

**IN THE HIGH COURT OF TANZANIA**  
**AT DAR ES SALAAM**  
**(DAR ES SALAAM REGISTRY)**  
**CRIMINAL APPEAL NO. 311 OF 2017**

*(Originating from The District Court of Morogoro at Morogoro  
Criminal Case No 31 of 2016 Before: Hon. A. Kimaze– RM dated  
20<sup>th</sup> July, 2017)*

**FRANKEN KIMARO----- APPELLANT**

***VERSUS***

**THE REPUBLIC ----- RESPONDENT**

**JUDGMENT**

**Last order date:** 05<sup>th</sup> June, 2018

**Judgment date:** 18<sup>TH</sup> June, 2018

**MLYAMBINA, J.**

The appellant was charged jointly together with others on two counts; the first count was of conspiracy to commit an offence contrary to Section 394 of the Penal Code, Cap 16 (R.E.2002). The second count was of obtaining goods by false pretence contrary to Section 302 of the Penal Code (*supra*). After hearing, the trial Court

acquitted the appellant on the first count but he was found guilty on the second count and been convicted and sentenced to serve three years' imprisonment.

The appellant has been dissatisfied with the decision of the Morogoro District Court, hence this appeal on 17 grounds, namely;

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1. That, the learned trial RM erred in law and fact by convicting the appellant while erroneously conducted a case on pleading to the charge when the prosecution substituted their charge (at page 9 line 18-24 to page 10 line 1-5 both of the Court proceedings) contrary to Section 234 (1) of the Criminal Procedure Act Cap 20 (R.E. 2002).
2. That, the learned trial RM erred in law and fact by convicting the appellant while conducted the preliminary hearing improperly (at page 17 of the Court proceedings) contrary to Section 192 (3) of the Criminal Procedure Act, Cap 20 (R.E.2002) by asking the accused person to sign the memorandum of undisputed facts/ matters without reading over and explaining to them the contents therein which were un-procedurally.
3. That, the learned trial RM erred in law and fact by convicting the appellant relying on the untenable and un-procedural

testimony of PW1 who merely testified to the effect; "*that on the material date they were loading 101 sacks of sardine from Mwanza to Dar es Salaam*" (at page 12 line 11-13 of the copy of judgment) contrary to the trial Court itself on its proceedings when refused to receive the weighing machine receipt of Usagara which were brought to prove on what the motor vehicle had loaded (at page 27 in the last paragraph of the court proceeding).

4. That, the learned trial RM erred in law and fact by convicting the appellant by relying on the discredited testimonies of PW1 who was not present at the locus in quo. (Refer at page 30 line 19-22 of the same page on the Court proceedings contrary to the law).
5. That, the learned trial RM erred in law and fact by convicting the appellant while erroneously believing that the appellant had committed the charged offence and she failed to take an adverse inference on the testimony of PW2 who stated that "*around 14:35 hours we saw 2 young boys called Masanja (1<sup>st</sup> accused) DW1, he came together with the 3<sup>d</sup> accused. They told us that they had their boss called the 4<sup>th</sup> accused/ appellant*" (at page 34 line 3-5 and line 17-19) of the same page on the Court proceeding contrary to the law.

6. That, the learned trial RM erred in law and fact by convicting the appellant while admitted the evidence of PW3 which had no evidential value as far as he was the one who recorded the Cautioned Statement of the 4<sup>th</sup> accused person/appellant contrary to the law as it was held in the case of **Njuguna Kimani v. Reginam (1954) EACA 316.**
7. That, the learned trial RM erred in law and fact by convicting the appellant while admitted the evidence of PW3 while it had no evidential value as far as he was testified to be an investigating officer of the case and was the one who recorded the Caution Statement of the 4<sup>th</sup> accused person/appellant contrary to the law as it was held in the case of **Njuguna Kimani v Reginam (1954) EACA 316.**
8. That, the learned trial RM erred in law and fact by convicting the appellant while relying on the discredited testimony of PW7 while failed to summon one Rajab the driver of the said motor vehicle semi-trailer nor the boys that assisted them on stepping down the sacks of sardine (at page 59 line 20-21 on the Court proceedings) to testify before the court as to whether the said motor vehicle had loaded the alleged sacks of sardine or not contrary to the law.

