IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LILA, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 350 OF 2020

1. AUGUSTINO DANIEL MWIMBE
2. KEDMON LAMECK SUNGURA ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the Judgment of the Resident Magistrates' Court of Dodoma at Dodoma)

(Dudu, PRM-Extended Jurisd.)

dated the 9th day of July, 2020
in
PRM Criminal Appeal No. 6 of 2020

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JUDGMENT OF THE COURT

17th & 27th August, 2021

LILA, J.A.:

In the Resident Magistrates' Court of Dodoma at Dodoma, the appellants together with three other persons namely Judith Javan Maninje, Oscar Elisha Ngoma and Yubeth Anderson Mhawi who are not parties to this appeal, were charged with the offence of 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 and Organized Crime Control Act [Cap 200 R.E 2002]. They were accused of willfully causing

Chamwino District Council, a local authority, to suffer a pecuniary loss of TZS. 4,000,000.00 on divers dates between 1st January and 31st December 2013 at Mvumi Makulu ward, within Chamwino District in Dodoma Region.

Briefly, the substance of the prosecution evidence was this. Acting on a letter by Mvumi Makulu Village requesting for financial assistance in the construction of a ward at Mvumi Makulu Health Centre, Father John Nowman (PW6) secured from his American friends TZS 6,500,000.00 and, through the 1st appellant who was then a councillor, handed the same to Mvumi Makulu Village Construction Committee. The money was later given to the 2nd appellant who was a contractor for construction of the ward. Construction work was however stopped by the District Engineer on allegation of the work done not to have accorded to the District Council Guidelines and the material used being substandard. That was the subject of the charge to all members of the village construction team and the appellants.

The appellants denied the charge. Save for the appellants who, respectively, admitted receiving the money from PW6 and the 1st appellant, the remaining persons admitted to be members of the

construction committee only and denied involvement in the way the said money was used.

The appellants' guilt was, at the height of the trial, found to have been established and the presiding magistrate (P. F. Mayumba, RM) convicted them and sentenced each to serve twenty (20) years imprisonment. The rest were acquitted.

The appellant's appeal was heard by the learned Principal Resident Magistrate with Extended Jurisdiction (Dudu, PRM, henceforth the learned first appellate magistrate). He did not determine the appeal on merit. It came to his knowledge that PW6 and DW1 were neither sworn nor affirmed before their respective testimonies were taken by the trial court. On that account, he found such evidence lacking evidential value and discarded the same. He then invoked his powers of revision under section 373 of the Criminal Procedure Act Cap. 220 R. E. 2002 (now R. E. 2019 (the CPA) and 45(3) of the magistrates Court Act, Cap. 11 R. E. 2002 (now R. E. 2019) (the MCA), and nullified both the proceedings and judgment of the trial court, quashed the conviction and set aside the sentence. After satisfying himself that there was no pit-holes in the prosecution case to be filled up by the prosecution in the event of a retrial order, he ordered the case be retried against all those who were

charged from the stage where the mishap started, that is; from the moment before PW6 gave his testimony.

The appellants were aggrieved by the order for retrial. Two separate memoranda of appeal comprising one ground of appeal each were lodged in this Court. They, essentially, raise a common issue that the learned magistrate fell into an error in making an order for the retrial. The main contention is that by excluding the two witnesses' evidence which was taken improperly, the prosecution case became weak rendering the charge not to have been proved beyond doubt. The order for retrial, will be prejudicial to them as it will afford opportunity to the prosecution to lead evidence that may result into their conviction. As an example of the weakness in the prosecution case, they pointed out a variance between the particulars of the offence in the charge and evidence by the prosecution witnesses on the amount of loss occasioned.

Like it was before the trial court, there was no legal representation on the part of the appellants before us at the hearing of the appeal. They appeared in person. The respondent Republic had the services of Ms. Judith Mwakyusa, learned Senior State Attorney who was aided by Ms. Neema Taji, learned State Attorney.

To the appellants, the grounds of appeal contained sufficient information of their grievances for the Court's consideration and allow their appeal. They adopted them and reserved their arguments which would arise after the respondent had responded to their appeal first.

