IN THE HIGH COURT OF TANZANIA
AT MTWARA

CONS. ECONOMIC CR. APPEAL NO. 1 & 2 OF 2006
ORIGINAL MTWARA RM'S COURT
ECONOMIC CRIMINAL CASE NO.9 OF 2004
BEFORE: T.K. SIMBA, ESQ: RM

1. VARENTINO AUGUSTINE RAHISI
2. EDITH EDMUND MIHURU ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

DATE OF LAST ORDER – 2/11/2007
DATE OF JUDGMENT - 6/12/2007

JUDGMENT

MJEMMAS, J.

The appellants, namely Valentino Augustine Rahisi and Edith Edmund Mihuru [who were second and third accused respectively] were together with one Shabani Selemani Mtogola who is now deceased, charged with several counts involving use of documents intended to mislead principal contrary to section 5 of the Prevention of Corruption Act, read together with paragraph 1 of the First Schedule to and section 59 both of Economic and Organized Crime Control Act, No.13 of 1984. At the end of the trial the first and second appellants were found guilty and convicted accordingly. The case against Shabani Selemani Mtogola abated after his death.

The background of the case is that, the deceased, Shabani Selemani Mtogola who was the first accused was the proprietor of a firm called Chikongola General Enterprises carrying on its business in Mtwara. The deceased was also employed as an accountant of Mtwara Sub-Treasury with responsibilities among others of authorizing payments, to sign cheques and Local Purchase Orders (LPO). Through his firm of Chikongola General Enterprises the deceased had a tender to supply food stuffs to Mkaseka Social Welfare Center at Lulindi, Masasi. Between June and December, 2006 he was required to supply among other things, 140 kilogrammes of maize flour @ TSh.350/= and 5 tins of cooking oil @ TSh.20,000/=. The accused issued a Profoma Invoice no.043 that he will supply 140 kg of maize flour at the rate of 350/=. However instead of showing total amount or cost to be TSh.49,000/= it showed TSh.140,000/=. He also issued an invoice no.050 showing the same particulars. It was also alleged that the first accused person in collaboration with the 3rd accused person (A Social Welfare Officer) indicated in Delivery Note No.008 that he had supplied 5 (five) tins of cooking oil to Mkasaka Social Welfare Centre knowing that to be false. The second and third accused persons were, allegedly with intent to deceive prepared a Request for Purchase Order No.4 of 2002/03 to show that the first accused's firm, namely Chikongola General Enterprises supplied 140 kgs of maize flour at the rate of TSh.350/= per kg giving a total amount of TSh.140,000/= a fact they knew was not true.

In the whole transaction including other items which were not in dispute a total of TSh.1,000,000/= was paid to Chikongola General Enterprises. All accused persons denied the charges against them. As noted earlier, the first accused person passed away (died) before the hearing of the case was completed so his case was marked abated. The remaining accused persons were found guilty as charged, convicted and sentenced accordingly. They were both aggrieved and hence the present appeal.

The appellants appeared in person, unrepresented while the respondent – Republic was represented by Mr. Hyera, learned State Attorney. Both appellants have prepared a long list of grounds of appeal and with the leave of the court added some more during the hearing of the appeal. However the grounds may be summarized as follows:

1: That the prosecution did not prove the case against the appellants beyond reasonable doubt.
2: The trial Magistrate denied the appellants the right to legal representation.
3: The trial Magistrate failed to consider the impact of the death of the first accused person on the defence of the appellants.

Mr. Hyera, learned State Attorney resisted the appeal. He supported the conviction and sentences imposed on both appellants.

Mr. Hyera submitted that there was no dispute that the appellants were employees of the Ministry of Labour, Youth Development and Sports in Mtwara Region and that they were authorizing officers. In their capacity as authorizing officers, said Mr. Hyera, the appellants prepared and approved a Request for Purchase Order which was sent to the Sub-Treasury showing that 140 kgs of maize flour (sembe) at the rate of TSh.350/= per kg was ordered and the total cost was shown as TShs.140,000/= instead of TSh.49,000/=. Mr. Hyera went on to submit that the said amount of TSh.140,000/= was paid by the Treasury. In his view, the appellants failed to verify the profoma invoice before preparing the Request of Purchase Order so they misled the Principal by preparing the Request which led the Government to pay extra TSh.91,000/=.

Mr. Hyera said also that the conviction of the second appellant in count four was proper because the evidence shows that the amount of cooking oil delivered per issue voucher was twenty (20) litres or one tin while the invoice shows five tins.

On the ground that the appellants were denied legal representation when PW.3 gave evidence, Mr. Hyera, conceded that it was wrong but submitted that there was no miscarriage of justice which occurred because the appellants did not dispute signing the documents which were produced by the witness (PW.3). Mr. Hyera agreed also that there were procedural errors or mistakes which were committed during the production of the statement of the first accused

person who died before giving evidence for his defence and statement of the second accused person. Mr. Hyera asked this court to evaluate the whole evidence and make the necessary orders as it deems fit including ordering re-trial of the case.

Let me start with the ground that the appellants were denied their right to legal representation. The record of the case (proceedings) show that the appellants were being defended by one Mr. Nkuhi learned advocate/counsel. On 3/2/2005 the 2nd accused informed the court that their advocate was sick and that he could not be available for about two months. The case was adjourned and fixed for mention on 3/3/2005. On that date, namely 3/3/2005 the Prosecutor from Prevention of Corruption Bureau told the court, I quote:

> "This case is for mention today. We have agreed with Mr. Nkuhi defence counsel to set this case for hearing on 4/4/2005"

The case was set for hearing on 4/4/2005. On that day the Prosecutor said, I quote:

> "This matter is for hearing. No witness has been called because we knew Mr. Nkuhi is sick."

Court: "We are officially informed of the sickness of Mr.Nkuhi.

Order: Mention on 4/5/2005.

The proceedings show that on 4/5/2005 the first accused informed the court that their defence counsel Mr. Nkuhi instructed them to set the case for hearing on 30/5/2005. The Prosecution did not object

and the case was set for hearing on 30/5/2005. On 30/5/2005 the Prosecutor, one Kasoro is recorded to have said, I quote:

> "Your honour the prosecution (sic) from PCB has asked me to adjourn this case till 3/6/2005. She has left for Newala where she is presiding/prosecuting another case."

On the same day the first accused told the court:

> "Your honour, our advocate has instructed us that he will be here on 3/6/2005. We have already sent him a ticket (air ticket)."

The case was fixed/set for hearing on 3/6/2005. On the 3/6/2005 the case could not proceed because the first accused informed the count that their advocate was still sick. The case was adjourned and set for mention on 7/6/2005. On 7/6/2005 the following transpired:

"Coram: T.K. Simba, RM
Pros: Kinyonto D. for PCB
Accd: Present
PROSECUTOR: Our witness one Stewart Mwamkai is present.

1st ACCD: We had sent an air ticket to the advocate who was supposed to come today. We do not have any other information.

2nd ACCD: NIL

COURT; This case has delayed for a long time. Let it proceed today.

PW.3: STEWART MWAMKAY KIONDO, 31 YRS, CHRISTIAN, SWORN STATES:"

It is not clear why the learned Magistrate decided to proceed with hearing of the case while it was not set for hearing. The case

was set for mention on that day. There may be no rule of law prohibiting that course of action or procedure but certainity of how things are conducted is important and it is more important where the rights and liberties of individuals are involved. All in all, the case proceeded without the accused persons/appellants having legal representation. On 17/6/2005 they asked for adjournment of the case for two weeks in order to look for another advocate. It appears from the record that they obtained the services of Mr. Mlanzi, learned advocate but on 28/3/2006 he withdrew from the case so the appellants had to defend themselves.

On this important point concerning denial of legal representation Mr. Hyera said that there was no miscarriage of justice which was occasioned because there is no dispute that the appellants signed the documents which were tendered in court by PW.3 when he was giving evidence.

However Mr. Hyera conceded that there were errors which were committed in admitting some of the documents which were tendered by PW.3.

The importance of the right to legal representation need not be overemphasized. The right is well recognized in international human rights instruments which our country is a party. Such instruments include the International Convenant on Civil and Political Rights of 1976. The Universal Declaration of Human Rights of 1948 and the African Charter on Human and Peoples Rights of 1981. Article 13(b)(a) of the Constitution of the United Republic of Tanzania provides:

> "Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa

> fursa ya kusikilizwa kwa ukamilifu, na pia haki ya kukata rufaa au kupata nafuu nyingine ya kisheria kutokana na maamuzi ya mahakama au chombo hicho kinginecho kinachohusika."

I entertain doubt that the right to be heard or to a "fair hearing" or "haki ya kupewa fursa ya kusikilizwa kwa ukamilifu" as stated in our country's constitution includes right to legal representation. The position is fortified by the Criminal Procedure Act, 1985 under section 310 which provides:

> "Any person, accused before any criminal court, other than primary court, may of right be defended by an advocate of the High Court subject to the provisions of any written law relating to the provision of professional services by an advocate."

There are a number of judicial authorities which have dealt with this point of legal representation and its importance in our society. Cases in point include **Thomas Mjengi v. Republic [1992] TLR.157, Laurent Joseph and Another v.R [1981] TLR.351, Hassani Mohamed Mkonde & Another v. Republic [1991] TLR.148 and Pascal Kitigwa v. Republic [1994] TLR.65** to mention but a few.

The question which arises is whether the appellants were prejudiced by the absence of their legal counsel. The learned State Attorney was of the view that the appellants were not prejudiced or according to his words "there was no miscarriage of justice which was occasioned."

Let me say, before dealing with the issue in detail, that I find no reason why the learned Resident Magistrate failed to give the appellants last chance opportunity to ensure that their advocate attends the court. Moreover the case was set for mention on that day when he refused the appellant's request to adjourn the case but he decided to hear the matter. I understand and appreciate the importance of time, expenses involved in bringing witnesses or inconvenience caused to them as it was correctly held in **Hassan Mohamed Mkonde and another v. Republic [1991] TLR.148.** I however, am of the view that the right to legal representation should not be taken away lightly just because we need to rush and dispose off a case. Lets remind ourselves of the old adage that "Justice hurried is justice buried." Another thing is that not every person, particularly a layman can defend himself or herself properly – this has been stated by various authorities and I need not over emphasise it – suffice to say that the right to legal representation should only be dispensed with during trial where the interests of the individual/accused person have been properly weighed against those of the other side.

Now as to the question whether or not the appellants were prejudiced I am of the opinion that under the circumstances of the case there was a failure of justice on the part of the appellants.

Of course, as it has been held elsewhere (i.e Pascal Kigwa's case) engagement of the services of an advocate is not a justification for protracted and undue delay in the disposal of proceedings before

the court due to the advocate's failure to attend court trial. However, in the present case there was information that the counsel for the appellants was sick and that's why he failed to attend the trial. On the 7/6/2005 the appellants informed the court that they did not have any information about their advocate although they had sent him an air ticket. As I said before, the court ought to have given them the last chance opportunity to communicate with their advocate.

Apart from that, I think the appellants were prejudiced because PW.3 who gave evidence after the court had decided to proceed with the case in the absence of the defence counsel was the most crucial witness in the case. In actual fact the whole case was built around that witness. The learned State Attorney argued that there was no miscarriage of justice which was caused because the documents which were produced by PW.3 were signed by the appellants and there is no dispute about that. With respect to the learned State Attorney, the issue is not only whether the appellants signed or prepared and signed the documents in question. Considering the charges which faced the appellants i.e use of documents intended to mislead principal, the issue is whether the appellants signed or prepared and signed the said documents knowing that they were false and with the intention of misleading the principal. The trial Magistrate did not address that issue properly, he merely relied on the said documents as given by PW.3 and convicted the appellants. Another issue which makes me to take the view that the appellants were prejudiced is the way documents which were issued by PW.3

were receive and treated by the court. Let me quote the relevant part of the proceedings when PW.3 was giving evidence. He said, I quote:

> "I managed to trace issue voucher 20/6/2003 which shows that only 20 litres were supplied which show that Mkaseka received only 20 litres. We pray to tender the LPO with all supporting documents as exhibit PI"

The record is silent on whether the appellants were given opportunity to object or not. It is not also clear whether the court received the document and marked it as exhibit 1 or it was the order of the witness that the document should be received and marked as exhibit P.1.

The witness continued:

> "I pray to tender issue voucher no.070443 of 20/6/2005 as exhibit P.2."

Again, the appellants were not given opportunity to object or otherwise. It is also not clear whether the court received the document and marked it as exhibit P.2 or it was the order of the witness that the document should be received and marked as exhibit P.2.

PW.3 continued:

> "The accused shows they wanted to cheat employer. I pray to tender in court statement of Shabani Selemani Mtogola ..... I pray to tender in court statement of the 2nd accused which I pray to tender in court as exhibit P.4"

PW.3 went on to say:

> "I managed to get cheques from Hazina with vide PCB/MT/ENQ/9/2003 of 16/8/04. I pray to tender certified copy of cheque of Shs.1,000,000/=. Admitted as exh.P7. I also pray to tender Bank statement as exh.P8. The accused deliberately committed the crime. That's all."

Although it was not shown in the record that the court accepted and admitted the documents tendered by PW.3 as exhibits or that the appellants were given opportunity to object or otherwise, the said documents formed the basis of conviction of the appellants. I will come back to this point later.

The appellants have complained also that the case against them was not proved to the required standard. In their petitions of appeal the appellants especially the first appellant argue that it was not simple to discover the arithmetical error or mistake in the item of sembe. He has also argued that the Request for Purchase Order was supposed to go to the Sub-Treasury for examination, verification and issue of LPO and cheque. Of course the second appellant alleges that she signed the document without scrutinizing it.

If I understood them well the appellants are saying that they had no intention to mislead anyone. They could have been negligent by not examining well the documents which were presented to them by the first accused person. Another thing which I understand from them is that they were not the final authority in the process because

the Request for Purchase Order had to go to the Sub-Treasury for inspection or verification by relevant authorities. I think I agree with the appellants in that respect. The Profoma Invoice and the invoice were issued by Chikongola General Enterprises and it was from those documents that the appellants prepared the Request for Purchase Order. Whether the documents from Chikongola General Enterprises were deliberately made to read TSh.140,000/= instead of 49,000/= is not clear and the issue was not resolved because the first accused person who was the owner of Chikongola General Enterprises died before the hearing of the case was completed. So his case was marked "abated". The appellants copied or reproduced what was written in the Profoma invoice and they are saying they did not notice the "mistake" because it was not easy to discover it. I think there is a point raised by the appellants. It is possible that the "error" or "mistake" was deliberately made or committed to obtain the extra money i.e TSh.91,000/= but there is also the possibility that the appellants were negligent or by sheer lapse they failed to notice or discover the mistake. Let me be clear, I am not saying that the laxity or negligence by the appellants is a good defence or justification of what happened but what I am saying is that looking at the circumstances of the case as a whole it cannot be said that the prosecution proved its case beyond reasonable doubt. One of the things which I have also taken into consideration and actually raised by the appellants is that the said Request for Purchase Order (which was defective) was sent to the Sub-Treasury for verification and issue of LPO, now why didn't those authorities at the Sub-Treasury

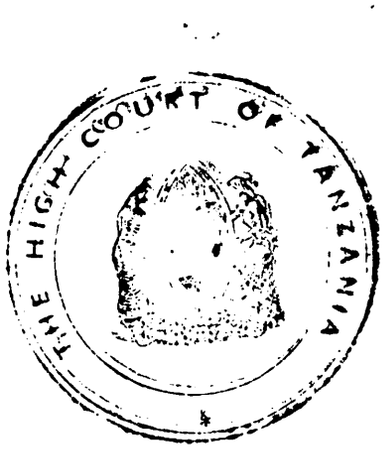
discover the defect or the "arithmetical error" instead they issued an LPO which did not itemize the foodstuff but merely showed "CHAKULA" Unit price 1,000,000/= and Total cost 1,000,000/=. If we are to go with the story or allegations made by the prosecution that the whole idea of the so called "mistake" was a deliberate calculation to mislead the principal now where are those people who approved and issued the LPO and cheque to Chikongola General Enterprises? It is from those circumstances that I find that the case against the appellants in respect of the third count was not proved to the required standard.

Let me go back to the issue of legal representation as promised earlier. From what I have said above, this issue is now relevant in respect of the second appellant who was convicted also of another charge (4th count which was charging the appellant jointly and together with the deceased – first accused). I have already held that the appellants were prejudiced for the absence of their advocates when Pw.3 was giving evidence. Perhaps, if their advocate was present a different picture would have possibly emerged. The issue is whether I should order retrial of the case in respect of the second appellant alone. I have considered this issue seriously and honestly I am of the view that it will not be in the interest of justice to order a re-trial. My reasons are that: first, the appellant was charged jointly and together with the deceased – first accused person. The appellants have complained that the death of the first accused person affected their case. As noted earlier the first accused person died before he gave his evidence (if at all he intended to do that). I am

not so sure how his defence could have helped the appellants but one cannot rule out the possibility that his evidence in defence could have brought to light certain factors which might have affected the appellants and also the view of the court on the appellants. I therefore give the appellant that benefit. My second reason is that the appellant was convicted and sentenced to imprisonment for five years on 10/5/2006 so she has spent almost one year and a half in prison. In view of that to order a re-trial would be quite unfair to her.

From the reasons and arguments given above the conviction of both appellants in all counts is hereby quashed and the order and sentences imposed are hereby set aside. The appellants are to be set free forthwith unless held for some other lawful cause.

Order accordingly.



G.J.K. Mjemmas,
Judge
6/12/2007

Date: 6/12/2007

Coram: G.J.K. Mjemmas, J.

1st Appellant: Present

2nd Appellant: Present

Respondent: Mr. Hyera, State Attorney for the Republic

B/C: G. Luoga, RMA

Mr. Hyera: This appeal is coming for judgment.

Order: Judgment delivered in chambers this 6th day of December, 2007 in the presence of Mr. Hyera, learned State Attorney and the appellants.

THE HIGH COURT OF TANZANIA

G.J.K. Mjemmas,
Judge
6/12/2007