IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 96 OF 2011

DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

1. GADI OMWONO ONEYA

2. KIGINGA MAGESA NYAUKO .....RESPONDENTS

3. DAÑIEL JOSEPH AGAI

(Arising from Criminal Case No. 1066 of 2008 of the Court of the Resident Magistrate of Dar es Salaam at Kisutu)

JUDGMENT

29th Nov., 2017 & 20th Feb., 2018

DYANSOBERA, J.:

This appeal originates from the decision of the Court of the Resident Magistrate of Dar es Salaam at Kisutu in Criminal Case No. 1066 where the three respondents, namely Gadi Omwono Oneya, Kiginga Magesa Nyauko and Daniel Josheph Agai, hereinafter to be called the 1st, 2nd and 3rd respondents, in that order, were charged with nineteen (19) counts .

The trio was charged in the first count with conspiracy to defraud c/s 306 of the Penal Code [Cap. 16 R.E.2002]. In counts Nos. 2, 4, 6, 8, 10, 14 and 16, the 1st respondent was charged alone with fraudulent false accounting c/s 317 (b) Penal Code [Cap. 16 R.E.2002]. The 1st and 2nd respondents were jointly charged with obtaining money by false pretenses c/s 302 of the Penal Code [Cap. 16 R.E.2002] in counts 3, 5, 7, 9,11,13,15 and 17. In the 12th count, the 1st and 2nd respondents were charged with fraudulent false accounting c/s 317 (b) Penal Code [Cap. 16 R.E.2002] while the 3rd respondent was charged in the 18th and 19th counts with obtaining money by false pretenses c/s 302 of the Penal Code [Cap. 16 R.E.2002].

All of them pleaded not guilty and to prove the case, the prosecution called a total of seven witnesses in proof of the allegations.

Briefly, the evidence at the trial was the following. PW 1 one Victor Onyango was employed by the Citibank as a Senior Manager in Kenya and between October, 2006 and December, 2008 he worked in Tanzania as a General Manager in charge of the operations. He recalled that on 30th day of July, 2008 Mama Jasmine Mawala, the Head of the department informed him that she had found several accounting entries in the Internal Bank Account which did not belong to any customer and the said entries lacked supporting documentation. An investigation revealed that the entries related to the electronic transfers that had been fraudulently inserted in a computer system by the 1st respondent. The transfer went to the account of Bisumwa Hardware Stores and CRDB and to the account of the 3rd respondent at NBC Bank in Musoma. PW 1 knew the 1st respondent who was responsible for processing customer cheques and sending electronic fund transfers to the Bank accounts in Dar es Salaam. He was using a computer and each computer had a unique password which could not be accessed to by any other person. As to what the 1st respondent did, PW 1 told the trial court that the 1st respondent fraudulently inserted payment in the electronic hearing files using his password with no supporting documents for those transfers which did not originate from any customer

with the Citibank (T) Ltd. PW 1 further testified that the 1st respondent who was employed as clearing assistant responsible for transmitting and authorizing resigned since 25th July, 2008 after the theft allegations.

Asha Ally who testified as PW 2 was an officer at a clearing department whose duties included receiving clients' cheques and making entries in the account. She was also receiving electronic fund transfer files and reading them into the system called Magnetic Ink Processing System (MIPS III) and after reading, and if the files balanced accounts, she would send them to the Bank of Tanzania. It was her evidence that the 1st respondent was her subordinate charged with duties of receiving cheques deposits, depositing them in their respective accounts for assistance of MIPS and reading the electronic magnetic transfer files. She said that the 1st respondent had a job description (Exh. P.1). she said that the investigation revealed that the person responsible for the loss was the 1st respondent..

Jabir Kasanga (PW 3) was a head of operation control and business information security officer. His duties included making sure the every banker was supplied with ID to access the computer according to the department. There was a compliance declaration that is the document

requiring the worker to comply with the regulations and which was an agreement that the worker would not divulge the ID, there was also entitlement review for computer networking and for system for making file clearing (Exh. P. 2 collectively). According to PW3 and PW 4 one John Mwangi, the 1st respondent's ID was GO 206612. PW 4 worked with Power Base Ltd, Nairobi and his duties included installing soft wares and training the users. According to PW 4, Bisumwa Hardware was a company but had no account with the Citibank.

There was evidence of PW 5 one Gilbert Bonaventura. He was a banker with Commercial Bank of Africa and worked with Citibank in 2000 to 2009 as an Internal Auditor Manager. His profession is an accountant with a Certified Public Accountant (CPA). His duties were to review internal control system of the bank system of the clients. He conducted an audit and discovered that the money was stolen by the 1st respondent who used his code to access software. Insp. Twaha (PW 6) recorded the 2nd respondent's caution statement who had a company known Bisumwa Hardware Store registered with BRELA and he had two bank accounts; one at Stanbic- Sukari House and the other CRDB, Holland House. PW6 produced in court a Bank Statement of the 2nd respondent (Exh. P 4).

According to PW 6, there were no documents of business transactions with other companies and no documents of the payments from those companies.

The last witness who testified as PW 7 was F.3841 D/Cpl Lugano who worked with CID with ZCO. He arrested and interrogated the respondents. As to how the respondents are related, PW7 said that the trio hail from Musoma, the 1st and 2nd respondents schooled and worked together with Citibank.

In its ruling dated 5.5.2011, learned Resident Magistrate found that the prosecution had failed to establish a prima facie case. he reasoned as follows. As far as the offence of conspiracy is concerned, he found that there was no proof of common intention or agreement to defraud. On the counts of fraudulent false accounting, the court found that the prosecution evidence did not prove the intention of the respondents in making false entry as there was no proof of falsity or fraud. Regarding the counts on obtaining money by false pretenses, it was found that there was no proof of inducements in order to obtain economic or material advantage. He thus found the respondents with no case to answer and acquitted them.

Dissatisfied, the Director of Public Prosecutions has appealed to this court on the following grounds:

1. The trial Magistrate erred in law and fact by saying that the evidence of PW 1-PW 4 is hearsay.
2. The trial Magistrate erred in law and in fact by holding that there was no evidence of intent to defraud
3. The learned trial Magistrate erred in law and in fact in ruling that a prima facie case was not established against the accused persons/respondents.

At the hearing of the appeal, the appellant was represented by Ms Neema Mbwana, learned State Attorney while all the respondents were absent despite service having been issued in accordance with the law.

Submitting in support of the appeal, learned State Attorney told this court that a prima facie case against the respondents was established. She relied on the decision of the court in the case of **R. Edward Mongo**, Criminal Appeal No. 103 of 1999 which elaborated circumstances in which a submission of no case to answer could be upheld that is:

"A submission of no case to answer may properly be upheld where there is no evidence to prove an essential element in the offence

charged or where the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so unreliable that no tribunal (if compelled to do so) would at the stage convict"

Learned State Attorney contended that according to the lower court proceedings, the evidence given by the prosecution was not discredited as a result of cross examination. According to her, PW 1 gave evidence, Mr. Mganzi respondent's advocate did not shake the evidence which was watertight. Further that the code number which appeared to transfer the funds was in possession of DW 1-GO 20612 and it was also mentioned by PW 2 at p. 75 of the proceedings. That the bank statement was admitted without objection and that in view of the fact that the prosecution evidence was not discredited, the ruling of no case to answer was wrongly entered, Learned State Attorney concluded.

I have considered the trial court's record, the grounds of appeal and the submission by learned State Attorney. The issue for determination is whether the prima facie case was established to warrant the respondents enter their defense.

As rightly submitted by learned State Attorney, a submission of no case to answer may properly be upheld where there is no evidence to

prove an essential element in the offence charged or where the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so unreliable that no tribunal would at the stage convict. That is exactly the principle enunciated in the case of **R. Edward Mongo** (supra).

As far as the first ground of appeal is concerned, PW 1 who worked as a General Manager in Tanzania as an in charge of operations, told the trial court that on 30th July, 2008 Mama Jasmine, the Head of the Department informed that she had found several accounting entries in the Internal Bank Account which did not belong to any customer and that the said entries lacked supporting documentation. As to how she came to that discovery and who was responsible, nobody could tell as that person who was the source of the information on which PW 1 acted was not called in court to give evidence and there was no explanation as to why. Clearly, the information PW 1 was telling the court was a hearsay.

Indeed, a prima facie case is a situation in which after the closure of the prosecution case, a reasonable court directing its mind to the law and evidence could convict if no explanation is offered by the defence.

The Court of Appeal of Tanzania in the case of **Director of Public Prosecutions v. Morgan Maliki and Nyaisa Makori**, Criminal Appeal No. 133 of 2013 (unreported) after discussing the decisions in the cases of **R.v. Jagwan M. Patel and Others** (1948) 1TLR (R) 85, **Ramanlal Trambaklal Bhatt v. R.** (1957) E.A 332 and **Murimi v. R.** (1967) on when can evidence be said to be sufficient for purposes of section 230 of the Criminal Procedure Act [Cap.20 R.E.2002], observed at p. 13 thus:

> **So, on the principles set out in BHATT's and MURIMI cases, we think that a prima facie case is made out if, unless shaken, it is sufficient to convict an accused person with the offence with which he is charged or kindred cognate minor one. Which means that this stage, the prosecution is expected to have proved all the ingredients of the offence or minor, cognate one thereto beyond reasonable doubt. If there is any gap, it is wrong to call upon the accused to give his defence so as to fill it in, as this would amount to shifting the burden of proof.**

In the instant case, there is nothing showing that the prosecution, at that stage, had proved all the ingredients of the offence or minor, cognate

thereto beyond reasonable doubt. The evidence is clear and learned State Attorney has not suggested any proof to the said standard. That disposes of the 2nd and 3rd grounds of appeal.

With the available evidence, there was no case upon which the respondents could be called to defend.

The finding of no case was justified and the acquittal of the respondents was rightly entered. The appeal fails and is, accordingly, dismissed.

W.P. Dyansobera

JUDGE

28.2.2018

Delivered this 2nd day of March, 2018 in the presence of Ms Neema Mbwana, learned State Attorney for the appellant and in the absence of the respondents.

W.P. Dyansobera

JUDGE