In resisting the appeal, Ms. Mwakyusa began her arguments by reaffirming the finding by the first appellate Magistrate to be proper that PW6 and DW1 were not affirmed or sworn in before their respective testimonies were taken and in violation of the provisions of section 198(1) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA). Consequently their testimonies had no evidential value. She was emphatic that the learned first appellate magistrate rightly exercised his powers of revision under section 45(3) of the MCA to quash both the proceedings immediately before PW6 gave his testimony onwards together with the judgment of the trial court. She also supported the order that all the five persons charged should appear before the trial court for it to proceed with the trial by recording the evidence by PW6 and DW1 according to law arguing that it was made for the interest of justice of both sides. She thus pressed for the appeal to be dismissed.

Both appellants, in rejoinder, restated what they had told the Court in their respective grounds of appeal and added that since it was

found that they were convicted on evidence taken not on oath or affirmation, the remedy is that there was no evidence implicating them with the offence hence they should be let free. They furiously attacked the order of retrial insisting that it will allow the prosecution chance to correct the anomaly hence lead to their conviction. Moreover, it being a legal matter, they left it for the Court to determine the appeal justly.

In resolving this appeal, we think, we should start by considering the essence of the provisions of sections 198(1) of the CPA and section 4(a) and (b) of the Oaths and Judicial proceedings Act, Cap. 34 R. E. 2002 (now R. E 2019) (the OJPA) and the Oaths and Affirmations Rules made under section 8 of the OJPA. From these provisions, it occurs to us that all witnesses in any judicial proceedings are competent to testify and must be affirmed or sworn before their evidence is taken unless any other law provides otherwise. As an example of an exception, we may not forget or avoid mentioning is the current provisions of section 127(2) of the Evidence Act, Cap. 6 R. E. 2019 which permits a child of tender age to testify not on oath or affirmation provided that he promises to tell the court the truth and not lies.

In the present case, fortunately, the learned Senior State Attorney, with no hesitation agreed that PW6 and DW1 were neither affirmed nor

sworn in before their respective testimonies were taken. She did not also take issue with the cases referred to by the learned first appellate magistrate as propounding the proper stance of the law. The cited cases were, **Nestory Simchimba vs Republic** Criminal Appeal No. 454 of 2017, **Mwami Ngura vs Republic**, Criminal Appeal No. 63 of 2014 and **Jafari Ramadhani vs Republic**, Criminal appeal No. 311 of 2017 (all unreported). She ardently accepted that in all these cases the Court explicitly pronounced that evidence taken not on oath or affirmation, unless it is of a witness who is not competent and is precluded by any law from being affirmed or sworn in, has no evidential value. Luckily too, Ms. Mwakyusa had no qualm with the first appellate court's finding as reflected at pages 160 and 161 of the record that the testimonies by PW6 and DW1 had no evidential value.

Having seriously examined the original record we have satisfied ourselves that it is true that PW6 and DW1 were not affirmed or sworn in. Only the religions to which they professed were recorded. That alone did not constitute sufficient affirmation or being sworn in. Incidentally, the Court faced an identical scenario in **Jafari Ramadhani vs Republic**, Criminal Appeal No. 311 of 2017 (unreported) and pronounced itself thus:-

"It seems clear to us, recording of the religion of a witness does not meet the threshold examination upon oath or affirmation required under section 198(1) of the CPA. Religion is, but an indication of type of oath or affirmation a witness of a given religion can take. The Oaths and affirmations Rules, GN No. 125 of 1967 (made under section 8 of the Oaths and statutory Declaration act, Cap 34 R. E. 2002) has prescribed distinct types of oaths for witnesses who are Christians; and Affirmations for witnesses who are Muslims, Hindus or Pagans testifying in courts other than in Primary Court:"

As we have intimated above, the parties to this appeal are agreed that evidence of a witness taken without oath or affirmation is not worth the name "evidence". It has no evidential value and cannot be relied on to ground a conviction. Instead, it can only be discarded. Apart from the case of **Nestory Simchimba vs Republic** (supra) and others cited above, the Court has consistently maintained that stance in many other decisions (see for example the unreported cases of **Eliko Sikujua and Another vs Republic**, Criminal Appeal No. 367 of 2015 and **Richard Mlingwa vs Republic**, Criminal Appeal No. 11 of 2016).

Alive to the foregoing settled position on the consequences that must befall on the testimony of a witness recorded not on oath or affirmation, the crucial issue in this appeal calling for our determination is, what was the proper way forward after the learned first appellate magistrate had made a finding that the testimonies by PW6 and DW1 had no evidential value and should be discarded?. In answering this question, the learned Senior State Attorney and the appellants were not in agreement. While the former moved the Court to uphold the order for retrial from the stage PW6 gave his testimony, the appellants complained of an injustice being done to them as that will accord the prosecution opportunity to align its evidence properly that will ultimately lead to their conviction. The latter proposed for their being set free on account of insufficient prosecution evidence.

Having considered the grounds of appeal, the submissions by both sides and the record of appeal, there are no doubts in our minds that the instant case presented identical situation to the one which obtained in **Nestory Simchimba vs Republic** (supra). In that case, the evidence by PW1, a crucial witness who led evidence establishing the age of the rape victim of rape which is an essential ingredient of the offence of statutory rape, was taken without being affirmed. Without it the prosecution case would collapse. Likewise, the defence evidence by

the appellant (then accused or DW1) was similarly recorded without affirmation the exclusion of which would amount to the denial of the appellant's right to defend himself. Both sides were equally adversely affected by the trial court's failure to ensure that they were affirmed before they testified. Under those peculiar circumstances, the Court was inclined to ensure justice was done to both sides and thereby ordered a retrial. In that case, it is noteworthy, the Court also had an eye on whether there were possibilities for the prosecution to fill up gaps in the event of an order for retrial being made and was satisfied that none existed.

In this instant case, the money the subject of the charge originated from PW6. He is, according to the record, the one faced by DW1 for financial assistance to build a ward for the Village Health Centre and, after consulting his friends, obtained the money and handed the same to DW1 for onward transmission to the Village Council. The evidence by both PW6 and DW1 is crucial for either sides and standing alone was able to show, respectively, from whom the money originated and to whom it was handed and how it was utilized. They were key witnesses on which the cases for either side rested. In the absence of such evidence, the cases for both sides miss legs to stand on. Exclusion of such evidence was out of the trial court's non-compliance with the

provisions of section 198(1) of the CPA and section 4(a) and (b) of the OJPA and the Rules thereof (the OJPA Rules). Would it be just to let the proceedings be terminated in favour of the accused and at the detriment of the victim due to the aforesaid anomaly? This is the issue that prompted the Court in **Nestory Simchimba's** case (supra) to order a retrial from the stage where the anomaly occurred so that justice could be done to both sides.

The situation we are faced with reminds us of the need to uphold what we call judicial precedence which enjoins courts to abide to former precedents where the same points or identical facts came again in litigation. That principle supposes that the law has been solemnly declared and determined in the former case and so as to keep the scale of justice even and steady, in identical facts, that position be maintained.

We have endeavoured to demonstrate the similarity of the facts and the circumstances of the cited case (**Nestory Simchimba's** case) and those of the present case; hence we see no good reason to depart from our earlier position. We accordingly agree with the learned Senior State Attorney that there was no miscarriage of justice done by the learned first appellate magistrate when he ordered a retrial as

complained by the appellants. We are impelled to uphold the first appellate magistrate's decision and direct as we do that the trial court record be remitted back for it to comply with the order for retrial involving all those who were charged as was ordered.

In fine, the appeal is dismissed in its entirety.

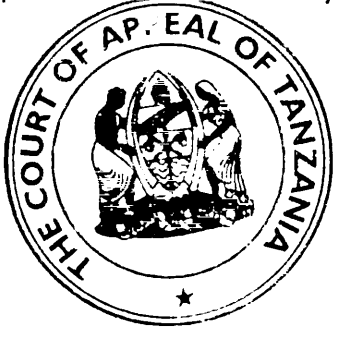
DATED at **DODOMA** this 27th day of August, 2021.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 27th day of August, 2021 in the presence of the 1st appellant in person and Ms. Salma Uledi, learned State Attorney for the Respondent and in the absence of the second appellant who is reported sick is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL