IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MJASIRI, J.A., MASSATI, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 324 OF 2015

1. DAVID WALTER MSUMBA
2. MUSSA MOHAMED SAID .... APPELLANTS

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Twaib, J.)

Dated 18th day of March, 2015
In
Criminal Appeal No. 112 of 2014

JUDGMENT OF THE COURT

17th May, & 19th August, 2016

MJASIRI, J.A.:

In the Resident Magistrate's Court at Kisutu Dar es Salaam, David Walter Msumba (the 1st appellant) and Mussa Mohamed Said (the 2nd appellant) were charged with three counts namely, (1) Interference with property used for the purpose of providing a necessary service contrary to paragraph 20(1) and (2) (b) of the First Schedule and sections 57(1) and 60 (2) of the Economic and Organized Crime Control Act [Cap 200 R.E. 2002] (the Economic Crime Act); (2) Forgery contrary to section 333, 335 (a) and 337 of the Penal Code, Cap 16 R.E. 2002 (the Penal Code) and (3) Personating public officers contrary to section 100 (b) of the Penal Code.

They were both convicted on the 1st and 2nd counts and were sentenced to five (5) years imprisonment on each count and the sentences were to run concurrently. The 2nd appellant was also convicted on the 3rd count and was sentenced to 2 years imprisonment.

Being aggrieved by the decision of the Resident Magistrate's court, the appellants appealed to the High Court. Their appeal was unsuccessful hence this second appeal to this Court.

At the hearing of the appeal the 1st appellant was represented by Mr. Symphorian Kitare, learned advocate while the second appellant appeared in person and had to fend for himself. The respondent Republic had the services of Mr. Mohamed Salim, learned Senior State Attorney, assisted by Selina Kapange, learned State Attorney.

Counsel for the 1st appellant presented three grounds of appeal:-

1. *The trial Judge erred in law and in fact to convict the appellant relying on the evidence presented by the trial court that did not meet a required standard.*
2. *The trial judge erred in law and in fact relying on the evidence against the second appellant to convict the 1st appellant.*
3. *The trial judge erred in law and in fact for not considering evidence that exhonerated the appellant from the charge.*

The 2nd appellant presented an eight-point memorandum of appeal which is summarized as follows:-

1. *The case against the appellant was not proved beyond reasonable doubt. The prosecution witnesses contradicted each other.*
2. *The first appellate court failed to evaluate the evidence on record.*
3. *The High Court Judge misdirected himself in relying on Exhibit P1 without calling a handwriting expert.*

Before hearing the appeal on merit Mr. Kitare brought forth a point of law as to *whether or not it was proper for the prosecution to combine economic and non-economic offences.* He argued that section 12 (4) of the Economic Crime Act was not complied with. Therefore the trial before the Resident Magistrate's Court was a nullity, and the conviction was not proper. He asked the Court to quash the conviction against the 1st appellant and to set aside the sentences of 5 years imprisonment meted out to the appellant. Mr. Kitare also contended that the evidence on record was not sufficient to ground a conviction against the 1st appellant. He submitted that the first appellate court relied on the evidence of PW2, PW3 and PW5 which did not implicate the 1st appellant.

He stated that both charges against the 1st appellant were not sustainable. He therefore asked the Court not to give an order for a retrial given the circumstances.

The second appellant being a layman and without the benefit of a legal counsel opted to let the learned Senior State Attorney submit first.

Mr. Salim readily conceded that the trial Court had no jurisdiction to hear the combined charges (that is economic and non-economic) given the requirements under sections 12 (4) and 26 (2) of the Economic Crime Act. He submitted that given the circumstances the proceedings of the trial court were a nullity. Therefore the proceedings and judgment of the High Court were also a nullity. He stated that the way forward was for the Court to nullify the proceedings and to order a retrial.

On the part of the 1st appellant he agreed with Mr. Kitare that the evidence on record was very weak and was not sufficient to ground a conviction against the 1st appellant. The only evidence linking the 1st appellant was the receipt purported to be signed by him, but no handwriting expert was called as required under section 59 of the Criminal Procedure Act [Cap 20 R.E. 2002] (the CPA). There is no other evidence on record linking the 1st appellant with the charges. However the circumstances are different

in respect of the second appellant. He submitted that a retrial should be ordered in respect of the 2nd appellant only.

