Johnson cited the case of **Azimio Matonge vs. Republic**, Criminal Appeal No. 35 of 2006 (unreported) which is found at page 129 of the record of appeal, where section 8(3) of the PCCB Act was discussed and he insisted that, since PW2 failed to explain how the said exhibit was seized, she was not a competent witness.

Mr. Johnson challenged the authorities cited by Mr. Mbangwa in **DPP vs. Mirzai Pirbakhishi @ Hadji & Three Others** (supra) and **DPP vs. Kristina d/o Biskasevskaja**, (supra) that, all are irrelevant and distinguishable from this appeal. He said, in those cases the witnesses laid the proper foundation on the exhibits they tendered and how the same were

handed over to them, while in this appeal, PW2 had since failed to lay the foundation on how the said exhibit landed into her hands. He thus urged us to dismiss the first and second grounds of appeal for want of merit.

On the third ground, Mr. Johnson disputed the submission by Mr. Mbangwa that, the chain of custody is established at the end of the prosecution case. According to him, the chain of custody is established at the time of admissibility of a respective exhibit and not at the end of the prosecution case. He thus argued that, it was correct for the learned trial Judge to rule out that PW2 has not established a chain of custody for that particular exhibit. He concluded his submission by strongly urging us to dismiss the appeal in its entirety and remit the file to the trial court to proceed with the hearing of the case.

On his side, Mr. Nkwera disputed the first and second grounds of appeal by strongly arguing that, PW2 was not a competent witness, because she failed to lay a proper foundation for the said exhibit she was about to tender. He said, pursuant to section 127 (1) of the Evidence Act, Cap. 6 R.E 2002 (the Evidence Act), for an exhibit to be admitted, the court considers its relevance, materiality and the competence of the witness tendering the same. He then argued that, since PW2 was not a competent witness and the

prosecution side has been given an opportunity to summon a competent witness to tender the said exhibit, then the appeal has no merit and should be dismissed. He also referred us to the decision of the Court in **DPP vs. Kristina d/o Biskasevskaja**, (supra).

In rejoinder submission, Mr. Mbangwa clarified that, the learned trial Judge had well considered the applicability of sections 8 and 10 of the PCCB Act and observed that, section 8 (3) does not extend to other sections and is not applicable in the matter. He further clarified that the objected exhibit was requested under section 10 of the PCCB Act, and that section is silent on the requirement of receipt and does not make any cross-reference to section 8 (3). It was therefore his contention that, the claim by Mr. Johnson that section 8 (3) is applicable on this matter is misconceived and should be disregarded. Mr. Mbangwa further challenged the authority in **Azimio Matonge (supra)** cited by Mr. Johnson and argued that the same is irrelevant as ruled out by the learned trial Judge at pages 174 -175 of the record of appeal. He finally insisted that PW2 was a competent witness, as she laid an adequate foundation on the said exhibit at pages 109 – 110 of the record of appeal.

We have gone through the record of appeal and carefully considered the arguments advanced, both in support and against the appeal. The issue for our determination is the question of admissibility of the exhibit tendered by PW2. Pursuant to section 127 (1) of the Evidence Act (supra), as argued by Mr. Nkwera, the basic prerequisites of admissibility of evidence in the court of law are relevance, materiality and competence of the person tendering the respective exhibit. In addition, competence of a witness to tender an exhibit must be tested along the set of guidelines reaffirmed by this Court in **DPP vs. Mirzai Pirkhishi @ Hadji & Three Others** (supra), where the Court with approval cited the case of **Hamis Said Adam vs. Republic**, Criminal Appeal No. 529 of 2016 (unreported) and stated that:-

"A person who at one point in time possesses anything, a subject matter of trial, as we said in Kristina's case, is not only a competent witness to testify but could also tender the same ...The test for tendering the exhibit therefore is whether the witness has the knowledge and he possessed the thing in question at some point in time albeit shortly. So, a possessor or custodian or an actual

owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question."

In the matter at hand, PW2 was declared incompetent witness to tender the said exhibit obtained from BRELA on the ground that, she failed to lay the proper foundation as to how the said exhibit landed into her hands. To know precisely what PW2 testified before the trial court, as a foundation for tendering the said exhibit, we have travelled through her evidence on record from pages 106 – 110 of the record of appeal and the extracted paragraph below captures what she testified, that:-

"I work with PCCB. I am a Senior Investigation Officer...I am at the Investigation Department ...I am presently stationed at the PCCB Headquarters. My duties are to investigate corruption offences...On 14th March, 2016 ...I was instructed by our supervisor one Khasim Ephraim to conduct investigation on the allegations that a Company known as Jambo Products (T) Limited was engaged in corruption and tax evasion... we started to conduct the investigation. We asked for documents from BankABC. We were provided with a mandate file which was in relation to opening of an

account...there were various annexures...these were the certificate of incorporation of the Company...Jambo Products (T) Ltd, Memorandum and Articles of Association of the Company, TIN –Certificate, VRN Certificate and Business License. There were also introduction letters from the Local Government...We then followed up the source of the documents to establish their genuiness. We followed up with BRELA on the registration of the Company. We established that the Company did not exist at BRELA..."

She then went on and testified that:-

"On 19th July, 2018 I was at my office. I was instructed by the Director of Investigation Mbelwa Kasomambutu to send to the Registrar Notice to produce documents. I sent the Notice to BRELA. The letter was attended. I was availed the documents. The Notice required the confirmation of the Registration of the Company- Jambo Products (T) Ltd. The letter was

accompanied by the certificate of Registration for the Company. The letter was attended to on the same day, that is 10th July, 2018. The Reply was given by Seka Isaya Kasela. The response was a reply letter together with the true file of Jambo Product (T) Ltd. I recorded the statement of Seka Isaya Kasela. I took the documents and filed them in the investigation file. I can identify the Notice to produce because it was signed by the Director of Investigation. (the said Notice was admitted as Exhibit PW1).

I will also identify the file from the name of the file and the number of it. The name of the file is Jambo Products (T) Limited number 287603. The file contains a certificate of Registration of the said Company, the Memorandum and Articles of Association. It also contains PCCB letters of request...The file contains the Notice to produce documents which I served on BRELA. I

pray that these documents be admitted as evidence."

From the extracted testimony of PW2, there is no doubt that, PW2 has adequate knowledge on the said exhibit, as she had clearly laid the foundation on how the same landed into her hands. We shall demonstrate:-

One, PW2 was assigned and instructed to conduct investigation on the matter. **Two**, she is the one who sent the Notice to produce the documents to BRELA. **Three**, the reply to her request was handled by one Seka Isaya Kasela who wrote a reply letter and PW2 is the one who received the said reply, recorded the statement of Seka Isaya Kasela in respects of the said exhibit. **Four**, she is the one who received the said exhibit from BRELA and filed all the documents contained therein. **Five**, before tendering the said exhibit, PW2 managed to identify the same by mentioning its unique features, symbols and reference number together with list of documents contained therein. In the circumstances and with respect, we find no reason why PW2 should be declared as an incompetent witness. That said, we are settled that, PW2 was with full information and knowledge of the exhibit and its contents, hence a competent witness than anyone else to tender the

same before the court. See also our recent decision in **Yohana Paulo vs. Republic**, Criminal Appeal No. 281 of 2012 (unreported).

As to the issue of receipt and applicability of section 8 of the PCCB Act, we have perused the said provision and we are in agreement with the submission of Mr. Mbangwa and the finding of the learned trial Judge on this matter. We therefore find the first and second grounds of appeal to have merit.

As regards the third ground, on the issue of chain of custody, we are in agreement with Mr. Mbangwa that, the same can be in whatever circumstances, conveniently established upon close of the prosecution case and not otherwise. We as such, reiterate what we have said in **DPP vs. Kristina d/o Biskasevskaja**, (supra). We are therefore of the respectful opinion that the learned trial Judge slipped into an error when he found that the chain of custody could have been established at that stage. We thus find the third ground of the appeal to have merit as well. In the event, we find and hold that, PW2 was a competent witness and it was not proper for the learned trial Judge to declare her as an incompetent witness to tender the said exhibit.

In view of the aforesaid, we allow the appeal, quash and set aside the ruling and order of the trial court dated 25th July, 2019. Subsequently, we remit the case file in respect of Corruption/Economic Case No. 03 of 2019 to the High Court for continuation of the trial from where it ended prior to the appeal. Order accordingly.

DATED at DAR ES SALAAM this 13th day of November, 2019.

S. S. MWANGESI
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

This Judgment delivered this 15th day of November, 2019 in the presence of Mr. Ladislaus Komanya, learned Senior State Attorney for the appellant, Ms. Cecilia Assey and Mr. Dominicus Nkwera, Counsel for the first and second Respondents respectively, Mr. Dominicus Nkwera holding brief for Mr. Jamhuri Johnson and Dr. Masumbuko Lamwai, Counsel for the third and fourth Respondents respectively, is hereby certified as a true copy of the original.



S. J. Kainda
S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL