IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

CONSOLIDATED (DC) CRIMINAL APPEALS No. 137, 138

AND 149 OF 2018

(Arising from Criminal Case No. 154 of 2015 of the District Court of Tabora)

UMAIYA MAKILAGI MUSOMA .....1ST APPELLANT

GEORGE EDWARD NGATUNGA .....2ND APPELLANT

BOAZ LUNYUNGU .....3RD APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date of Last Order: 19/06/2020

Date of Delivery: 10/07/2020

AMOUR S. KHAMIS, J.:

In the Resident Magistrates Court of Tabora, the three appellants herein, namely, Boaz Lunyungu, George Edward Ngatunga and Umaiya Makilagi @ Musoma were arraigned for Seven (7) different counts.

The counts were conspiracy to commit an offence contrary to Section 384 of the Penal Code, Stealing contrary to Sections 258 and 265 of the Penal Code and money laundering Contrary to Sections 3 (K), 12 (a) and 13 (a) of the Money Laundering Act, No. 12 of 2006.

The matter proceeded to trial whereupon, the trio were found guilty on conspiracy to commit an offence and stealing.

Boaz Lunyungu and George Edward Ngatunga were also found guilty of money laundering.

The trial Court pronounced a sentence that varied from each of the convicts on the 3rd, 4th, 5th, 6th and 7th counts.

On the first and second counts, each of the appellants was adjudged to serve three (3) years imprisonment.

On the fourth count, Boaz Lunyungu was penalized to pay a fine of Tshs.100, 000, 000/= or serve five (5) years imprisonment term on default.

On the fifth count, George Edward Ngatunga was punished to pay Tshs. 100, 000, 000/= as a fine or serve five (5) years imprisonment on non remittance.

On the sixth count, George Edward Ngatunga was decreed to pay Tshs. 100, 000, 000/= or serve five (5) years imprisonment on failure to pay.

On the seventh count, George Edward Ngatunga was ordered to pay Tshs. 100, 000, 000/= fine or serve five (5) years imprisonment.

Aggrieved by both conviction and sentences passed by the trial Court, each of the convicts separately appealed to this Court.

In DC Criminal Appeal No. 137 of 2018, Umaiya Makilagi Musoma, petitioned this Court on seven grounds, to wit:

1. *That the presiding magistrate erred in law for mis apprehending the substance, nature and quality of the evidence adduced leading to injustice.*
2. *That the presiding magistrate erred in law and fact for convicting and sentencing the appellant without considering, evaluating and taking into account the appellant's defence accord the same any weight.*
3. *That there was an improper analysis and evaluation of the evidence adduced leading to wrong finding fact.*
4. *That the presiding Magistrate erred in law for not specifying the Section of law against which the appellant was convicted.*
5. *That it is not certain from the judgment of the trial Court whether the appellant was acquitted or convicted in the offence of money laundering in counts no. 3.*
6. *That there is no compliant and his statement (appellant's) in this case.*
7. *That from totality of the evidence adduced, guilty of the appellant was not established.*

In Criminal Appeal No. 138 of 2018, George Edward Ngatunga, advanced 14 grounds of appeal followed by three (3) additional

grounds of appeal contained in a supplementary petition of appeal thus:

1. *That the presiding magistrate erred for misapprehending the substance, nature and quality of the evidence adduced leading to injustice.*
2. *That the presiding magistrate erred in law, and fact for convicting and sentencing the appellant without considering, evaluating and taking into account the appellant's defence evidence and accord the same any weight.*
3. *That there was an improper analysis and evaluation of the evidence adduced leading to wrong finding fact.*
4. *That the presiding magistrate did not specify the Section of law against which the appellant was convicted.*
5. *That the presiding magistrate erred in law and fact for finding that the appellant stole money from the strong room of TPB at Tabora branch basing his findings on the testimonies of PW 12 and PW 15 who through exhibit P. 11 the audits report, were implicated to have stolen the same money since the duo were custodians of the strong room, thus classified as accomplices.*
6. *That the presiding magistrate erred in law holding that the appellant stole money subject of the charge in the second count in the course of conduct of his duties at the bank in total disregard to the provisions of Section 36 of the Evidence Act, Cap. 6, R.E. 2002.*

7. *That taking money out of the strong room by the appellant for purposes of construction of mini branch of Nzega which belongs to TPB (the victim company) as put by PW 12 and PW 15 does not constitute the offence of stealing within the ambit of Section 258 and 265 of the Penal Code, Cap. 16, R.E. 2002.*
8. *That the pecuniary loss, subject of exhibit P. 11, allegedly occasioned by the appellant at TPB Tabora branch in the course of conduct of his duties which form the subject of the charge in the second count was not justified by independent external auditor. Also it was not approved by the Board of Directors as required by the TPB Banking Operation Manual and Financial Institutions Act No. 6 of 2006.*
9. *That the Sections of law against which the appellant was found guilty, convicted and sentenced in the offence of money laundering in count no. 3 does not create an offence.*
10. *That it is not certain from the Judgment of the trial Court whether the appellant was acquitted or convicted in counts nos. 5, 6 and 7.*
11. *That the appellant is punished twice in count no. 2 which is against the established rule of law.*
12. *That the presiding magistrate erred in law for requiring the appellant to establish his innocence in the offence of money laundering.*
13. *That there is no compliant and his (appellant's) statement in this case.*
14. *That the Judgment of the trial Court was recomposed without*

there being an order for decomposition from the Higher Court.

The additional grounds of appeal were:

1. That the trial magistrate erred in law and fact for convicting the appellants without follow(ing) a fundamental principle of our criminal Justice that the beginning of a criminal trial the accused must be arraigned.
2. That the trial magistrate erred in law and fact by producing two different judgments on the same criminal case.
3. That the trial magistrate erred in law and fact by convicting the appellant basing on defective charge sheet.

Through Criminal Appeal No. 149 of 2018, Boaz Lunyungu, moved this Court to vary the findings of the trial Court on eight (8) grounds, thus:

1. That the Honourable trial magistrate erred in law and fact by holding that the prosecution side had proved their case beyond reasonable doubts.
2. That the Hon. trial magistrate erred in law and fact by seriously mis apprehending the substance, nature and quality of evidence in the proceedings and thus resulting in serious mis directions and non directions that resulted in unfair conviction and sentence.
3. That the Honourable trial magistrate erred in law and fact to convict and consequently sentence the appellant, where the prosecution's body of evidence was full of contradictions, discrepancies and inconsistencies that would (not) warrant

conviction in the circumstances of the case, and which contraditions, discrepancies and inconsistencies touch the root of the case and the Hon. trial magistrate failed to address them.

4. That throughout the proceedings there were serious irregularities in the admission of evidence, in particular no proper description of exhibits were given before admission and contents of documentary exhibits were not read over after being admitted.
5. That the Honourable trial magistrate erred in law and fact by:

i) Holding that, the prosecution had proved their case beyond reasonable doubt on the offence of conspiracy to commit an offence.

ii) In respect of the offence of stealing the period within which the offence is alleged to have been committed, that is, January 2014 to July 2015, the prosecution failed completely to prove beyond reasonable doubt that, the 1st, 2nd and the 3rd accused persons were the ones who were exclusively responsible in handling money in the strong room.

iii) In respect of the 3rd Count i.e. the offence of money laundering, the prosecution side failed miserably in establishing that the money alleged to have been stolen was subject to predicate offence.

iv) In respect of the 4th count, i.e. the offence of money laundering, the Hon. trial magistrate failed to address the evidence that the appellant commenced building his house

at Pugu, Dar es Salaam in the year 2013 using money loaned to him by his employer.

v) Failing to consider evidence of DW 1 Boaz Lunyungu which was concurrent and corroborative to prosecution's body of evidence in respect of who, as from January 2014 to July 2015, were responsible in laundering money in the bank's strong room at Tabora.

6. That the Honourable trial magistrate erred in law and fact by failing to properly evaluate and address variances of the charge and the body of evidence.
7. That the Honourable trial magistrate erred in law and fact by misapplying the doctrine of common intention in respect of the appellant.
8. That the Honourable trial magistrate erred in law and fact by misapplying the principles of sentencing where he ordered "if imprisonment should run conquetry (sic . . .:)"

On 14/11/2018, this Court made an Order for consolidation of the three appeals and directed that:

> *". . . For easy of reference, Umaiya Makilagi @ Musoma, George Edward Ngatunga and Boaz Lunyungu will be referred to as the first, second and third appellants respectively . . . ."*

At a time of hearing before me, Mr.Godwin Simba Ngwilimi, assisted by Mr. Gervas Gereya, learned advocates, appeared for the third appellant, Boaz Lunyungu.

Ms. Flavia Francis, learned advocate, acted for the second appellant, George Edward Ngatunga.

Whereas the first appellant, Umaiya Makilagi Musoma, was unrepresented and thus fended for himself, Mr. Shadrack Kimaro, learned Principal State Attorney, assisted by Mr. Nassor Katuga, learned Senior State Attorney and Mr. Tumaini Pius, learned State Attorney, dutifully stood up for the interests of the Republic.

The appeal was orally argued with Mr. Godwin Simba Ngwilimi leading the appellants team.

Umaiya Makilagi Musoma adopted his grounds of appeal as Mr. Godwin Simba Ngwilimi and Ms. Flavia Francis exhausted the grounds of appeal outlined in the second and the third appellants' petitions of appeal.

Mr. Nassor Katuga, learned Senior State Attorney and Mr. Shadrack Kimaro, learned Principal State Attorney, took to the floor and rebutted the appellants' contentions in succession and urged this Court to uphold the trial court's findings.

I had the advantage of listening to the rival submissions by the learned counsel for the appellants and the respondent. I also scanned the entire record of the trial Court including the exhibits tendered and admitted by the Court below.

Having exhausted the records and the parties' submissions, I am of the view that one ground of appeal on the procedure adopted

by the trial Court during trial, sufficiently dispose of the entire appeal.

In the Supplementary Petition of Appeal, George Edward Ngatunga faulted the trial magistrate for failure to arraign the appellants at a commencement of trial.

Ms. Flavia Francis, learned advocate for the second appellant, contended that the trial magistrate failed to observe mandatory requirements of Section 228 (1), (2) and (3) of the Criminal Procedure Act which requires an accused person (s) to be called upon to plea at a commencement of trial.

The learned counsel submitted that failure to read over the charge to the accused persons at a commencement of a trial amounted to a denial of justice as the appellants failed to know the nature of the charges facing them.

Ms. Francis relied on Article 13 (6) of the Constitution of the United Republic of Tanzania and the case of NAOCHE OLE MBILE V REPUBLIC (1993) TLR 253 in support of her contentions.

Mr. Godwin Simba Ngwilima, learned advocate for the third appellant, concurred with Ms. Flavia Francis and cited **MUSA MWAIKUNDA V REPUBLIC (2006) TLR 387** as outlining principles of a fair trial and submitted that the same were violated by the trial Court.

Mr. Nassor Katuga, learned Senior State Attorney, sharply differed with the defence team and submitted that the appellants were properly arraigned.

He contended that the case of NAOCHE OLE MBILE V REPUBLIC (supra) cited by Ms. Francis was distinguished from the present matter on a reason that the accused in the cited case were never arraigned.

Mr. Katuga asserted that the charge sheet in the present case was read over to the appellants on the first day of their appearance in Court and argued that if the same was not reminded at a commencement of trial, it brought no prejudice to the appellants.

The learned Senior State Attorney cited **CHACHA JEREMIAH MURIMI & 3 OTHERS V REPUBLIC**, Criminal Appeal No. 551/2015 arguing that the overriding principles of justice requires this Court to examine whether the discrepancy in the proceedings affected the accused's justice.

Mr. Katuga submitted that the oxygen principle will apply against the appellants on the trial Court's omission to remind the charge at a commencement of trial.

Addressing the Court on this point, Mr. Shadrack Kimaro, learned Principle State Attorney, contended that the supplementary petition of appeal which raised the issue of failure to arraign, was filed out of time and without leave of the Court.

He asserted that whereas Section 361 of the Criminal Procedure Act prescribed 45 days within which to file a petition of appeal, the second appellant lately filed his supplementary petition of appeal on 21/11/2018 while the trial Court's records were ready for collection by 29/8/2018.

In a rejoinder, Ms. Flavia Francis buttressed her earlier submissions and insisted that on a date that PW 1 started his testimony, the charge sheet was not read over to the appellants as required by the law.

She contended that the oxygen principles were not applicable in this case as the appellants' right to a fair trial were curtailed.

The learned counsel for the second appellant argued that the omission to read over the charge at a commencement of trial rendered the trial Court's proceedings a nullity.

On the Supplementary Petition of Appeal, Ms. Francis contended that leave of the Court to file it was sought for by the second appellant and granted by Mallaba, J (as he then was) in presence of Mr. Tumaini Pius, learned State Attorney and Mr. Gervas Genelya, learned advocate for the third appellant.

I propose to start with the respondent's contention that the supplementary petition of appeal was filed out of time and or without leave of the Court.

Section 361 (1) (a) and (b) of the **CRIMINAL PROCEDURE ACT, CAP. 20, R.E. 2002** provides that no appeal shall be entertained unless the appellant

> *"a) has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence, and*
>
> *b) has lodged his petition of appeal within forty five days from the date of the finding, sentence or order."*

The trial Court's judgment was pronounced on 29/8/2018 and the sentences delivered on the same date.

The second appellant, George Edward Ngatunga, presented a notice of intention to appeal in the Resident Magistrates Court of Tabora on 31/8/2018.

However, the notice was signed by the second appellant on 30/8/2018 and counter signed by the Commanding Officer, Uyui Central Prison on the same date.

Apart from that notice, through Flavia Francis (advocate), the second appellant presented another notice of appeal in the trial Court on 31/8/2018.

The original Petition of Appeal by George Edward Ngatunga was presented for filing in this High Court on 25/9/2018 and prior to filing it was certified by the Officer in Charge, Uyui Central Prison on 21/9/2018.

Upon presentation in Court, George Ngatunga's appeal was named as DC Criminal Appeal No. 138 of 2018.

In these circumstances, the notice of appeal was lodged two (2) days from the date of conviction and sentence. The petition of appeal was lodged in a 27th day from the date of the findings and sentence, well within the statutory periods.

Proceedings of this Court show that leave to file a supplementary petition of appeal was sought for by Ms. Flavia Francis for the second appellant and granted by the Court on 14/11/2018.

The relevant portion of the proceedings before Justice Mallaba, J (as he then was) reads:

> *"**MS. FLAVIA FRANCIS, ADVOCATE***
>
> *We have no objection to the adjournment. We also pray to file supplementary grounds of appeal. We are able to file the same within one week.*
>
> ***MR. GERVAS GENELYA, ADVOCATE***
>
> *We have no objection.*
>
> ***MR. TUMAINI PIUS, STATE ATTORNEY***
>
> *I have nothing to add and have no objection to the Supplementary Petition of Appeal. We don't intend to reply to the same.*
>
> ***ORDER:***

1) *The respondent Republic to be served with copies of documentary exhibits in this matter and also to be served with copy of the charge.*
2) *The 2nd appellant to file a supplementary Petition of Appeal by 21st November 2018.*
3) *Hearing of the appeal on 3rd December, 2018*

Signed

JUDGE

14/11/2018."

The Supplementary Petition of Appeal was lodged in this Court on 21st day of November 2018 as per the order of Hon. Justice Mallaba, J. dated 14/11/2018.

It follows that Mr. Kimaro's allegations are not supported of factual basis and thus overruled.

I will now proceed with the substantive ground of appeal, namely, that the appellants were not properly arraigned at a commencement of the trial.

Section 228 of the **CRIMINAL PROCEDURE ACT, CAP. 20, R.E. 2002** equip that:

> *"228 (1) The substance of the charge shall be stated to the accused person by the Court, and he shall be asked whether he admits or denies the truth of the charge.*

2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary.

3) If the accused person does not admit the truth of the charge, the Court shall proceed to hear the case as hereinafter provided.

4) If the accused refuses to plead, the Court shall order a plea of "not guilty" to be entered for him.

5) (a) If the accused pleads:

i) that he has been previously acquitted of the same offences,

or

ii) he has obtained a pardon at law for his offence, the Court shall try whether or not in fact such plea is true.

b) If the Court holds that the evidence adduced in support of such plea does not sustain the plea, or if it finds that such plea is false in fact, the accused person shall be required to plead to the charge.

6) After the accused has pleaded to the charge read to him in Court under this Section, the Court shall obtain from him his permanent address and shall record and keep it."

Section 229 (1) of the **CRIMINAL PROCEDURE ACT** (supra) elaborates the procedure to be followed after a plea of "not guilty" is recorded. It reads:

> *"229 (1) if the accused person does not admit the truth of the charge, the prosecutor, shall open the case against the accused person and shall call witnesses and adduce evidence in support of the charge."*

In **NAOCHE OLE MBILE V REPUBLIC (1993) TLR 253**, the Court of Appeal revisited the above provisions of the law on plea taking, and held that:

> *"1) one of the fundamental principles of our criminal justice is that at the beginning of a criminal trial the accused must be arraigned, i.e., the Court has to put the charge or charges to him and require him to plead.*
>
> *2) Non – compliance with the requirement of arraignment of an accused person renders the trial a nullity."*

In **JOSEPH S/o MASAGANYA V REPUBLIC, CRIMINAL APPEAL NO. 77 OF 2009** (unreported), the Court of Appeal observed that:

> *"the arraignment of an accused is not complete until he has pleaded. Where no plea is taken the trial is a nullity. The mission is not an irregularity which can be cured by Section 346 of the Criminal Procedure Code (now Section 388 (1) of the Criminal Procedure Act)."*

In **MUSA MWAIKUNDA V REPUBLIC (2006) TLR 387**, the Court of Appeal outlined the minimum standards that must be watched for an accused to undergo a fair trial, namely:

> *"He must understand the nature of the charge and this can be achieved if the charge discloses the essential element of the offence charged, he must plead to the charge and exercise the right to challenge it, he must understand the nature of the proceedings to be an inquiry into whether or not he committed the alleged offence, he must follow the course of the proceedings, he must understand the substantial effect of any evidence that may be given against him, and he must make a defence or answer to the charge."*

In **ROJELI S/o KALEGEZI & 2 OTHERS V REPUBLIC, CRIMINAL APPEAL NO. 141 CF 143 OF 2009,** the Court of Appeal, discerned that failure to comply with mandatory requirements of Section 228 of the Criminal Procedure Act amounts to unfair trial.

Applying the principles obtained in the stated binding authorities to the circumstances of this case, I am inclined to find that the trial Court's failure to read over the charge to the appellants at a commencement of trial, rendered the proceedings a nullity.

Such omissions, in my view, cannot be rescued by the oxygen principle as they go to the root of the case thus causing injustices.

Consequently, the trial Court's Judgment and proceedings are hereby quashed and the sentences metted upon the appellants are set aside.

The case is remitted to the Resident Magistrates Court of Tabora for retrial before another magistrate of competent jurisdiction.

It is so ordered.

AMOUR S. KHAMIS
JUDGE
10/07/2020

ORDER: Judgment delivered today on 10/7/2020 through Video conferencing linking all appellants and the State Attorney, Mr. John Mkony.

Right of appeal explained.

E. NKYA
AG. DEPUTY REGISTRAR
10/7/2020