**THE UNITED REPUBLIC OF TANZANIA**
**JUDICIARY**
**IN THE HIGH COURT OF TANZANIA**
**MBEYA DISTRICT REGISTRY**
**AT MBEYA**
**CRIMINAL APPEAL NO. 137 OF 2020**
***(Originating from Criminal Case No. 84 of 2020 in the District Court of Mbarali at Rujewa, Criminal Case No. 84 of 2020)***

**ELIZA IJUMBA @ KALIBURE.....APPELLANT**
**VERSUS**
**THE REPUBLIC.....RESPONDENT**

## JUDGMENT

***Date of last order:*** *20/10/2020*
***Date of Judgment:*** *22/12/2020*

**NDUNGURU, J.**

Before the District Court of Mbarali at Rujewa, the appellant Eliza Ijumba @ Kalibure was arraigned for two counts; **One**, Conspiracy to commit an offence contrary to Section 384 of the Penal Code (Cap 16 Revised Edition 2019). **Two**, Theft contrary to Section 258 and 265 of the Penal Code (Cap 16 Revised Edition 2019). In first count, the prosecution alleges that the appellant and two others who are not in this appeal were jointly and together charged on 5th day of February, 2020 at Kapunga Village within Mbarali District in Mbeya Region willfully and unlawfully did conspire to commit an offence to wit stealing. On the

second count, the prosecution side alleged that the appellant and the two others who are not in this appeal were jointly and together charged on 5th day of February, 2020 at Kapunga Village within Mbarali District in Mbeya Region willfully and unlawfully did steal on hundred sucks of paddy valued at Tshs. 8,500,000/= the property of **PETER S/O ALLEN @ NSEMWA**.

After a fully trial that comprises five witnesses and documentary exhibit for the prosecution andfour defense witnesses, the appellant was convicted on the second count and sentenced to serve four years in jail. The third accused who is not part to this appeal was as well convicted and sentence to pay Tshs. 100,000/= or to serve one-year imprisonment.

Dissatisfied, the appellant quests to assail the conviction and sentence entered at the trial court through a petition of appeal which contains seven grounds. The substance of the appellant's complaints may be paraphrased as follows:

1. *That appellant was convicted and sentenced without the complaint/victim testifies to the court that his property was stolen.*
2. *That the trial court raised extraneous evidence or matters which was not tendered by the parties*

3. *That the owner of the stolen property was not called to testify in court*
4. *That the trial court did not consider the defense evidence.*
5. *That the trial court shifted the burden of proof to the accused person*
6. *That the trial court relied on hearsay evidence of PW3,*
7. *That exhibit PE1 and PE2 were not read to the appellant after its admission.*

In this appeal, Mr. Chapa the learned counsel appeared for the appellant whereas, Ms. Kasambala the learned State Attorney appeared for the respondent republic. With the leave of the court, the parties urged the grounds of appeal orally.

In his submission, Mr. Chapa forcefully submitted that the trial court convicted the appellant on the first ground without having satisfied itself that the property was stolen. He added that the charge sheet provides that the complainant is one Peter Allen Nsemwa but he was not called to testify in court and there was no reason given as to why the said complainant did not testify. Mr. Chapa went on further to state that there are circumstances where the accused can be convicted without the complainant be called to testify. He invited the court to place its reliance

in the case of **Oswald Charles vs. Republic**, Criminal Appeal No. 223 of 2017 Court of Appeal of Tanzania (unreported).

The leaned counsel went on to state that the complainant was required to appear before the court and testify as the owner and the one who stored the consignment in godown. The complainant had also to prove that he was the owner. He referred to court the case of **Mshewa Daud vs. Republic**, Criminal Appeal No. 50 of 2018, Court of Appeal of Tanzania (unreported) at page 20. Mr. Chapa was of the strong view that there is no any proof whether the complainant has property in the said godown. For him failure by the complainant to testify without giving any reason creates doubts. He insisted that in the absence of evidence proving the existence of property alleged to have been stolen, the appellant cannot be held liable for the offence of stealing. Mr. Chapa also invited this court to find an inspiration in the case of **Aziz Abdalla vs. Republic (1991) T.L R 71, Paschal Kiteu vs. Republic**, Criminal Appeal No. 12 of 2018 (Court of Appeal of Tanzania) (unreported) at page 17.

Submitting on the 2nd ground of appeal, Mr. Chapa was of the view that the trial magistrate has discussed the matter which was not testified by PW1. He referred to this court at page 11 of the typed proceedings. Mr. Chapa further contended that the trial magistrate raised the matters

which were not the testimony of neither of the witnesses, hence extraneous matters. Mr. Chapa referred to this court the case of **Okale and Others vs. Republic (1965) E.A 555, Augustino Nandi vs. Republic**, Criminal Appeal No. 388 of 2017 Court of Appeal of Tanzania at Mbeya (unreported) at page 14.

Addressing on the 3rd ground, Mr. Chapa was of the strong view that according to the charge sheet, the complainant was Peter Nsemwa who never testifies, but at page 13 of the typed judgment, the trial magistrate ordered the appellant to pay Tshs. 8,500,000/= to the appellant who never testified in court. For him the order of the trial court was illegal since the complainant never proved to be the owner of the alleged property. On the fourth ground, Mr. Chapa submitted that the defense evidence was not considered by the trial court referring to this court page 8 of the typed judgment. Referring to the 5th ground of appeal, the court shifted the burden to the appellant while it is the duty of the prosecution side to prove the case beyond reasonable doubt and not the weakness of the defense.

Mr. Chapa decided to abandon ground 6 of his appeal. The last ground of appeal is that the court shifted the burden of prove to the accused persons. On this ground, Mr. Chapa submitted that at page 17th and 18th of the typed proceedings, Exhibit PE1 and PE2 were admitted to

court but were not read to the appellant. He cited to this court the case of **Mshuwa Daud vs. Republic**, Criminal Appeal No. 50 of 2018, Court of Appeal of Tanzania at page 6. He prayed for the two exhibits to be expunged as they were not properly tendered. Mr. Chapa ended his submission by persuading the court to allow the appeal, the conviction be quashed, the sentence be set aside, and the appellant to be released forthwith.

On her part, Ms. Hannarose Kasambala conceded the second ground of appeal that the court discussed extraneous matters which were not part of the evidence. She was of the strong view that the court discussed matters which were not from the witness's evidence. Ms. Kasambala added that what the trial court did was fatal and it vitiates the whole proceedings of the trial court and its judgment. The learned State Attorney referred to this court the case of **Athanas Julius vs. Republic**, Criminal Appeal No 498 of 2015, Court of Appeal of Tanzania at Mbeya (unreported). Ms. Kasambala insisted that in this irregularity, the whole proceedings isto be vitiated and the sentence be quashed. She was of the view that since there is enough evidence, she prayed for the court to remit the case to the trial court for re-trial.

Ms. Kasamabala was of the further view that the case was proved beyond reasonable doubt. She insisted that they managed to prove

actus reus (as portation) and crimusfurand (guilty mind). She cited to this court the case of **Christian Mbunda vs. Republic (1953) T.L.R 340.** She was of the strong view that PW1 who was the store keeper keeping the consignment of Peter Msigwa. She went on to state that PW1 gave the appellant 100 bags of paddy which belongs to Peter Nsemwa and also gave him the payslip to prove that he paid Tshs. 8,500,000 in the account of Peter Nsemwa. She referred to this court page 11 of the typed proceedings. Ms. Kasamabala was of the view that there is evidence that the appellant took 100 bags of paddy. Ms. Kasambala ended up his submission by persuading the court to order re-trial.

In a short rejoinder, Mr. Chapa was with similar view with the leaned state attorney. He only prays for the court to be guided by the decisions of the Court of Appeal of Tanzania in ordering re-trial.

I wish to begin by considering the evidential value of Exhibit PE1 and PE2. The exhibit needs to be cleared for admission and the same be read out after admission. Before going further discussing this, I would like to find an inspiration in the case of **Robinson Mwanjisi and Others vs. Republic (2003) T.L.R 218** where it was stated that:

> *"whenever it is intended to introduce any document in evidence, it should be first be cleared for admission, and be*

*actually admitted before it can be read out. Reading out documents before they are admitted in evidence is wrong and prejudicial."*

This is a settled and sound principle of procedure asserted by the Court of Appeal of which this court is bound to follow. After having perused the trial court record, I entirely agree with Mr. Chapa, the learned counsel for the appellant that the contents of PE1 and PE2 were not read out in court after it was cleared for admission as an exhibit. Having revisited at page 18, there is no objection that the said exhibit was not read out to court. It is settled legal position that the effect of that omission is that the same should be expunged from the record. The same stance was observed in the case of **Robinson Mwanjisi and Others vs. Republic (2003) T.L.R 218** and in the case **of Mshewa Daudi vs. Republic,** Criminal Appeal No. 50 of 2018, Court of Appeal of Tanzania at Dar es Salaam (unreported).As the contents of Exhibit PE1 and PE2 were not read out after admission, they were wrongly acted by the trial court.

The court of Appeal has insisted that the right to adversarial proceedings is one of the elements of fair hearing within **Article 13(6) (a) of our Constitution of the United Republic of Tanzania, 1977** (as amended from time to time) which clearly stipulates that each party

to a trial be it criminal or civil, must in principle have the opportunity to have knowledge of and comment on all evidence adduced or observations filed or made with a view to influencing the court's decision. The same stance was observed in **Hassan Said Twalib vs. Republic**, Criminal Appeal No. 95 of 2019, Court of Appeal of Tanzania at Mtwara and in the case of **Kurubone Bagirigwa and Others vs. Republic**, Criminal Appeal No. 132 of 2015 (both unreported).

Having explained the above instances, I am on the firm view that the infraction was fatal and deserves to be expunged from the record. There is nothing left solid that can implicate the appellant from the offence charged. This ground is therefore answered in affirmative.

Grounds one (1), three (3) four (4) of appeal may be grouped under one sunshade. They bear a mutualgrievance that the appellant's conviction was not well initiated. In essence they pose a critical issue on whether the prosecution side proved their case against the appellant beyond the reasonable doubt. As stated, inter-alia, the appellant stood charge with the offence of conspiracy to commit an offence contrary to Section 384 of the Penal Code and theft contrary to Section 258 and 265 of the Penal Code. She was convicted and sentenced under Section 258 and 265 of the Penal Code for the offence of theft. Section 258 defines what amounts to theft while Section 265 is a sentencing section. In view

of the above clear provision, to constitute the offence of theft, its ingredients must conjunctively be established. The charge mentioned one called Peter Allen Nsemwa as the owner of the alleged stolen 100 sacks of paddy. The said complainant never testified in court to establish that he is the owner of the alleged stolen 100 sacks of paddy. It is the settled law that properties suspected to have been stolen should be identified by the complainant who must avail the terms of description of the stolen item. This is crucial since in criminal case, it is not enough to make a generalized description of the property. This was stated in the case of **David Chacha and 8 others vs. Republic**, Criminal Appeal No. 12 of 1997 and in the case of **Hassan Said Twalib vs. Republic (supra)** (both unreported). At the trial court, the complainant did not appear to prove the ownership of the stolen property. Unlucky PW1 who appeared to testify tendered Exhibits PE1 and PE2 which were wrongly acted by the court because it was not read out to the court after its admission. Hence there is nothing left to prove ownership of the said 100 bags of paddy. There is no supporting evidence from the complainant in order to substantiate that he is the actual owner of the stolen 100 sacks of paddy. Suffice to say that the case was not proved beyond reasonable doubt. The above consolidated grounds of appeal are also answered in affirmative.

The next to be considered is whether the trial Magistrate involves extraneous matters. This ground should not detain me much since both sides have agreed that that the trial court raised extraneous matters which was not raised by any witness in this case. This can be seen at page 1 and 3 of the typed judgment. As correctly submitted by Ms. Kasambala, this is fatal and it vitiates the whole proceedings of the trial court and its judgment. I find prudent to place reliance in the case of **Athanas Julius vs. Republic, (supra)** where it was observed that:

> *"extraneous matter is fatal and it vitiates the entire proceedings of the trial court....."*

In this case, the Court of Appeal went on to quash the proceedings and set aside the sentence entered. I am in consonant with this holding since there is an irregularity, it vitiates the whole proceedings. Ms. Kasambala wants this court to order retrial after having quashed the entire proceedings and the conviction entered. It is a settled law that a retrial should not be ordered where the prosecution evidence is patently week and by ordering a retrial, the prosecution will seize an opportunity to fill up gaps at the prejudice of the appellant, unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result. In the case of **Fatehali Manji vs. Republic (1966) EA. 343**.

> *"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the trial...each case must be made where the interests of justice requires it."*

Grounding on the cited provision of the law above, it is my view that the procedural irregularity occasioned by the trial magistrate renders the proceedings fatal hence ordering a trial will assist the prosecution to fill gaps as detailed above. It was also stated in the case of **Pascal Clement Branganza vs. Republic (1957) EA 152** where the court observed the following conditions before ordering re-trial.

(i) *A retrial is ordered only where there has in fact been a previous trial that was conducted but which is vitiated by reason of an error in law or procedure.*

(ii) *When a trial of a case is declared a nullity, it means that there has never been a trial as the purported trial had no legal force or effect.*

(iii) *Where a trial of a case is declared a nullity for non compliance with the provisions of law, the court will bear in mind the gravity of the offence, justice of the case and all other circumstances in ordering a fresh trial to the accused.*

In the event that the order of retrial is made, definitely the prosecution will seize that chance to fill the gaps seen at the lower court records. This will occasion injustice to the appellant. The similar stance was observed in the case of **George Claud Kasanda vs. The DPP**, Criminal Appeal No. 376 of 2017, Court of Appeal of Tanzania at Mbeya (unreported). I am of the view that Ms. Kasamabala took cognizance of this loophole when she swore from pressing for an order of retrial.

In the above contravention and deficiency in the prosecution case sufficiently disposes of the appeal. I shall not therefore labour to consider the rest of the grounds of appeal since grounds number 1, 2, 3, 4 and 7 are meritorious. To that end, I hereby quash both the proceedings of the lower court and the conviction entered, set aside the sentence of imprisonment for four years and the order of compensation at the tune of Tshs. 8,500,000/=. I also direct that the appellant shall be set free unless otherwise held on account of any other lawful cause.

It is so ordered.

THE HIGH COURT OF TANZANIA

**D. B. NDUNGURU**
**JUDGE**
22/12/2020

**Date: 22/12/2020**

**Coram:** D. B. Ndunguru, J

**Appellant:** Absent

**For the Appellant:** Mr. Chapa – Advocate

**For the Republic:** Ms. Rosemary – State Attorney

**B/C:** Mwinjuma

**Ms. Rosemary – State Attorney:**

We are ready for judgment.

**Court:** Judgment is delivered in the presence of Ms. Rosemary State Attorney and Mr. Chapa counsel for the appellant.

THE HIGH COURT OF TANZANIA

**D. B. NDUNGURU**
**JUDGE**
22/12/2020

Right of Appeal explained.

ORIGINAL