

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: RUTAKANGWA, J.A., MUSSA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 323 OF 2013

**FRANK MICHAEL @ MSANGI.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania
at Mwanza)**

(De-Mello, J.)

dated 16th day of September, 2013

in

Criminal Appeal No. 30 of 2013

JUDGMENT OF THE COURT

1st & 4th June, 2015

MUSSA, J.A.:

In the District Court of Nyamagana, at Mwanza, the appellant along with two others were originally jointly arraigned upon three counts involving forgery and obtaining goods by false pretences. In that original charge, the appellant stood as the first accused, whereas his co-accused persons, namely, Frank Moshi and John Elikana @ Stone were, respectively, capped as the second and third accused persons.

At a certain stage of the proceedings, before the commencement of the trial, the second accused jumped bail, following which the charge against him was dropped. The prosecution mounted a substituted charge comprised of seven counts in which the appellant and the said John Elikana @ Stone were featured as the first and second accused persons, respectively. We shall henceforth interchangeably refer the second accused to as "the co-accused" or "Stone."

On the first five counts, the appellant and the co-accused were jointly arraigned for conspiracy to commit an offence (1st count), forgery (2nd, 3rd and 4th counts) and obtaining goods by false pretences (5th count). As regards the sixth and seventh counts, the co-accused was arraigned alone, respectively, for being in possession of implements of forgery and stealing a cheque book. It is, perhaps, pertinent to observe, at this stage, that the initial charge was lodged on the 29th October, 2008 and upon the event of the said Frank Moshi jumping bail, the substituted charge was lodged more than a year later, on the 3rd December, 2009.

The appellant and the co-accused refuted the charge, whereupon the prosecution lined up nine witnesses, as well as several documentary

exhibits. In reply, the appellant and the co-accused gave sworn evidence with one witness who was featured by Stone. On the whole of the evidence, the trial court found insufficient material to support the first and seventh counts. Accordingly, both accused persons were acquitted on those two counts. As regards the second, third, fourth and fifth counts, the trial court found overwhelming evidence to which both the appellant and Stone were found guilty and convicted. The co-accused alone was found guilty and convicted for the remaining sixth count.

Nonetheless, Stone was not in attendance during the pronouncement of the judgment and, in the result, it was the appellant alone who was sentenced to serve respective terms of five years imprisonment on the second, third and fourth counts. As regards the fifth count, the convicting court handed down a sentence of six years imprisonment. All the prison terms were ordered to be served consecutively and, in addition, the court unprecedentedly ordered that **“the first accused shall not be pardoned.”**

The appellant was aggrieved but, on his first appeal, the High Court (De-Mello, J.), found no cause to fault the verdict of the trial court. Still

dissatisfied, the appellant presently seeks to impugn the decision of the High Court upon a memorandum of appeal comprised of eight points of grievance. Ahead of our consideration and determination of the raised points of contention, we deem it instructive to explore the factual setting as unfolded in the course of the trial.

The whole episode was triggered off at the offices of AOL Technology Company Limited which are situated at Miti Mirefu, within Mwanza City. The company deals with the sale of solar power appliances. On the 2nd July 2008, around 10:00 a.m. or so, a man going by the name of Frank called at the offices of the company. The visitor introduced himself as an officer of AMREF, the reputable African Medical and Research Foundation. At the AOL offices, Frank was received by Okomo Otonde (PW1), the technical Manager of the company. The former disclosed to the latter that he had been sent there to secure a price list of solar appliances which were required by AMREF for fixing in rural Health centres and dispensaries. The visitor left after being promised to be availed with the requested price quotations.

On the following day, Frank, again, visited the AOL offices, only this time he was in the company of two others, who introduced themselves by the names of Maisha and Stone. The three visitors left after PW1 availed to them a proforma invoice with respect to the requested solar power appliances.

On the 18th July 2008, Frank alone paid a third visit at the AOL offices and, upon arrival, he gave PW1 a Local Purchase Order (LPO) which was, allegedly, drawn by AMREF towards the purchase of the required appliances. Nonetheless, PW1 regrettably informed Frank that the appliances were, at that moment, out of stock but he assured him to get in touch with him soon after the arrival of the requested goods.