9. That, the learned trial RM erred in law and fact by convicting the appellant while relying on the evidence of PW1, PW2 and PW7 who testified in contrary to the allegation revealed in the Charge sheet since PW1 testified that they took all the seven tons of sardine to the 4<sup>th</sup> accused (at page 30 line 12-13 on the court proceedings) contrary to PW2 who stated to "*we got 101 sacks of sardine which were equivalent to 7298Kgs times the purchase price of TZs 3000 per Kg, we got TZs 21,809,400/= at page 35 line 15-17 on the Court proceedings and in contrary to PW7 who testified to the effect that " we stated measuring the said sardine and we got 7928 Kgs of sardine worth TZs 21,894,000/= each Kg"* (at page 59 line 17-19 on the Court proceedings) refer to the case of **Musa Mwaikunda v Republic (2006) 387.**
10. That, the learned trial RM erred in law and fact by convicting the appellant based on contradicted testimonies of PW2 and PW7 who stated that "*so after giving him that account number we went together to the bank, we stayed at the bank for about 3 hours later on the 4<sup>th</sup> accused was not seen"* (at page 60 line 14-16) in Contrary to "*we went together with the 4<sup>th</sup> accused to NMB Bank. A few seconds the 4<sup>th</sup> accused told us that he expected to get money from a person unfortunately he did not*

*deposit the money into his account*" (at page 36 line 7-10 both of the Court proceedings), hence this inconsistency the case was not proved beyond reasonable doubt as it was held in the case of **Michael Haishi v Republic (1992) TLR 92**.

11. That, the learned trial RM erred in law and fact by convicting the appellant while relying on unjustified and uncorroborated testimonies of PW7 who stated that "*he already received little amount of money*" (at page 62 line 7 of the court proceedings) in contrary to the charge nor the facts of the case revealed against the appellant since it was neither subtracted from what was alleged in the charged offence then, it left no proof beyond reasonable doubts.
12. That, the learned trial RM erred in law and fact by convicting the appellant while there were neither PW2 nor PW7 had testified to be presented falsely, be the 4<sup>th</sup> accused/ appellant nor any official from the said alleged bank were summoned to testify before the trial court. Then, the charged offence was not proved beyond reasonable doubt.
13. That, the learned trial RM erred in law and fact by convicting the appellant while she addressed the appellant properly in terms of Section 231 of the Criminal Procedure Act Cap 20

(R.E.2002) as by not explaining the substance of the charge to the accused/ appellant contrary to the procedure of law.

14. That, the learned trial RM erred in law and fact by convicting the appellant without evaluating properly the second issue of determination as to whether 101 sacks of sardine was delivered to the 4<sup>th</sup> accused person based on the evidence adduced by PW1, PW2 and PW7. The prosecution failed to summon any independent witnesses who loaded the said sacks of sardine at Mwanza nor the person who stepped down the same as alleged to the milling machines of the 4<sup>th</sup> accused person to prove the facts that the alleged sacks of sardine were 101 sacks and were handed to the 4<sup>th</sup> accused person/ appellants premises.

15. That, the learned trial RM erred in law and fact by convicting the appellant while relying on the evidence of PW2 and PW7 (at page 13 line 1-3 of the copy of judgment) *whereas* in fact they were not corroborated with the evidence of PW5 and PW6 who were not present at the *locus in quo* instead, they did record the statement of 3<sup>rd</sup> and 2<sup>nd</sup> accused respectively contrary to the law.

16. That, the learned trial RM erred in law and fact by convicting the appellant while relying on the evidence of PW2 and PW7 in corroboration to the accomplices cautioned statement of the 2<sup>nd</sup> accused (exhibit PE3) and the 3<sup>rd</sup> accused cautioned statement

(exhibit P4) which were admitted un-procedurally without the author read over to the alleged mark the contents therein.

17. That, the learned trial RM erred in law and fact by convicting the appellant while disregarding and not evaluating the defence testimony of the appellant on her judgment contrary to the procedure of law which required the appellant to have raised some reasonable doubts in the minds of the Courts and the Courts should give any benefits of doubt to the appellant and not to shift the burden of proof to the appellant.

WHEREFORE the appellant prayed; -

- (a) That, this Hon. Court to allow his appeal, quash the conviction, set aside the sentence and leave the appellant at liberty.
- (b) That, this Hon. Court allow the appellant be present at the hearing of the appeal.

In addition to the grounds of appeal, the appellant filed another six supplementary grounds of appeal, namely; -

- 1. That, the learned trial RM erred in law and fact by convicting the appellant while relying on the discredited testimonies of PW2 and PW7 who both failed to tender before the trial Court any purported document including purchasing receipt and a

receipt given at the weighing machines as exhibit in evidence to prove that, the alleged sardine in question were 101 sacks weighed 7298 Kgs as it was barely stated by PW2 (at page 33 line 10-23 and PW7 at page 61 line 25-26).

2. That, the learned trial RM erred in law and fact by convicting the appellant while relying on the discredited testimony of PW7 who stated to have no contract to show that, the said sardine was about 7928 Kgs (at page 61 line 25-26) and he did not know the weight of the luggage he had when it was measured at the weighing machine (at page 62 line 3-4).
3. That, the learned trial RM erred in law and fact by convicting the appellant while relying on exhibit PE2 and PE5 (Cautioned Statement of the 1<sup>st</sup> accused and 2<sup>nd</sup> accused/acquitted) at page 15 line 11-15 in the copy of judgment while the trial Court failed to read over exhibit PE2 and PE4 to ascertain the credibility before relied upon as a basis of conviction (at page 49 line 6-7 and page 55 line 1-6), contrary to the procedure of law.
4. That, the learned trial RM erred in law and fact by convicting the appellant while the prosecution side failed to prove its charge beyond any reasonable doubt as it failed to tender before the trial Court any purported document to prove that,

the alleged sardine in question were in 101 sacks weighed 7928 Kgs contrary to the procedure of law.

5. That, the learned trial RM erred in law and fact by convicting the appellant while it failed to determine that the sweet at hand was a civil nature and not a criminal nature as per the evidence adduced before the trial court by both parties regarding exhibit DE1 and DE2 (account number and deposited bank sleep).
6. That, the learned trial RM erred in law and fact by convicting the appellant while erroneously believing that the appellant had committed the charged offence in lack of cogent evidence which incremented the appellant.

WHEREFORE the appellant humbly prayed; -

- a. That, this Hon. Court to allow his supplementary grounds of appeal, to quash the conviction and set aside the sentence and leave the appellant free at liberty.
- b. That, the appellant be present at the hearing of the appeal.

At hearing, the appellant appeared in person. Being a layman, the appellant simply prayed this Court to consider all his 17 original grounds of appeal and his 6 supplementary grounds of appeal, the

conviction and sentence imposed against him be set aside and he be acquitted.

In reaction to the appellant's prayer, the learned State Attorney Hellen Masululi conceded to all grounds of appeal. The very learned State Attorney submitted that the proceedings display some irregularities.

According to the learned State Attorney, there was no proof of ownership of all 101 sacks of Sardine. That, there was neither proof in terms of document nor even receipt for transportation of the said Sardine sacks from Mwanza to Dar es Salaam.

The learned State Attorney submitted that, there was a receipt tendered but it was refused by the Court for lack of Stamps. The value of 101 Sardine sacks was TZs 21, 894,000/= . Thus, the value was at higher side but no receipts. The learned State Attorney maintained, one should have expected receipts. Such evidence was supported by the evidence of PW1 (at page 30 of the proceedings) in which he stated; -

*"I purchased the said Sardine from different customers but I have no any receipt to prove that.....on that date I had no transport permit of seven (7) tons of Sardine"*

For the afore reason, the State Attorney maintained that there was no proof of ownership.

The second issue of which the learned State Attorney found not proper was on witnesses. That, all witnesses on part of the Republic (PW1 and PW2) adduced that they handled the Sardine luggage to the appellant. That, they agreed payment could be made on the next day. There was no handing over of the Sardine which is at higher value.

The learned State Attorney went on to submit that, at page 35 of the proceedings, PW2 stated that the appellant contended it was late, the banks were closed, so payments could be done on the next day. That was on 28<sup>th</sup> December, 2016. PW2 adduced further that, they told the appellant to put into writings but he refused. But there was no any reason stated for such refusal.

The learned State Attorney, reiterated that, it is difficult to believe such evidence because the value of the 101 Sardine sacks was at high, one could not easily accept without any documentary proof.