The 2nd appellant did not have much to say in reply. He simply stated that in relation to count No 3, that he is not a TANESCO worker and that he never pretended to be one in relation to count No. 1.

Having carefully reviewed the record and taking into account the submissions made by counsel, we are of the considered view that the requirement under section 12(4) of the Economic Crime Act has not been complied with. Section 12(4) provides as follows:-

> *"The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case in which he deems it necessary or appropriate in the public interest, by certificate under his hand order that any case instituted or to be instituted before a court subordinate to the High Court and which involves a non-economic offence or both an economic offence and a non-economic offence, be instituted in the Court."*

Therefore under subsection 4 of section 12, the Director of Public Prosecutions has been empowered to authorize a trial combining economic and non-economic offences.

The consent issued by the State Attorney in charge under section 26(2) of the Economic Act makes reference to the first count only. No other consent was issued giving jurisdiction to the subordinate court to handle a combination of economic and non-economic offences in accordance with Economic Act. Section 26(2) provides that:-

> *"The Director of Public Prosecutions shall establish and maintain a system whereby the process of seeking and obtaining his consent for prosecutions may be expedited and may, for that purpose, by notice published in the Gazette specify economic offences the prosecutions of which shall require the consent of the Director of Public Prosecutions in person and those the power of consenting to the prosecution of which may be exercised by such officer or officers subordinate to him as he may specify acting in accordance with his general or special instructions."*

In **Abdul Swamadu Azizi v Republic,** Criminal Appeal No. 180 of 2011 CAT, (unreported) the Court emphasized the need to obtain prior consent under section 26(2) of the Economic Act and certificate conferring jurisdiction on a subordinate court to try a combination of economic and non-economic offences. It was stated thus:-

*"In the instant case, **the counts against the appellant combined the economic and non-economic offence, but again no certificate of the DPP was issued. This Court in its various decisions had emphasized the compliance with the provisions of section 12(3), 12(4) and 26(1) of the Act and held that consent of the DPP must be given before commencement of a trial involving an economic offence."***
[Emphasis provided].

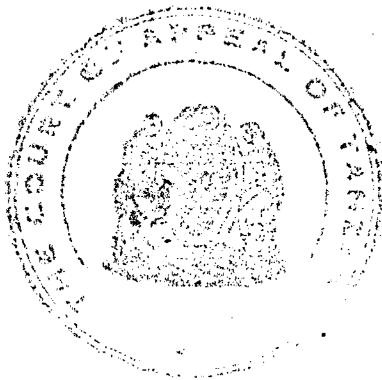
See for instance **Rhobi Marwa Mgare and Two Others v Republic,** Criminal Appeal No. 192 of 2005, **Elias Vitus Ndimbo and Another v Republic**, Criminal Appeal No. 272 of 2007 and **Nico Mhando and Two Others v Republic**, Criminal Appeal No. 332 of 2008 CAT (all unreported).

Given the circumstances we are inclined to agree with counsel that the trial court had no jurisdiction to combine economic and non-economic offences in view of the requirements under sections 12 (3), 12 (4) and 26(1) of the Economic Act. The trial was therefore a nullity. We are therefore compelled to invoke section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002. We hereby quash the proceedings and judgments of both the trial Court and the High Court and set aside the sentences imposed on the appellants.

The next issue for consideration is whether or not to order a retrial. Upon perusal of the record we are in agreement with both the learned Senior State Attorney and the learned advocate that as far as the 1st appellant is concerned, it is evident from the record that he is not directly linked to the commission of the offence. We would therefore not make an order for retrial in respect of the 1st appellant.

We however, cannot make a similar conclusion as far as the 2nd appellant is concerned. We would therefore order a retrial in respect of the second appellant only. However, in the event that he is found guilty and subsequently convicted, account should be taken that he has already served a term of two (2) years imprisonment out of the five (5) year sentence imposed by the trial Court.

DATED at **DAR ES SALAAM** this 17th day of August, 2016.



S. MJASIRI
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL