IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 89 OF 2017

(Originating from Simanjiro D/Court, Criminal Case No. 48/2016)

1. PETER JOHN MOLLEL
2. ESTER M. KINABO } **.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT ON APPEAL.

S. M. MAGHIMBI, J:

The appellants named above were charged before Simanjiro District Court with a total twenty four (24) counts. Ten (10) counts were against both appellants for use of document containing false material particulars with intent to deceive and mislead the principal c/s 22 of the Prevention and Combating of Corruption, Act. No. 11/2017 (The PCCB Act). Twelve (12) counts which were against both appellants were for stealing by person in a public service c/s 258 and 270 of the Penal Code, Cap. 16 R.E 2002 (the Penal Code) and two counts against both appellants were for abuse of position c/s 31 of the PCCB Act. After a full trial, the appellants were acquitted on 10 counts c/s 22 and two counts c/s 31 of the PCCB Act. They were however convicted on 12 counts c/s 258 and 270 of the Penal Code and sentenced to pay a fine of Tshs. 1.5 Million for each count or

serve five years imprisonment in default of paying the fine. The appellants were further ordered to return the total sum charged with to the Government within twelve (12) months. Being aggrieved with the judgment of the trial court, the appellants appealed before this court basing on the following grounds;

1. That the trial court erred in law and in fact to convict appellants on hearsay evidence.
2. That the trial court erred in law and in fact to convict appellants on defective charge.
3. That the trial court erred in law and in fact to convict appellants on fabricated and contradictory evidence.
4. That the trial court erred in law and in fact to convict the trial unprocedurally.

Before this court, the appellants were represented by Mr. Samson Rumende learned Advocate, while the respondent/republic was represented by Ms. Sabina Silayo learned Senior State Attorney. This court ordered the hearing of this appeal to be by way of written submissions whereby the appellant was ordered to file his submission on 19/12/2017, reply by respondent to be filed on 02/01/2018 and rejoinder if any to be filed on 10/01/2018. Both parties filed their submissions accordingly.

In his submissions, Mr. Rumende started by submitting on the second and the fourth grounds of appeal where he submitted that, the trial court did not invoke section 9 (3) of the Criminal Procedure Act, Cap. 20 RE 2002 (The CPA) which imposes a legal duty to the

trial Magistrate to insure that there was fair hearing on both sides as emphasized in article 13 (6) (a) of the Constitution of United Republic of Tanzania, 1977. He quoted section 9 (3) of the CPA which provides that;

> *(3) Where in pursuance of any information given under this section proceedings are instituted in a magistrate's court, the magistrate shall, if the person giving the information has been named as a witness, cause a copy of the information and of any statement made by him under subsection (3) of section 10, to be furnished to the accused forthwith."*

He further referred this court to the case of **Kamau and Others vs R [1954] EACA 203** and **Thairu Muhoro, Njoroge Gutu Thiongo Njau vs Reginam [1954] EACA 187** where in both two cases, the court held that the prosecution side should provide the defense/accused statements which were recorded by the police of witnesses whom are coming to testify so that he can prepare defense.

Mr. Rumende submitted further that another defect is seen vividly in charge drafting. He contended that, drafting of charges is governed by section 132 and 135 (c), (v) of the CPA which mostly emphises or stipulates how a charge should look. He contended that, the charge sheet which was filed on 10th day of May, 2016 had some particulars necessary required by or legally provided under Section 135 to 137 of the CPA. But the charge sheet which was substituted on 22nd day of August, 2016 and another one filed on 5th day of December 2016

lacked necessary particulars hence offended provisions of section 137 of the CPA. He argued that, generally amendment or substitution of a charge is legally allowed but when making amendment or substitution, there are basic criminal procedures which should be looked or observed. To support his argument, he referred this court to the case of **Halid s/o Twalib vs R 1967-8 HCD 423** which provides basic things that should be observed. In that case, the court held that;

> *(1) The trial court had the power under section 209 (1) of the Criminal Procedure Code to amend the charge by substituting the section of the new Act for that of the repealed Ordinance, and the High Court has power under section 319(1), 329(1) and 346 to do what the trial court ought to have done. Such an amendment can be made provided that no failure of justice would result and provided that the offence under the old and the new statutes is in every essential the same.* ***[Citing R. v. Indo ParsadJamictramDave, Crim. Rev. 40 of 1963; Abdulrasul G. Sabur v. R., (1958) E.A. 126].***
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> *(3) After the amendment adding the second count accused should have been given the opportunity to cross-examine prosecution witnesses who had previously testified and it cannot be said positively in this case that accused was not prejudiced by the failure to do so. Conviction on first count amended to specify the new statute; conviction on second count quashed."*

He submitted that the trial court records show that several amendments or substitution have been made or carried out and allowed by the trial court. That in a substitution made on 5th day of December 2016, the appellants were not granted opportunity to cross examine witnesses already testified in court. He argued that failure to grant an opportunity to cross examine was a serious error which led to injustice. To support his argument, he referred this court to the case of **A.S.P John Crysostom vs Republic (1978) LRT No. 54** which was quoted in the Manual for Magistrates by Chipeta J (as he then was) where it was held that;

> *"however , the cases in which it has been held that the omission to inform the accused of their rights to recall those witnesses who had already testified at time of the substitution or amendment of the charge nullifies the conviction are legion and the law is also clear and this was applied in a recent case of RAMADHAN MWINYISHEHE AND ABEL KASEREGERA VS REPUBLIC , Criminal Appeal no48 of 1976(Dar es Salaam registry, un reported) in which my learned brother Samatta Ag. J, found that although the evidence against the appellants was fairly incriminating, the omission by the trial court to advise the appellants of their right of the second proviso to section 209 (1) of the Criminal Procedure Code was fatal to the conviction"*

He also cited the case of **Halid s/o Twalibu** (supra) where it was held that;

(3) After the amendment adding the second count accused should have been given the opportunity to cross-examine prosecution witnesses who had previously testified and it cannot be said positively in this case that accused was not prejudiced by the failure to do so. Conviction on first count amended to specify the new statute; conviction on second count quashed".

Mr. Rumende went on to submit that another defect of the charge is when the substituted charge sheet had no written consent of the Director of Public Prosecutions as per section 57 of the Act No. 11 of 2007. He stated that, the charge which had written consent from the Director of Public Prosecutions was the one which was instituted on 10th day of May 2016, the rest amendments or substitutions mainly of 22ndday of August, 2016 and that of 5th day of December, 2016 had no written consent from the Director of Public Prosecutions as per section 57. That the provisions of section 57 (1) of Act No. 11 of 2007 have the same wisdom with the provisions of section 34 of the Police Force Ordinance by then. He referred this court to the case of **Peter Thomas** *alias* **Peter Toshi vs Republic [1996] TLR 370** (HC) where it was held that;

"Section 34(4) of the Police Force Ordinance provides that `no prosecution' such as the one in the instant case `shall be commenced without the leave of the Director of Public Prosecutions';

(ii) In order to protect people against possible abuse of the due process of the law it is mandatory that s 34(4) of the Ordinance be construed strictly;

(iii) As the prosecution of this case was commenced without the consent of the Director of Public Prosecutions, the provisions of s 34(4) of the Police Force Ordinance were contravened, rendering the proceedings before the lower court null and void."

He further referred this court to the case of **Denis Justine Swai vs Republic, Economic Case Appeal No. 1 of 2011**, High Court of Tanzania, at Moshi, (Unreported) where the court stated that;

"...no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of Public Prosecutions.

"Considering what has been stated above, I agree with both learned counsel for the appellant and respondent that without the consent of the DPP, the District Court had no jurisdiction to entertain the matter..."

He therefore contended that the trial court had no jurisdiction to entertain the case as legally required by the provisions of the Act No. 11 of 2007 particularly section 57 (1) which imposes a legal duty to the prosecutions to obtain consent from the DPP.

Mr. Rumende submitted further that the prosecution side only mentioned the amount that the appellant might have stolen from the employer and produced some documents which might have been

used to steal. He argued that while proving offences alleged to have committed, the prosecution mostly needed to show aspiration which might be directly shown by testimonies. That the proof could have been adduced by expert witnesses and in our case, prosecution side should have summoned an auditor and hand writing expert but the prosecution side failed to summon them to proof that there was an *actus reus.* He contended that, as a general rule, a person cannot be guilty of an offence unless he has done an act which law prohibits or has omitted to do that which the law requires him to do, and that the act or omission was with the guilty mind. He referred to the n latin maxim *actus non facit reum, nisi mens sit rea* which means that the act itself does not constitute guilt unless done with a guilt mind. He further submitted that the evidence adduced was hearsay evidence, contradictory, fabricating and inconsistent with no forensic report presented, tendered and admitted to be part and parcel of the record of trial court. He referred this court to section 62 (1) of the Evidence Act which provides that;

> *"(1) Oral evidence must, in all cases whatever, be direct; that is to say–*
>
> *(a) If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it."*

He submitted further that all the prosecution witnesses did not see the act of stealing and preparation of documents which were used to defraud or mislead the principal. Further that there was no any witness who managed to adduce evidence proving that the

appellants made a document which purported to be what it is not; or that the appellants altered a document without authority in such manner that if the alteration had been authorized it would have altered the effect of the document; that the accused introduced into a document without authority whilst it is being drawn up some matters which it had been authorized would have altered the effects of document; that the appellants signed a document in the name of any person without such person's authority.

He argued further that no any prosecution witness adduced evidence that he/she is familiar with handwriting or acquainted or conversant with the handwriting in dispute or documents in question. That since there was no direct evidence, one would expect to have in addition expert evidence. He referred this court to the case of **Joseph Mapema vs Republic [1986] TLR 148** where it was held that;

> *"(i) For the purpose of enabling a court to decide the author of any piece of handwriting in dispute, the opinion of a person who is conversant with the handwriting of the disputing author is as good as, if not sometimes better than, that of a handwriting expert"*

He further invited the court to read section 69 of the Evidence Act which provides that;

> *"Proof of signature or handwriting of person alleged to have signed or written document If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document*

as is alleged to be in that person's handwriting must be proved to be in his handwriting."

Mr. Rumende then contended that no auditor was assigned to investigate or audit, hence no auditor's report was produced. Further that no auditor who was summoned to come and adduce evidence. He referred this court to section 51 (2) of the Local Government Finance Act, Cap. 290 which provides that;

"51(2) The auditor shall, in his report, draw attention to every item of expenditure charged in the accounts which is not authorized by law or which has not been sanctioned by the Local Government Authority, and shall also draw attention to any deficiency or loss incurred by the negligence or misconduct of any person accounting and to any sum which ought to have been but has not been brought to account by that person and shall certify the amount of that unlawful expenditure, deficiency or loss, or the sum which has not been brought to account".

He then submitted that the prosecution side did not immediately show the authorization as to accessibility to the records of local government authority by the competent authority once there was an allegation according to section 47, 48 (5) and section 82 of the Local Government Authorities Act, Act No. 6 of 1999. That all prosecution evidence was fabricated and tempered with. He hence prayed that this court allow the appeal, quash and set aside trial court judgment

and order the monies paid as fine be restored to the appellants forthwith.

Opposing the appeal, Ms. Silayo started with the first and third ground of appeal. Her reply was that there was no hearsay, fabricated and or contradictory evidence. That the Prosecution brought in court 8 witnesses and also tendered 22 exhibits, none of which were hearsay fabricated or contradictory. She submitted further that from the evidence on record, the prosecution case based mainly on documentary and oral evidence. There was evidence that both appellants were involved in preparing, authorising and using documents for payment of salary with inflated amount. That the testimony by P4, P7, and exhibits P12, P13, P9, P3, P1, P2 and P4 confirmed that the 1st appellant is the one who authorized salary document which had inflated amount in both appellant names by signing and sometime writing his name P.J. MOLLEL. Further that in his cautioned statement, exhibit P21, the 1st appellant admitted that he authored such documents. She further stated that there is evidence that the 1st appellant was the author of the documents in question as his signature was identified by witnesses (PW4 and PW7) who testified that they were acquainted with 1st appellant's signature as provided under section 49 of the Tanzania Evidence Act which she cited:

1. *When a court has to form an opinion regarding the person by whom, any document was written or signed, the opinion of any person acquainted with the handwriting of the*

person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

2. *For the purposes of subsection (1) a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person or when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.*

Ms. Silayo then argued that, the issue of identification of signature by a person acquainted with such signature was held in the case of **Joseph Mapema vs Republic 1986 TLR 148** that;

"For the purpose of enabling a court to decide the author of any piece of handwriting in dispute, the opinion of a person who is conversant with the handwriting of the disputing author is as good as, if not sometimes better than, that of a handwriting experts"

She further cited the case of **Nicholas Alfred Kiyabo vs. Republic 1987 TLR 59** where the appellate court upheld the conviction basing on the testimony of a witness who saw the accused signing the invoices. She submitted that the 2nd appellant did not deny that she was involved with preparing the documents and going to the

bank to process the payment of salary. In her testimony she admitted that she authored payment vouchers which culminated into the preparation of cheque. She further admitted that she was involved in collecting the payrolls from the Regional Treasury Office and that the documents for payment of salary were authorized by the 1st appellant. She hence argued that the evidence on record confirm that both appellants were involved with preparing and authoring documents for payment of salary with inflated amount.

Ms. Silayo went on submitting that the evidence on record further proves that both appellants knowingly converted the claimed amount into their own use. That the 1st appellant admitted during his defense that at the material time he was the District Treasury of Simanjiro District Council and he had two accounts; Account Number 01J/20/448426/01 of CRDB and account number CA 4248000010 of NMB, that he used such accounts to receive his salary and that the amount of salary credited in his accounts on several occasions was excessive from the amount indicated in his salary slip. The 2nd appellant admitted that she was at the material time an employee of Simanjiro District Council as Assistant Accountant, that she was responsible in preparing salary documents including making follow up of the payrolls and that she was the one who was preparing payment vouchers. She also admitted that she had two accounts; Account CA 42480000355 and Number CA 424800003254 both of NMB, that she used such accounts to receive her monthly salary, the amount of

salary she received was excessive from the amount appearing in her salary slip.

Ms. Silayo submitted further that the appellants in their defense claimed that the excessive amount deposited as salary was paid to them as emoluments other than salary and that the main issue in this case was therefore whether the amount credited to the appellant bank account was their entitlement other than salary but the 1st appellant in his defense neither did mention the time when such claims arose, of what amount and the reasons for such claims. She stated that, it is clear that more than Tanzania Shillings Twenty Three Million (Tshs. 23,000,000/=) was credited in his account being over payment between September 2008, November 2008, May 2009, December 2009 and consecutively in the year 2010 from February to June. Yet the 1st appellant could not give explanation for any single coin out of all such amount. She referred this court to the evidence of PW4, PW6 and exhibit P21 to establish that there was no any hearsay, fabricated and or contradictory evidence.

Responding to the 2nd ground of appeal, Ms. Silayo submitted that according to the Criminal Procedure Act Cap. 20 R.E. 2002, all charges and information must comply with the requirements under section 31, 32, 33 and 35 of the Act. She stated that, all charge sheets which were filed when the charges were ready in court and the amended one after conducting preliminary hearing were not defective as they complied with all the requirements under aforementioned provisions of the law. That they contained the

statement of the offence in every count, the particulars of the offence and it stated clearly in each count which of the appellants was charged and the particulars of the offences were sufficient to enable the appellants understand the nature of the offence charged. She argued that at no point was the charge sheet defective to cause miscarriage of justice. To support her argument, she referred this court to the case of **Republic vs Hassani Said 1984 TLR 226** where the court held that a substantial miscarriage of justice has not flown from the defect and the provisions of section 346 of Criminal Procedure Code can be brought into play and the conviction be sustained as the accused understood the substance of the case he was meeting as such the defect did not lead to a substantial miscarriage of justice.

On the forth ground of appeal, Ms. Silayo submitted that all the procedures were complied with in conducting the case before the trial court. That the only one defect noticed is that the trial Magistrate recorded that Section 192 of the Criminal Procedure Act was complied with as the records do not explain clearly if the adopted memorandum of facts was read and explained to the accused before pleading. She argued that however, such irregularity did not cause miscarriage of justice because nowhere did the trial Magistrate base her findings on admitted facts during preliminary hearing. She stated that the appellants could have been prejudiced only if the trial court had convicted them basing on admitted facts without evidential proof of such facts. She further submitted that, it is a principle established

in our jurisdiction that minor irregularities in the proceedings conducted by a competent court cannot nullify the trial. She referred this court to the case of **Thomas Elias Paul Peter and Meng'olu Ndamuni vs Republic 1993 TLR 263** and the case of **MT. 7479 Sgt. Benjamin Holela vs Republic 1992 TLR 121** and **Pagi Msemakweli vs. Republic 1997 TLR 331** (HC) where it was stated that even failure to conduct preliminary hearing, where such failure does not occasion miscarriage of justice, is not fatal unless the omission to conduct a preliminary hearing resulted in an unfair trial leading to a failure of justice, which was not the case in this matter. Based on her submissions and arguments, she prayed for the dismissal of the appeal as it has no merits at all and that the conviction be upheld. She further prayed for the conviction of both appellants in respect of the 1st to 10th counts under section 366 (1)(a)(ii) of the Criminal Procedure Act (Cap 20 R.E 2002) because the reason adduced by the trial Magistrate for acquitting the appellant, that the amended charge sheet required consent has no basis because the charge sheet was amended within the ambit of the consent. She further prayed the court to invoke section 366 (1) (a) (ii) of the Criminal Procedure Act (Cap 20 R.E. 2002) to increase the sentence imposed by the trial Magistrate because sentenced them to pay fine of 1.5 million in each count of stealing by Public Servant which penalty is below the minimum sentence prescribed under the law. That Section 270 of which the accused were convicted with imposes the maximum sentence of 14 years imprisonment and as

such, it is a scheduled offence which its minimum sentence is imprisonment for seven years. She hence argued that the sentence imposed by the trial Magistrate was illegal which calls for alteration.

In rejoinder, Mr. Rumende reiterated what he stated in the submission in chief and added that the charged sheet lacks particulars that were necessary for giving reasonable information as to the nature of the offence charged. He stated that, the payment voucher purported to be prepared had no voucher number and no bank cheque number hence it is difficult to differentiate a payment voucher mentioned in count one and that of count two. Further difficult to differentiate between the pay list mentioned in count one and that mentioned in count two and bank cheque mentioned in count one and that of count two from other having false particulars. He argued that the charge sheet contravened section 132 and 135 (c) (v) of the Criminal Procedure Act (supra). He submitted further that, the defectiveness are seen in jurisdiction and lack of particulars in the charge sheet which is not curable under section 387 and 388 of Criminal Procedure Act (supra).

In regard to the issue raised by learned State Attorney that the sentence passed by the trial court was below the minimum sentence, he submitted that if the respondent was dissatisfied with the sentence she should have appealed or filed cross appeal. He hence prayed that this court allow the appeal, quash and set aside the trial court judgment and order the monies paid as fine be restored to the appellants forthwith. He also played for an order for costs.

I have considered the submission of both sides and have gone through the records of the trial court. In disposal of this appeal, I will start dealing with the second aspect in the first ground of appeal. In that ground, Mr. Rumende raised an argument that the charge sheet was defective in that, the charge sheet which was substituted on 5th day of December, 2016 to which the appellants were tried with had no written consent from the Director of Public Prosecutions as per section 57 of the PCCB Act. The Section provides:

> *"Except for offences under section 15, prosecution for an offence under this Act shall be instituted with written consent of the Director of Public Prosecutions."*

The appellants in this matter, amongst other offences; were charged with offences under section 22 and section 31 of the PCCB Act to which consent of the DPP was mandatory. As per the records, it is undisputed that the substituted charge dated on 5th December, 2016 was filed without consent of the DPP. The Consent of the DPP was issued in the charge sheet dated 26th day of February, 2016. The amended charge sheet was substituted and hence it was as good as a new charge sheet was filed. Therefore the consent of the DPP did not apply in the later Charge Sheet dated 5th day of December, 2016. Therefore the Prosecution were required to seek fresh consent of the DPP to the substituted charge sheet. As such, since section 57 (1) of the Act referred above, requires consent of the DPP before commencement of trial, and no certificate of consent was filed by

prosecution before commencement of trial before the trial court, as per section 26 (1) of Cap. 200 R. E 2002, the trial Magistrate had no jurisdiction to try all the offences charged under the PCCB Act. In the case of **Denis Justine Swai vs Republic** (supra) it was held that;

> *"...no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of Public Prosecutions.*
> *Considering what has been stated above, I agree with both learned counsel for the appellant and respondent that* ***without the consent of the DPP, the District Court had no jurisdiction to entertain the matter****..." (emphasis is mine)*

Having made those findings, I am satisfied that the trial Court had no jurisdiction to try the case. For that reason, I hereby allow the first ground of appeal, that the trial court had no jurisdiction to entertain the case. The proceedings, judgment and orders made thereto are hence quashed and set aside. I order that the matter be re-tried at a court with competent jurisdiction which may be well conferred to the same court by the consent of the DPP under Section 57 of the PCCB Act. The trial should however be before another magistrate of competent jurisdiction.

Dated this 29th day of May, 2018.

(SGD)

S. M. MAGHIMBI

JUDGE.

I hereby certify this to be a true copy of the original.

HIGH COURT OF TANZANIA

S. M. KULITA

DEPUTY REGISTRAR

14/08/2018