In view of the learned State Attorney, the Republic has the right to call witness as per Section 143 of the Evidence Act. It was their expectation that important witnesses could be procured. One of such witness was Rajabu the driver of the truck which transported

the Sardine sacks. It was unfortunate such witness was not summoned to adduce evidence.

On the point of Caution Statement, the State Attorney submitted that (at page 45 of the proceedings) which is the evidence of PW3, one of the grounds of appeal is that Caution Statement was admitted without been read. In view of the State Attorney, and without giving proper citation, that was contrary to the decision of the case of **Seleman Abdallah v Republic (unreported)**. Thus, the Caution Statement must be read prior been admitted, contrary to that, it suffers been expunged out of the record.

With the afore reasons, the learned State Attorney maintained that the prosecution side failed to prove the case beyond reasonable doubt.

In the light of the afore grounds of appeal, supplementary submissions, prayer of the appellant and reply submissions, we think that in this matter the Court has to answer three issues;

**First**, whether there was no proof of ownership in terms of document and receipt for transportation from Mwanza to Dar es Salaam of all 101 sacks of Sardine. **Second**, whether the Caution Statement was read to the appellant prior been admitted as an

exhibit. **Third**, whether the prosecution side proved their case beyond reasonable doubt.

From the records, as far as the first question is concerned, I'm of settled view that the prosecution side ought to have exhibited documentary proof of ownership of the suit 101 Sardine sacks to prove his case. Indeed, to prove legal transportation of the Sardine sacks, the prosecution side ought to have exhibited transportation receipts. As correctly submitted by the learned State Attorney, the records reveal that the prosecution side did not exhibit any document of ownership.

Indeed, there is no any transportation receipts which was admitted as exhibit before the trial Court. The Court of Appeal had laid down a principle that before pronouncing any proceeding in a criminal case to be a nullity, it must be shown that the irregularity was such that it prejudiced the accused and therefore occasioned failure of justice **(See Michael Luhiye VR [1994] TLR 181)**.

In this case, I'm of fortified view that failure of the prosecution side to prove their case on the required standard by exhibiting documentary ownership and transportation of the 101 sacks of sardine from Mwanza to the destination prejudiced the accused and led to injustice on his part.

On the second question, there is nowhere in the record to prove that the Caution Statement was ever read before the accused prior admission before the court as an exhibit. It follows, therefore, that the trial Magistrate procedurally erred in admitting the caution statement prior been read over to the accused. In the case of **William Lengai (Appellant) v Republic Criminal Appeal No. 203 of 2007 Court of Appeal of Tanzania at Dodoma (Msoffe J.A, Rutakangwa J.A and Bwana J.A)** held *inter alia* that: -

*The way the cautioned statement was recorded neither shows that the appellant was given an opportunity to agree to be recorded, nor was it read over to him after the recording. All these irregularities in respect of the cautioned statement should have led the two courts "a quo" not to rely on it, let alone to admit in evidence....in absence of the said statement, the prosecution case did not have a strong legal leg to stand on, leading to the conviction of the appellant. Fortified by this sober legal thruth, and as conceded by Mr. Mulokozi, the conviction cannot stand."*

The above findings take us to the third question. As correctly argued by the learned State Attorney, Rajabu the driver of the truck which transported the 101 Sardine sacks, in our view, was an important prosecution witness. It is Rajabu who could have told the Court as to who contracted the truck he drove to transport the said Sardine sacks and what happened on his way to the contracted transport destination. In the case of **Azizi Abdallah v Republic (1991) TLR 71 at page 72** it was held: -

*"...the general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify the material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw inference adverse to the prosecution."*

It follows, therefore that, the prosecution side having failed to prove ownership of the Sardine sacks, the important witness not been called to adduce evidence, and the admission of the Caution Statement been not read to the appellant herein prior been tendered made the entire prosecution case weak. In that regard, the prosecution side totally failed to prove their case beyond reasonable doubt as per the requirement of the law.

With the afore abundant reasons, the appellant appeal is allowed, the trial court conviction and sentence are quashed and set aside respectively. The appellant be released forthwith unless held for different lawful cause. It is ordered accordingly.



**Y. J. Mlyambina**

**Judge**

**18/06/2018**

Dated and delivered this 18<sup>th</sup> day of June, 2018 in the presence of the appellant in person and learned State Attorney Monica Ndakidemi for the respondent.



**Y. J. Mlyambina**

**Judge**

**18/06/2018**