Indeed, upon arrival of the appliances, on the 28th July 2008, PW1 relayed the information to his visitors, assertedly, by phone, whose numbers he did not disclose. Around 5:00 p.m., on that same day, Frank and his two colleagues were at the AOL offices. The AOL technical manager (PW1) was there to receive them and this time he had the company of another AOL official, namely, Leopold Ebere (PW2). The visitors did not go there empty handed, for they had, in hand, a payment

voucher and a CRDB Bank cheque No. 455754, dated the 27th July 2008 which was, allegedly, drawn by AMREF in favour of AOL for the purchase of the appliances. The documents were, there and then, uttered to the AOL officials and, within a while, Frank and his colleagues were supplied with ten solar panels and five batteries worth a sum of Tsh. 11,500,000/=.

On the morrow of the delivery, the AOL officials presented the cheque at the CRDB bank only to be greeted with unpleasant news: The bank system indicated that the account from which the cheque was drawn belonged to a different entity, namely, Kirumi Insurance. In addition, they were told, the CRDB bank had no account in the name of AMREF, the alleged drawer. Accordingly, Mwita Christopher (PW8), the CRDB banker who was at the customer care desk, advised the unfortunate drawee to seek police assistance. Realizing that they had been swindled, the AOL officials relayed a police report and, thus, the proceedings giving rise to this appeal were a direct result of the criminal prosecution that followed the police report.

It is, perhaps, opportune to apprise, at this stage that, in the course of their testimony, PW1 and PW2 made a dock identification through which

they claimed that the appellant and the co-accused were the very ones who introduced themselves as, respectively, Frank and Stone during their visit at the AOL offices. As it were, PW1 concluded his testimony by adducing into evidence the proforma invoice, the LPO, payment voucher and the counterfeited CRDB cheque No. 455754 which were collectively received and marked "exhibit P1."

The way it appears, the police got hint of the transaction through a tip from an undisclosed whistle blower who showed them a CRDB cheque leaf which was involved in a related scam at a so-called Chalinze tyre centre. Whether through this informer or from whatever source, a police constable, No. E8225, namely, Arid (PW4), came across the appellant and apprehended him at Kirumba, within Mwanza City. For some obscure cause, the constable did not wish to disclose the date of the arrest. According to him, upon interrogation, the appellant admitted to have been involved in the Chalinze tyre centre transaction to which he also implicated Frank Moshi and Stone, as his fellow culprits. After the arrest, PW4 did not pursue the matter any further as he was instructed to hand over the brief

to his senior, namely, No. D5178, Detective Staff Sergeant Emmanuel (PW5). Thus, from here, it is the sergeant who picks the tale.

In his testimonial account, PW5 did not dispute the detail about taking over the investigations of the case although he, just as well, did not wish to apprise as to exactly when he took over. He further testified that, upon being interrogated, the appellant also confessed participation in the AOL transaction to which he, again, implicated Frank Moshi and Stone. The appellant further revealed that Frank Moshi was a resident of Dar es Salaam City. And so, according to the sergeant, with the assistance of the appellant, he managed to arrest Frank Moshi in Dar es Salaam. It was, in turn, the latter who disclosed that Stone resides at Magu and, accordingly, PW5, thereafter, travelled to Magu township along with the appellant and Frank Moshi.

On the 18th October 2008 they arrived at Magu and proceeded straight to where Stone used to reside. Upon seeing them, he (Stone) took to his heels through the back door with a black bag in hand. PW5 pursued him from behind and, in the process, the fleeing suspect entered into the house of a certain Mzee Bundula. Incidentally, in that house there was a

police constable No. E.7586, namely, Peter (PW6) who used to reside therein. According to him, he (PW6) saw a person running and entering straight into a room rented by his neighbor, namely, Mama Agness. Following closely behind him, were police officers who asked Peter to get in the room and take out the man. As to what transpired thereafter, we think it will be best if we directly tape from the constable's own word of mouth:-

"...I entered and then took that person outside. As he was entering the room of mama Agness, he had a black bag with him. I took him outside, we asked him the black bag he had and he said he had none. I entered inside to look for the bag, I found he had thrown it in the tank of water. I picked up the bag, we took it outside we opened it and found various documents, stamps, stamp pads, payment vouchers, fake USD and too many other things which were listed in the certificate. After that the suspect signed on the document,

*then the police who had come from Mwanza left
with him."*

The foregoing account tells it all. As it were, the black bag was not, actually, seized from the person of Stone. It was, so to speak, single handedly fetched and retrieved by the constable who, as already intimated, was a tenant in that house. From the testimony of PW5 there was a further detail to the effect that the contents of the black bag were listed in the presence of various witnesses. The witness further alleged that the suspect (Stone), as well as the owner of the house (Bundula), appended their signatures on the certificate of seizure. Unfortunately, the owner of the house was not called to confirm the detail, just as the various witnesses who, allegedly, braced the occasion, were not called to testimony. PW5 wound up his testimony by tendering some of the items seized at the Magu residence (exhibit P3) and the certificate of seizure (exhibit P4) in which the impounded items were listed.

On the 27th October 2008, that is, two days before the appellant and his colleagues were arraigned upon the initial charge, No. C4804 Detective Staff Sergeant Felix (PW9) allegedly recorded a cautioned statement from

the co-accused (Stone). Two days later, on the 29th October 2008, the sergeant also, allegedly, recorded a cautioned statement of the appellant. The cautioned statements were adduced into evidence (exhibits P5 and P6) against an attended protest from their alleged makers to the effect that the same were not freely made.

There was some further prosecution evidence from Obed Mrita (PW3), the AMREF Human Resources Manager, who categorically refuted any transaction between the foundation and AOL. In addition, he disowned all documents comprised in exhibit P1 and said that the same did not originate from the Foundation. What is more, he denied knowing Frank, Maisha and Stone who allegedly visited AOL offices on the pretext that they were sent there by AMREF.

Lastly, the prosecution featured Julius Mtoni (PW7), the insurance agent who confirmed to be the owner of the cheque book having cheque Nos. 455726 to 455775. It is noteworthy that the counterfeited cheque No. 455754 which was presented by the fraudsters to AOL, was actually peeled from this cheque book. PW7's account was that, way back on the 1st December 2007, he travelled to Magu where he lost his bag in which

were several documents including the ill-fated cheque book. Back at Mwanza, he made a police report on the loss, which was acknowledged as MZ/RB/1303/2007. The referred report was, actually, confirmed by PW5 in the course of his testimony. With the foregoing detail, so much for the prosecution version disclosed during the trial.

In his sworn testimony, the appellant told the trial court that he was arrested on the 22nd September, 2008 at Kirumba, within Mwanza City. Upon arrest, he was incarcerated in police custody for over a month without trial. Throughout the period, he was subjected to frequent beatings at the hands of the police. The police were enquiring from him, the whereabouts of Frank Moshi to which he told them that he (Moshi) resides in Dar es Salaam. Then, sometime in October 2008, the appellant accompanied PW5 to Dar es Salaam, where the latter arrested the said Frank Moshi. It was Moshi who, in turn, led PW5 to the arrest of the co-accused (Stone) and thereafter, on the 29th October, 2008 the three suspects were formally arraigned in court on the initial charge. With reference to the accusation facing him, the appellant refuted the prosecution claim just as he disowned the alleged confessional statement. The co-accused (Stone), similarly, refuted the accusation laid at his door

and, in a brief account, he related how he was also subjected to untold beatings by the police which led to his leg being fractured.

As hinted upon, on the whole of the evidence, the two courts below found overwhelming evidence against the appellant and, accordingly, convicted and upheld his conviction to the extent already intimated. With eight points of grievance, the memorandum of appeal before us is lengthy but, fortunately, since it is, in some respects, also repetitive, the same may conveniently be crystalised into only three substantive points worth our consideration, which are: **First**, whether or not the dock identification of the appellant was worthwhile, inasmuch as it was not preceded by an identification parade; **second**, whether or not the cautioned statements were properly adduced into evidence; and **third**, if the foregoing two issues are answered in the negative, whether or not there was some other sufficient evidence to sustain the appellant's conviction.

At the hearing before us, the appellant was fending for himself, whereas the respondent Republic had the services of Mr. Juma Sarige, learned Senior State Attorney. The appellant fully adopted the memorandum of appeal which he did not elaborate, as he opted to do so,

if need be, after the submission of the learned Senior State Attorney. Incidentally, on his part, Mr. Sarige readily discounted the dock identification of the appellant by PW1 and PW2 on account that the same was not preceded by an identification parade. To this submission, we entirely subscribe much as, we note, the fraudsters who paid a visit at the AOL offices were, hitherto, unknown to the witnesses. In this regard, we only wish to reiterate what was said in the unreported Criminal Appeal No. 172 of 1993 – **Musa Elias and Two others vs. The Republic:-**

"...It is a well established rule that dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial."

Coming to the two cautioned statements, which were allegedly made by the appellant and the co-accused person, the learned Senior State Attorney similarly discounted them for the reason that the same were adduced into evidence against an attended protest from their alleged

makers with respect to the voluntary nature of the statements. On our part, we, again, entirely associate ourselves with the submissions of Mr. Sarige. It was, so to speak, wrong for the trial court to ignore the protest from the appellant and the co-accused to the effect that the statements were involuntary. We find it instructive to re-affirm the appropriate procedure which we stated in the unreported Criminal Appeal No. 199 of 2010 – **Makumbi Ramadhani Makumbi and Four others vs. The Republic:-**

"...We now hold without any demur that subordinate courts have a duty to hold a trial within trial whenever an accused confessional statement is either repudiated or retracted before it is admitted in evidence. Once an objection is made by the defence after the trial court has informed the accused of his right to say something in connection with it, which is an unavoidable duty on the part of the court, the trial court must stop everything and proceed to conduct a trial within a trial, giving each side

opportunity to call a witness or witnesses in support of its position."

To the extent that the trial court did not comply with the requirement, the caution statements were wrongly adduced into evidence and we, accordingly, expunge them from the record of the evidence.

Having discounted the dock identification of the appellant as well as the cautioned statements, Mr. Sarige, nevertheless, insistently contended that the remaining evidence was sufficient to sustain the conviction against the appellant. The learned State Attorney had in mind the claim comprised in the testimony of PW5, to the effect that the appellant admitted complicity on the AOL incident to which he implicated Frank Moshi and Stone. The learned Senior State Attorney then sought to impress that so much of the information received from the appellant was relevant inasmuch as the same led to the arrest of his accomplices as well as the discovery of the implements of the fraud. To this formulation, Mr. Sarige sought reliance on the provisions of section 31 of the Evidence Act, Chapter 6 of the revised laws which stipulates:-

"When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, is relevant."

With the foregoing provision in mind, we think that for the "*fact thereby discovered*" to be of any utility, it must be so discovered upon a due process and, above all, it must implicate the person accused. In the case under our consideration, there is little doubt that Frank Moshi and, perhaps, Stone as well, were arrested upon information received from the appellant. It was also commonplace that some items were retrieved from a certain house in Magu to which the prosecution sought to impute possession on the co-accused (Stone).

In reality, however, and as already explained, the black bag, in which the items were, was not actually seized from Stone. It was, rather, constable Peter (PW6) who single handedly fetched and retrieved the bag

from a water tank. Strangely, the owner of the house and the civilian witnesses who were lined up to witness the search did not accompany PW6 when he walked back into the house to discover the black bag. Furthermore, none of them was called to testimony. In the unreported Criminal Appeal No. 29 of 2012 – **Adriano Agondo vs. The Republic**, this Court was confronted with a similar situation in that the items at issue were single handedly retrieved by a police officer from a ceiling roof and the Court made the following remark:-

"...it is beyond question that the civilian witnesses were not engaged in the search on the ceiling roof which was, apparently, an exercise conducted exclusively by the police. To this end, we cannot overrule the possibility that the items might have been fraudulently planted..."

Similarly, in the situation at hand, we cannot overrule the possibility that the contents of the black bag might have been fraudulently planted. And, in any event, apart from PW5's bland assertion that the retrieved items were implements of a fraudulent scheme, none of them was legitimately linked to the AOL incident, let alone, implicating the appellant.

In the upshot, we are of the settled opinion that having discounted the dock identification of the appellant as well as the cautioned statements, the remaining evidence falls short and, as such, the conviction cannot be sustained. We, accordingly, allow the appeal and set aside the conviction and sentence. The appellant should be released from prison custody forthwith unless he is otherwise lawfully detained.

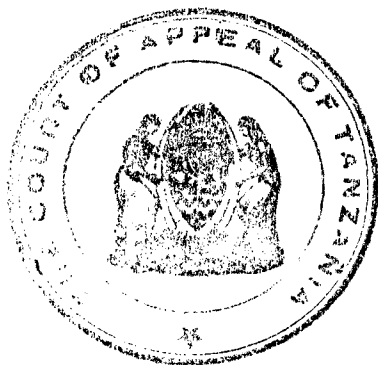
DATED at **MWANZA** this 4th day of June, 2015.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL