IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MUGASHA, J.A., KEREFU, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 571 OF 2019

ELIREHEMA MACHA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tabora)

(Nyaki, SRM Ext. Jur.)

dated the 29th day of October, 2019
in
Extended Jurisdiction Criminal Appeal No. 1 of 2019

JUDGMENT OF THE COURT

17th & 20th March, 2023

KEREFU, J.A.:

Elirehema Macha, the appellant herein, was an employee of Tanzania Railways Corporation (TRC) as a driver of a passenger train No. B12 from Dodoma to Tabora. On 28th August, 2018, he found himself standing in the dock answering a charge before the Resident Magistrate's Court of Tabora as an accused person in Criminal case No. 79 of 2018 in connection with the offence of drunkenness while on duty contrary to section 84 (2) of the Railways Act No. 10 of 2017 (the Railways Act). It was alleged that on 13th

August, 2018, the appellant, being a driver of a passenger's train No. B 12 from Dodoma to Tabora was found to be under the influence of alcohol to the tune of 343.7 mg/100ml. The appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. To establish its case, the prosecution paraded a total of seven witnesses and two documentary exhibits namely, the certified copy of the test result for alcohol content (exhibit P1) and the police station diary (exhibit P2) respectively. On the other side, the appellant relied on his own evidence as he did not summon any witness.

Upon a full trial, the appellant was found guilty, convicted and sentenced to pay a fine at the tune of TZS 2,000,000.00 and in default, to serve twelve (12) months imprisonment term.

The material facts leading to the appellant's arrest as obtained from the record of the appeal indicate that, on 12th August, 2018, the passenger's train No. B12 was on its route from Dar es Salaam to Kigoma with considerable number of passengers. No.PF 18199 Insp. Steven Archie (PW1), the in-charge of the security in the said train, testified that, since the said route was long, drivers were to exchange after a considerable trip distance or as may be ordered by the shift supervisor. On that sequence,

upon arrival at Dodoma, one Robert Ngunga, the driver who drove the said train from Morogoro handed over the shift to the appellant who was to drive it until Tabora. PW1 testified further that, along the way, there were small stations which the train had to stop to allow some of the passengers to alight and others to board. However, upon reaching at Malongwe Station, the appellant failed to stop the train and when PW1 went to check on what had happened, he found the appellant in a state of drunkenness. PW1 ordered him to stop and alight and he brought him to the station master one Patrick Kusaba (PW2).

PW1's testimony was supported by PW2 and Peter Venance Mihayo (PW4). PW2 added that the train did not stop at Malongwe Station as it passed at a very high speed and stopped at a distance of about 800 meters. That, upon seeing the appellant's condition, PW2 summoned another driver one Daniel Njowelo (PW3) who came and drove the train from Malongwe Station to Tabora. PW2 stated further that, the appellant looked tired and could not communicate well. Thus, the appellant was arrested and taken to a traffic police where he was examined and found to be drunk. Thereafter, G. 5043 PC Leornard (PW5) conducted an alcohol content test on the appellant through the machine which gave a printout result (exhibit P1)

which indicated that the appellant had alcohol content of 343.7mg/100ml. According to PW5, the said content was very high for a driver because drivers are not supposed to take any kind of alcohol while driving.

No. G 2410 D/C Ashiri (PW7), testified that he was involved in the investigation of the incident. That, on 14th August, 2018 he handed over a copy of exhibit P1 to the appellant through a police station diary. The said diary was admitted in evidence as exhibit P2.

In his defence, the appellant, apart from admitting that he was an employee of the TRC in the capacity of a driver and that on the fateful date he drove the passenger's train No. B12 from Dodoma to Malongwe Station, he denied involvement in the commission of the offence. He contended that he drove the train for about fourteen (14) hours and upon reaching at Tura-Malongwe he started to feel unwell as he had a problem of high blood pressure. That, he took valium tablets and proceeded with the journey. A moment later, he felt dizziness which caused him to fail to stop at Malongwe Station as he stopped at a distance of 200 meters and he thus reversed the train to the place where it was supposed to park. According to him, a drunk person cannot reverse the train. The appellant stated further that, having parked the train, he went to inform the station master that he was unwell

and another driver one Daniel Njowelo was called to proceed with the journey. That, after handing over the train, he went to rest at the nearby rest house. While there, he was arrested by PW1 who alleged that he was drunk. He added that he was forced by PW5 to blow an alcoholic tester machine after PW7 had blown on the same and given a printout showing that he had alcohol content of 343.7mg/100ml.

The appellant challenged the procedure adopted by PW5 to test the alcohol content as he testified that, pursuant to Rule 13 (c) of the Tanzania Railways Corporation General Rules, 1997 (The TRC Rules), a test of that nature is supposed to be conducted immediately after suspicion, by a medical officer and must be witnessed by two independent witnesses. He contended that all those conditions were not complied with as he was tested by traffic officer after lapse of six hours from the time when he was suspected to be drunk and there were no independent witnesses who witnessed the said test.

However, at the end of it all, the learned trial Magistrate found that the charge against the appellant was proved to the required standard. Thus, the appellant was found guilty, convicted and sentenced as indicated above. The appellant's appeal to the High Court was unsuccessful. Undaunted, and

still protesting his innocence, the appellant has knocked doors of this Court on a second appeal seeking to challenge the decision of the first appellate court. In his memorandum of appeal, the appellant raised six grounds which can be conveniently paraphrased as follows: **one**, that the first appellate court erred in law for failure to consider the 4th, 5th and 6th grounds of appeal hence the appellant was denied the right to be heard; **two**, Rule 13 (c) of the TRC Rules was wrongly interpreted thus led the first appellate court to arrive into an erroneous decision; **three**, the alcohol content test examination was conducted by an unqualified person; **four**, the evidence of prosecution witnesses was shaky and weak hence incapable to mount the appellant's conviction; **fifth**, failure by the lower courts to properly evaluate the evidence on record, and **sixth**, the prosecution case was not proved to the required standard.

At the hearing of the appeal, the appellant, was represented by Ms. Stella Thomas Nyakyi, learned counsel whereas Ms. Mwamini Yoram Fyeregete, learned Senior State Attorney assisted by Mr. Merito Boniphace Ukongoji, learned State Attorney appeared for the respondent Republic.

Upon taking the floor, Ms. Nyakyi prayed to abandon the first ground and intimated that she will argue the remaining grounds conjointly. The

learned counsel faulted the learned High Court Judge for finding that the charge against the appellant was proved to the required standard while, among the seven witnesses summoned by the prosecution, none testified to have seen the appellant drinking or drunk. To clarify on this point, Ms. Nyakyi referred us to the evidence of PW1, PW2, PW3, PW4 and PW6 and argued that all these witnesses apart from stating that they found the appellant tired, in bad condition and unable to communicate, none of them testified to the effect that he was drunk.

Ms. Nyakyi contended that the only evidence relied upon by the trial court to convict the appellant was the alcohol content test which was improperly conducted by PW5. The learned counsel, referred us to Rule 13 (c) of the TRC Rules and argued that, pursuant to the said Rule, if a TRC employee is found on duty and believed to be under the influence of intoxication, written statements of at least two independent witnesses must be immediately obtained and whenever possible, an alcohol content test must also be conducted by a medical officer. She argued that, in the instant appeal, there were no independent statements tendered before the trial court and no independent witnesses who were summoned to testify to that effect. To the contrary, the test was conducted by PW5, the traffic police

officer at 20:25 hours, after lapse of about six hours, from 14:00hours when the appellant was suspected to be drunk. She thus urged us to find that it was improper for the lower courts to rely on such a test which was conducted contrary to the requirement of the law.

Ms. Nyaki also referred us to page 21 of the record of appeal and contended that exhibit P2 was unprocedurally admitted in evidence as its contents were not read over after its admission in evidence contrary to the requirement of the law. As such, the learned counsel prayed for the said exhibit to be expunged. It was her argument that, after expunging the said exhibit from the record, the remaining oral account by PW1, PW2, PW3, PW4 PW6 and the irregularly conducted alcohol content test would not be sufficient to ground the appellant's conviction. In conclusion and on the strength of her submission, she urged us to allow the appeal, quash the conviction and set aside the sentence imposed on the appellant and set him free.

In response, Ms. Fyeregete, declared the stance of the respondent Republic of not supporting the appeal for the reason that the charge against the appellant was proved to the required standard. As such, she disputed all

other complaints raised by the learned counsel for the appellant in relation to the alcohol content test conducted by PW5.

Upon being probed and referred to the requirement of Rule 13 (c) of the TRC Rules cited by Ms. Nyakyi and asked as to whether those conditions were complied with, Ms. Fyeregete conceded that the said requirement were not adhered to, but she still insisted that since the test was conducted by PW5 who was a traffic officer and found that the appellant was drunk, the prosecution case against the appellant was proved to the hilt.

Ms. Fyeregete also readily conceded that exhibit P2 was unprocedurally admitted in evidence as its contents was not read out after its admission in evidence. She thus also urged us to expunge it from the record. Nonetheless, the learned Senior State Attorney was still confident that, even if the said exhibit is expunged, it would not affect the strength of the prosecution's case because the process of handing over exhibit P1 to the appellant was well explained by the oral account of PW7. She thus prayed that the entire appeal be dismissed for lack of merit.

In a brief rejoinder, Ms. Nyakyi reiterated her submission in chief. She insisted that, since Ms. Fyeregete had conceded that the alcohol content test was conducted contrary to the requirement of the law and there were no

statements of the independent witnesses, who were material witnesses in the circumstances of this case, the charge levelled against the appellant was not proved to the required standard.

On our part, having carefully considered the grounds of appeal, the submissions made by the learned counsel for the parties and examined the record before us, the main issue for our consideration is whether the prosecution proved its case beyond reasonable doubt. We shall therefore determine the grounds of appeal in the same manner as submitted to us by the learned counsel for the parties.

However, before doing so, it is crucial to state that, this being a second appeal, under normal circumstances, we would not interfere with concurrent findings of the lower courts if there were no mis-directions or non-directions on evidence. Where there are mis-directions or non-directions on the evidence, the Court is entitled to interfere and look at the evidence with a view of making its own findings. See for example **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149, **Salum Mhando v. Republic** [1993] T.L.R. 170 and **Mussa Mwaikunda v. The Republic** [2006] T.L.R. 387. We shall be guided by the above principle in disposing this appeal.

It is on record that the charge levelled against the appellant, who was then an employee of the TRC, was on the offence of drunkenness while on duty contrary to section 84 (2) of the Railways Act. As correctly argued by Ms. Nyakyi, Rule 13 (c) of the TRC Rules provides for a procedure to be followed when a TRC employee is found on duty in an intoxicated condition or believed to be under the influence of intoxicants. For the sake of clarity, the said Rule provides that:

> *"13 (c) If an employee is found on duty in an intoxicated condition, or believed to be under the influence of intoxicants,* ***written statements of at least two independent witnesses must be immediately obtained.*** *Whenever possible, 'Alcolyser' test must be conducted or the employee examined by a medical officer." [Emphasis added].*

In terms of the above section, when a TRC employee is found on duty in an intoxicated condition or is believed or suspected to be under the influence of intoxicants, there must be written statements of at least two witnesses to that effect. In the instant appeal, having considered the submissions made by the parties on that aspect, it is clear to us that both learned counsel for the parties are at one that the said requirement was not complied with as there were no independent witnesses' statements produced

before the trial court. Furthermore, there were no independent witnesses summoned to testify before the trial court on that aspect. Therefore, the main point of controversy is on the argument by Ms. Fyeregete that, despite the pointed-out omission, the alcohol content test conducted by PW5 was valid as it did not prejudice the appellant and it was properly relied upon by the trial court to find that the charge against the appellant was proved to the required standard.

With profound respect, we are not persuaded by the argument advanced by Ms. Fyeregete. As correctly argued by Ms. Nyakyi, the availability of the said independent witnesses' statements was crucial to accord credibility of the alleged alcohol content test conducted by PW5. It is on record that, apart from PW5 who claimed to have conducted the level of alcohol content on the appellant, there was no single witness who testified to have seen the appellant drinking alcohol as majority of them testified that they found the appellant tired, in bad condition and could not communicate properly. We shall demonstrate.

At page 10 of the record of appeal, PW1 testified that:

> *"We went to check on him when we identified that he was in the state of drunkenness...When he was being examined, he*

*was found that he was drunk...**I did not witness when the accused person was drinking beer**."*

Furthermore, at page 12 of the record, PW2 testified that:

*"They so advised me to find out as to what happened which made the driver moving on the speed which was not normal. I called him by phone but we could not communicate well. So, I had to send the inspector of the train namely Mazimba to go and call the driver. He came with him to my office. **The driver was tired and he could not communicate well...I do not know what caused him being on that condition**."*

Again, at page 20 of the record of appeal PW6 testified that:

***"I did not witness when the appellant was drinking beer. I do not know whether he was drunk or not.** The same driver who passed at the station is the one who returned/reversed the train to the point where he passed. **If at all he managed to reverse the train it is possible that he was not drunk otherwise he could not have managed to reverse the train**." [Emphasis added].*

From the above extracted excepts, it is clear that the evidence of PW1, PW2 and PW6 was based on suspicion which at any rate, in our view, cannot be said to have proved that the appellant was found drunk of alcohol. It is trite principle of the law that suspicion, however strong is not enough to find

the accused guilty of an offence charged. Instead, suspicion entitles an accused to an acquittal, on a benefit of doubt. See for instance the cases of **MT. 60330 PTE Nassoro Mohamed Ally v. Republic**, Criminal Appeal No. 73 of 2002; **Aidan Mwalulenga v. Republic**, Criminal Appeal No. 207 of 2006, **Lidumula Luhusa @ Kusuga v. Republic**, Criminal Appeal No. 352 of 2020 and **Halfan Ismail @ Mtepela v. Republic**, Criminal Appeal No. 38 of 2019 (all unreported).

We are increasingly of the view that, in the circumstances of this appeal, and taking into account that the appellant contended that the machine which was used to test him had the breath of PW7 who started first to blow his breath in it and then he was also asked to do the same, the independent witnesses were material witnesses, as if summoned would have shed more lights on what exactly transpired during the said test. Therefore, the failure by the prosecution to field such important witnesses, without reasons, would have prompted the trial court to draw an adverse inference against the prosecution.

We are also mindful of the fact that both learned counsel for the parties urged us to expunge exhibit P2 from the record as it was unprocedurally admitted in evidence. Having revisited the evidence of PW7 who tendered

the said exhibit, we agree with them as, indeed, the record bears it out at page 21 that the contents of exhibit P2 were not read out after its admission in evidence. We thus outrightly expunge exhibit P2 from the record.

It is on record that the appellant was convicted on the basis of exhibit P2 which, among other things, was found by the trial court to have established the chain of custody of the impugned alcohol content test (exhibit P1). Having expunged the said exhibit from the record and upon our finding that the alcohol content test conducted by PW5 was invalid for failure to comply with the mandatory requirement of the law, there is no evidence on record on which it could safely be concluded that the charge against the appellant was proved to the required standard. It is our further view that had the first appellate court properly evaluated the evidence on record, it would have come to the inevitable finding that it was not safe to sustain the appellant's conviction.

In view of what we have demonstrated above, we find merit in the appeal. The guilt of the appellant was not established beyond reasonable doubt. In the event, we allow the appeal and accordingly quash the

conviction and set aside the sentence imposed on him to pay a fine of TZS. 2,000,000.00 and in default twelve (12) months imprisonment.

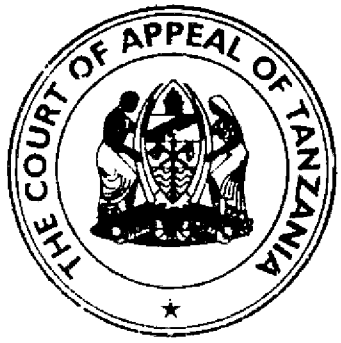
DATED at **TABORA** this 20th day of March, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 20th day of March, 2023 in the presence of Ms. Stella Thomas Nyakyi, counsel for the Appellant and Ms. Tunasia John Luketa, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL