IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 223 OF 2020

DIRECTOR OF PUBLIC PROSECUTIONS .....APPELLANT

VERSUS

RAJABU MJEMA RAMADHANI ..... RESPONDENT

(Appeal from the decision of High Court of Tanzania at Mbeya)

(Mambi J.)

dated 28th day of February, 2020

in

Criminal Appeal No. 147 of 2019

JUDGMENT OF THE COURT

7th & 23rd February, 2023

LILA, J.A.:

The Director of Public Prosecutions (henceforth the DPP) is appealing against the decision of the High Court in Criminal Appeal No. 147 of 2017 which allowed the respondent's appeal and acquitted him from all the 120 counts he was initially charged with, convicted and sentenced by the Resident Magistrates' Court of Mbeya. The offences charged under those counts were of three categories: stealing by public servant contrary to section 258 (1), (2) (a); forgery contrary to sections

333, 335 (a) and 338 and uttering a false document contrary to section 342 and 337 all of the Penal Code.

Briefly, the background to the matter as offered by thirteen (13) prosecution witnesses is that; the respondent (DW1) was an assistant accountant duly employed by the Tanzania Forest Services Agency (TFS) and was stationed at Kawetire Forest Plantation in Mbeya Region (the KFP) and was among the signatories to the bank account No. 61010001249 owned by KFP at National Microfinance Bank (NMB) Mbalizi Road Branch. Other signatories to that account were the Plantation Manager one Arnold Abel Shoo (PW1) and his assistants namely, Thadeus Roman Shirima (PW4) and Mohamed Omary Mgaza (PW2). Money could be withdrawn from the bank upon two of the signatories endorsing a cheque. At a certain time Mr. Thadeus Roman Shirima was transferred and Mr. Anold Abel Shoo left to attend a certain course. Mr. Mohamed Omary Mgaza acted the position of the manager. All was fine until when a cheque serial No. 000998 of TZS 3,984,000.00 drawn in favour of TFA was dishonoured by the bank. That prompted the Acting Manager (PW2) to visit the bank so as find out why the cheque was dishonoured. Alas, he found the account had insufficient funds. He reported the matter to the Manager (PW1) who, on his return,

was given a bank statement which upon a serious examination he found to have unauthorised transactions worth more than TZS 249 million. According to him, the respondent admitted responsibility to those transactions and reduced it into writing admitting liability of TZS 249,198,800.00. he withdrew after forging signatures of the two other signatories and promised to repay the same within a month. That notwithstanding, the matter was reported to the police and upon a search in the respondent's house, a number of cheque lists, cheque leafs and payment vouchers were seized which, when they were subjected to examination by the handwriting experts, were found to have been written and signed by the respondent.

The respondent, who was the sole defence witness, vehemently denied all the accusations. He first, claimed that he wrote the letter admitting liability by force and secondly; the amount he allegedly admitted in the letter showed TZS 249 million hence differed from the total amount in the charge which was TZS 262 Million. In respect of various documents found in his residence, he claimed that he could work anywhere hence it was not wrong for such documents to be found at his residence.

All the same, the trial court scrutinised the evidence by both sides and was convinced that the charge was proved. It accordingly convicted and sentenced the appellant to serve four (4) years imprisonment for each count of stealing by servant, five (5) years imprisonment for each count of forgery and three (3) years imprisonment for each count of uttering a false document. The sentences were ordered to run concurrently. It was also ordered that the appellant should pay his employer TZS 262,937,400.00 as compensation.

Perturbed by the findings and sentences meted out by the trial court, the appellant, as stated above, successfully preferred an appeal to the High Court of which its decision is a subject of this appeal. The appellant's attack on the trial court's decision before the High Court centred, essentially, on these complaints:

1. *That, the trial magistrate erred in law and in fact in convicting the appellant on charges which were not proved beyond reasonable doubt.*
2. *That, the trial magistrate erred in law and in fact by admitting the evidence and proceed with the trial without the said exhibits being read and explained in court.*
3. *That, the trial magistrate erred in law and in fact in convicting the appellant on weak, contradictory and unreliable evidence of the prosecution.*

4. *That, the trial magistrate erred in law and in fact in disregarding the defence of the appellant.*

5. *That, the trial magistrate grossly erred in law and in fact in ordering the appellant to pay back the sum of Tshs 262,937,400/= without proof.*

6. *That, the trial magistrate erred in law in recalling PW2 and heard him without administering the oath.*

After hearing the parties, the learned judge composed his judgment. He, at first, reproduced the whole charge and recited the parties' submissions. Before canvassing the aforementioned whinges, the learned judge considered what he considered as 'key irregularities' he noted in the course of reading the trial court record. He, at page 388 of the record of appeal, pointed out two irregularities to be; **one**, some of the counts and statements of the offences have contradictory statements and contents and **two**, the way the appellant was convicted based on the charge. In addressing the first issue, after referring to various decisions of the Court within and outside our jurisdiction which we see no need to cite them here on the issue, it was his conviction that the charge was defective and prejudicial to the respondent. In his own words, he stated that:

> *" This means that if the accused is charged under defective charge sheet or wrong offence and such charges are not read to him, as seen in this case, he will be denied right to know what evidence has been given and what statements have been made affecting him and this can go to the root of the case by affecting his right to be heard as observed in the above case."*

In respect of the manner the plea was recorded by the trial magistrate, the learned judge was satisfied that since the respondent was charged with 120 counts, by recording, *"Entered plea of NOT guilty to **both** counts"* it meant that **he pleaded to only two counts** and he concluded that:

> *"In view of the above findings, it can confidently be concluded that, failure to properly record the accused/appellant's plea leaves doubt as to whether the appellant pleaded basing on the particulars of the offence against him".*

Finally, the learned judge held:

> *"In the circumstances I am satisfied that the appellant (sic) conviction and sentence was not properly done as the trial court failed to notice some irregularities which lead (sic) to injustice on*

the part of the accused who is now the appellant."

It is evident that the learned judge was inclined to allow the appeal on those two findings although he proceeded to consider the complaints itemized above which he also found meritorious too leading to the appellant's convictions being quashed and sentences meted out by the trial court being set aside. Those findings ultimately resulted in the appellant regaining his liberty. He was set free.

The appellant was aggrieved and lodged a four points memorandum of appeal but for a reason of what transpired in Court and which shall be apparent a moment later, we shall not reproduce them as they will not serve any useful purpose.

Mr. Baraka Mgaya, learned State Attorney represented the appellant whereas Mr. Kamru Habibu Msonde and Mr. Felix Kapinga joined forces to represent the respondent who was also present in Court.

Mr. Mgaya was first to address the Court. He treated the appeal with the seriousness it deserved. However, at the middle of his submission, we discovered that there is one legal point which ought to have been placed before the learned counsel for the parties for their

comments ahead of hearing the grounds of appeal. It was about whether defectiveness of the charge and the manner plea was recorded formed part of the grounds of appeal and, therefore, whether the learned judge was correct to determine those issues without affording counsel for the parties to be heard on them. Accordingly, the Court, *suo motu,* raised those issues and asked learned counsel for the parties to address the Court.

Both counsel were in agreement that the two issues neither formed part of the complaints nor were they permitted to submit on them hence the learned judge strayed into error by dealing with them in the course of composing the judgment without allowing them opportunity to address him on them. By so doing, the learned judge acted in contravention of one of the principles of natural justice, the right to be heard which is very fundamental, they stressed. Mr. Mgaya quickly pointed out that following that infraction the decision of the High Court arrived at under such circumstances is a nullity and, in bolstering his submission, he referred the Court to its decision in **Tabu Ramadhani Mattaka vs Fauzia Haruni Said Mgaya**, Civil Appeal No. 456 of 2020 in which a similar issue arose and the Court nullified the decision. Both counsel beseeched the Court to nullify the decision of the

High Court, remit the record for it to compose a fresh judgment after it has accorded the counsel for the parties the right to be heard on the two issues which were raised by the learned judge *suo motu*.

We wish, without hesitation, to readily associate ourselves with the concurrent observations by the learned counsel for the parties. Admittedly, the record speaks it all on the mishap. Indeed, the stance they firmly stood for is the correct position of the law. Time without number, the Court has consistently insisted on the need to guard against contravention of the right to be heard (*audi alteram partem*) in adjudicating the rights of parties. It is a rule against a person being condemned unheard. Any decision arrived at without a party getting an adequate opportunity to be heard is a nullity even if the same decision would have been arrived at had the affected party been heard. [See – **John Morris Mpaki vs The NBC Ltd and Ngalagila Ngonyani**, Civil Appeal No. 95 off 2013 (unreported) and **Tabu Ramadhani Mattaka vs Fauzia Haruni Said Mgaya** (supra)]. To show how deep rooted is the principle, the Court, citing with approval the English case of **Ridge v. Baldwin** [1964] AC 40 in the case of **Mbeya – Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R. 251 observed that:-

"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard among the attributes of equality before the law, and declares in part:-

> *Wakati haki na wajibu wa mtu yoyote vinahitajika kufanyiwa uamuzi wa Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu..."*

Much as we do not doubt the soundness of the decisions relied on by the learned judge in his judgment whilst meandering in resolving the two issues, yet the fact remains that he dealt with the issues he raised *suo motu* and determined them without hearing the parties on them. No matter that he could have done that in good faith, such a course cannot be condoned. And, we once again wish to remind learned judges and magistrates who exercise powers of appeal the Court's repeated pronouncement and guideline in various decisions on the procedure to be followed when they discover a new issue in the course of composing a judgment or a decision as we did in the case of **Ausdrill Tanzania Limited vs Mussa Joseph Kumili and Another**, Civil Appeal No. 78

of 2014 (unreported). In that case, the learned judge discovered that an affidavit was defective when composing a judgment and dealt with that issue without hearing the parties. The Court stated that:

> *"That being the case, we hasten to say that the learned judge did not apply the correct procedure. We are of the settled view that after she had observed the said defect, she ought to have stopped composing the judgment and re-summon the parties with a view of requiring them to address her on the point. Only then that she could have properly continued writing the judgment."*

Our above finding suffices to determine this appeal hence rendering delving on the merits of the grounds of appeal superfluous. Paying homage to our earlier position, we hereby hold that the decision arrived at by the learned judge is a nullity.

In exercising our power of revision under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition 2022, we hereby nullify and quash the High Court judgment and set aside the order acquitting the appellant from all counts and setting him free. We remit the record for the High Court to accord the parties a right of hearing on the two issues raised by the learned judge *sou motu* when

composing the judgment and the grounds of appeal and then compose a fresh judgment.

In fine, the appeal is allowed only to the above extent.

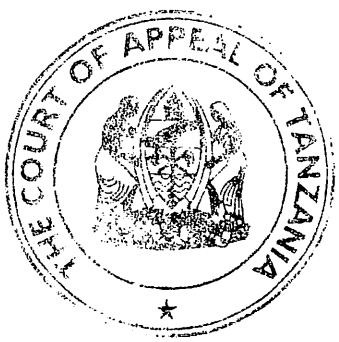
DATED at **MBEYA** this 22nd day of February, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of February, 2023 in the presence of Mr. Stephen Rusibamayila, learned State Attorney for the Appellant/DPP and Mr. Felix Kapinga, learned counsel for the respondent is hereby certified as a true copy of original.



D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL