

**IN THE HIGH COURT OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA**

CRIMINAL APPEAL NO. 212 OF 2019

(Original Criminal Case No. 152 of 2018 of the Resident Magistrate Court of Mwanza)

MATHIAS DOSELA @ ADRIANO KASANGA ----- APPELLANT

VERSUS

THE REPUBLIC ----- RESPONDENT

JUDGMENT

29th January & 05th February 2020

J. C. TIGANGA, J.

In this Judgment the Appellant is challenging the conviction and sentence meted out by the trial Resident Magistrate's Court of Mwanza in Criminal Case No. 152 of 2018.

Before that Court, he stood charged with two counts namely obtaining money by false pretence contrary to section 301 and 302 of the Penal Code (Cap 16 RE 2002) in the first count, and personation contrary to section 369 of the same law.

According to the particulars of the offence, he was charged to have been falsely pretended and obtained Tshs. 5,000,000/= (five millions) from one Severine Bendaki Rwegasira after pretending to be the owner of plot No. 815 Block 'M' Kiseke in Mwanza City and sold that plot to the said Severine Bendaki Rwegasira thereby obtaining the above mentioned money, and in so doing he personated himself to be Adriano Kasanga while knowing that it was false.

➤ After a full trial, which involved four prosecution witnesses and one defence witness, the Accused (now the Appellant) was found guilty and convicted as charged in both counts. Consequent to his conviction, he was sentenced to serve three years jail imprisonment in each count and the sentence were ordered to run concurrently.

➤ The conviction and sentence aggrieved the Appellant, he decided to Appeal against the two. Through the service of Mr. Constantine Mutalemwa and Musa Joseph Nyamwelo learned counsels of Mutalemwa & Company Advocates, he filed four grounds of Appeal which were as follows;

- i. That the trial Court erred in law in convicting the Appellant basing on exhibit P1 and P2, the cautioned statement and transfer documents

respectively whose contents were not read out to the Appellant in court after being admitted as evidence.

In the alternative

- ii. That the trial court erred in law in admitting the transfer documents as collective exhibit P1.
- iii. That the trial court erred in law in convicting the Appellant without proper analysis and evaluation of evidence of both, the prosecution and the defence sides.
- iv. That the conviction of the Appellant is wrongly premised in law on account that the Prosecution case was doubtful for failure to call the material witness; the Land Officer (Jackline Songora) of the Ilemela Municipal Council who recognised, and identified the appellant as the lawful owner of the landed property in dispute.

However, when the Appeal was called for hearing, the Appellant through Mr. Constantine Mutalemwa learned counsel, decided to drop ground number 3 and 4 grounds and argued the two remaining grounds of Appeal.

Arguing ground No.1, Mr. Mutalemwa informed the court that exhibit P1 and P2 which are the transfer documents and the cautioned statements

were admitted unprocedurally as their contents were not read out to the Accused person after they were admitted. It is his submission that, that is fatal therefore the documents so admitted must be expunged from the records, as they cannot be relied upon to form the base of conviction.

He cited the authority in the case of **Rashid Kazimoto & Masoud Hamis Vs. Republic**, Criminal Appeal No. 558/2016 decided on 06/12/2019 by the Court of Appeal of Tanzania at Mwanza, and the case of **Mbagga Julius Vs. Republic**, Criminal Appeal No. 131/2015 (CAT) Mwanza, according to him, both authorities are insisting that, the documentary exhibit must be read out in court to the parties after they are admitted.

He in essence submitted that, the non-reading of the exhibits denies the Accused person with an opportunity to understand the case and make a meaningful defence. According to him, it goes to the root of the right to be heard. It is his submission that looking at the proceedings under scrutiny, there is nowhere the said Exhibits were read out to the Accused person after they were admitted.

He further submitted that the honourable trial Magistrate wholly based his findings on the content of Exhibit P2 as reproduced at page 3

and 4 of his Judgment, the fact which negatively affects his conviction as the same is based on the document which was un procedurally admitted. He prayed for the conviction in the first count to be quashed and sentence be set aside.

On the second ground of Appeal which was that admission of Exhibit P1 in a collective manner was un- procedural, Mr. Mutalemwa for the Appellant cited the case of **Anthony M. Masanga Versus Penina (Mama Mgesi)** and **Lucia (Mama Anna)** Civil Appeal No. 118/2014 (CAT) Mwanza (unreported) to support that ground. According to him, the case authority sets the principle that admission of documents in a collective way or omnibusly denies a person entitled to challenge the said documents an opportunity to challenge them. He submitted that the documents should be dealt with one after another and failure to do so causes the miscarriage of Justice. He also asked the documents Exhibit P1 to be expunged from the record consequent of which will leave the conviction without base. He in the end asked for the appeal to be allowed, conviction to be quashed and sentence set aside.

Miss Marry Lazaro learned Senior State Attorney who appeared representing the Respondent supported the conviction on the ground that

the case was proved beyond reasonable doubt. She conceded that the Exhibit P1 and P2 were not read out to the Appellant when they were admitted. However she submitted that, that omission did not cause any injustice to the Appellant because the documents were not new to him as he was the one who recorded the cautioned statement and participated in the making of the transfer documents. She submitted that the authorities cited by the Appellants are distinguishable as they have already been overtaken by events following the amendment of the law which introduced principle of overriding objectives. The complaint is that there was procedural technicalities in admitting the said exhibits, but the technicalities did not go to the root of the matter said Miss Lazaro. Besides the said documents were admitted without objection, the facts which makes the current complaint an afterthought.

In cementing of her stance, she also called upon this court to find that over and above the documentary evidence there was also oral evidence, and this being the first Appellate court, it is entitled to revisit, analyse and evaluate evidence taken and recorded by the trial court and find the Appellant guilty as found by the trial court.

On the second ground which challenges the collective admission of documentary exhibits, she submitted that the case of Anthony Masanga Versus Penina and Lucia (*supra*) is distinguishable as it was dealing with the documents of different nature, in this case according to her, the documents are similar as they are dealing with transfer of title of the right of occupancy from one person to another, and that the transfer is never completed by a single document or form and that since the documents were completing the same transaction, the same can be properly admitted collectively.

She finally submitted that the irregularities are just procedural which have not gone to the root of the matter, therefore the overriding objective principle can be applied to cure the said irregularities, she asked the conviction to be upheld.

In his rejoinder Mr. Constantine Mutalemwa submitted that the case of Rashid Kazimoto & Another (*supra*) is not distinguishable and has not been overtaken by the events in the sense that, while the principle of overriding objective was introduced in the law in the year 2018, the decision of Rashid Kazimoto was decided in December 2019, when the

principle of overriding objection was already in existence. He also submitted that the requirement to read the content of the document is mandatory whether the document was admitted with or without objection. He submitted that the non reading of the contents of the documents caused injustice to the appellant taking into account that the two documents found the base of the conviction.

Regarding the submission that this court may revisit the oral evidence and evaluate the same as the alternative of the documentary evidence. Mr. Mutalemwa asked this court to decline and disregard the prayers because the trial Magistrate only summed up, but did not analyse and evaluate the said evidence, so this court cannot now step into the shoes of the trial court.

On the second ground concerning an omnibus or collective admission of the documents, he submitted that the same denied the Appellant his fundamental right to be heard, he prayed that the Appeal be allowed, Judgment and conviction quashed and sentence set aside. That marked the arguments for both parties, hence this Judgment.

I have respectfully and carefully considered the submissions and arguments by both counsel in this Appeal. As submitted by Mr. Mutalemwa

the grounds of Appeal are basically two, that, the non reading of the contents of the admitted exhibits P1 and P2 is fatal and makes the said exhibits unreliable, and second that the admission of the documents exhibit P1 in a collective or omnibus style is fatal as the documents is required to be dealt with one after the other.

As earlier on pointed, that the contents of the exhibit P2 and P1 were not read out in court as required by the law, that facts is not disputed by the counsel representing the Respondent, and it is further exhibited by the proceedings at page 7 and 10 respectively. However, it is a contention of the counsel for the Respondent that, the omission to read the said cautioned statement is merely a procedural technicality and did not cause any injustice to the Appellants as both documents were known to him.

Mr. Mutalemwa, on that, strongly submitted that the omission is fatal and renders the documents in effective and liable to be expunged from the records. To support his arguments he cited the Authority in the case of **Mbagga Julius Vs Republic** Criminal Appeal No. 131/2015 CAT Mwanza (unreported) and **Rashid Kazimoto and Masudi Hamis Vs Republic**, Criminal Appeal No. 458 of 2016, in which it was held inter alia that failure to read out the documentary exhibits after their admission

renders the said evidence contained in that documents, improperly admitted, and should be expunged from the record.

Miss Marry Lazaro did not at all dispute the authorities so cited, but asked the court to find that the omission can be served by the amendment of the law which introduced the principle of overriding objective as the same is merely procedural technicalities which should not be allowed to defeat justice.

With respect to Miss Lazaro, as correctly submitted by Mr. Mutalemwa, the stand of the law as elaborated in the two case authorities cited by Mr. Mutalemwa makes it a necessity for the document admitted in evidence to be read out in court, I hold so because the provision of the law which introduced the principle of overriding objective was passed in the year 2018 as Written Laws Miscellaneous Amendments Act No. 8 of 2018, while the decision of **Rashid Kazimoto and Another Vs Republic** (supra) was delivered on 05/12/2019, about a year after Act No. 8 of 2018 has been passed, and yet still, the Court of Appeal maintained that, it is necessary to read out the contents of the documents after their admission as exhibits. This means, the authority cited by Mr. Mutalemwa is current and up to date and had the Court of Appeal been of the view that the non-

reading of the documents is a mere technicality and can be served by the principle of overriding objective, it would have held so. It follows therefore that the authority in *Rashid Kazimoto* has a proper interpretation and a current position of the law, it should be relied upon in the decision of this case.

Having found that the two exhibits i.e exhibit P1 and P2 were not read out in court, and having relied on the authority as cited above, that renders the two exhibits ineffective and the available remedy is to expunge them from the records. In that tone I hereby expunge both exhibit P1 and P2 for being un procedurally admitted and relied on. All that said and done, the 1st ground of Appeal is thus merited, and so, it is allowed.

With regard to the second ground of Appeal which is to the effect that it was unprocedural for the Exhibits, P1 to be admitted in a collective manner, since the said exhibit has already been expunged here in above, it will be a wastage of labour to deal with this ground of Appeal as the alleged documents have already been expunged and the said exhibit is no longer forming part of the records. That said, the second ground of Appeal is also allowed for the reasons given in this Judgment.

Now, having expunged the two sets of exhibits, and allowed both grounds of Appeal, what should be the consequences over the findings of the trial court?

As rightly observed by Mr, Mutalemwa, the conviction of the Appellant was founded on the cautioned statement i.e exhibit P2 (which has already been expunged). This fact is true looking at content of the Judgment especially the findings of the trial court as reflected on page 3 of the typed Judgment where the foundation of the conviction has been made as follows:-

"I have gathered from the Accused's Cautioned Statement that he was not a lawful owner of the plot in question, as part of his caution statement states.

'Baada ya Bakary kunitambulisha kwa Jack kuwa ana viwanja vingi anavouza ila anataka nisimamie kiwanja kimoja wapo kilichoko huko Kiseke Green view.....'

From the above quoted part of the Accused's caution statement exhibit P2, it is very clear that the Accused was not the lawful owner of the plot in question, but was selling for the said person called Jack who in the prosecution has not joined in this case for reason best known to themselves....., I therefore find the prosecution evidence has proved the case beyond reasonable doubt. I accordingly find the Accused guilty of the offence and consequently convict him."

With regard to the 2nd count, the trial court went further and held that;

"Just as quoted above the names Adriano s/o Kasanga are not Accused's names as stated in the cautioned statement....., From the foregoing the prosecution has proved beyond reasonable doubt, this 2nd count and I accordingly find the Accused guilty of the second count and convict him forthwith".

From the above quotation, it is evident that the conviction in respect of both counts was founded on the cautioned statement of the Accused

person, i.e Exhibit P2 which has already been expunged. That leaves the conviction without base.

Miss Marry Lazaro learned Senior State Attorney asked the court to revisit the oral evidence as presented by the prosecution witnesses in the alternative of the documentary evidence expunged and analyse and evaluate evidence and up hold the conviction entered by the trial court. On this Mr. Mutalemwa learned counsel submitted that the trial court did not analyse and evaluate the oral evidence, this court can not at all, step into shoes of the trial court which had the duty of assessing, analysing and evaluating the said evidence. To do so, according to him, is to deny the appellant the chance to challenge the same because the said evidence in analytical and evaluated form did not feature in the Judgment therefore it will be against the principle of Natural Justice especially the right to hearing.

I entirely agree with Mr. Mutalemwa that primarily, the duty to analyse and evaluate evidence is the domain of the trial court. Since in this case the trial court did not do that in the Judgment, doing so at this stage is to deny the Accused person the opportunity to challenge the finding founded on the oral evidence analysed and evaluated at the appellate

stage. That said, I find merit in Mr. Mutalemwa's submission, that this court cannot, without prejudicing the Appellant, revisit, analyse and evaluate the evidence as prayed by Ms. Marry Lazaro learned Senior State Attorney.

That said, I find both grounds of Appeal merited, I proceed to quash the conviction entered by the trial court and set aside the sentence passed as well as the orders thereto.

Mr. Mutalemwa learned counsel submitted that as the counsel for the Respondent did not ask for the retrial, therefore this court cannot on its own motion order retrial.

As this argument was raised during the rejoinder, therefore Miss Marry Lazaro had no chance to reply on it. Looking at the circumstances of this case, I find the argument worth consideration. In such endeavor to consider the argument, some case authorities on the theme as decided by the court of record will be of assistance. My thorough reading of the authority of **Rashid Kazimoto and Masudi Hamisi Vs Republic** (supra) as cited by Mr. Mutalemwa in support of the first ground of Appeal provides for the principles governing the situation in which a retrial can be ordered. This authority quoted with approval the authority in the case of

Sultan Mohamed Vs Republic Criminal Appeal No. 176 of 2003

(unreported) which also quoted with approval the decision in **Fatehali Manji vs Republic** (1966) E.A 343 which stated that:-

"In general, a retrial will be ordered only when the original trial was illegal or defective; It will not be ordered where the conviction is set aside because of in sufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial, however, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of Justice require it"

Also see **Paschal Clement Branganza versus Republic** (1957) EA 152

Looking at the principle in the above cited authorities, it is not a condition that the order for retrial can only be made where it is sought by the parties. But it should be made if the following conditions exists:

- i) *where the original trial was illegal or defective;*

- ii) *where the conviction was set aside not because of insufficiency of evidence, or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial.*
- iii) *Where the circumstances so demand*
- iv) *where the interest of Justice require it"*

This means if the court finds that the circumstances described in the above authorities are established and where the interest of Justice so requires may order retrial whether or not any party has asked it. Thus this goes against the argument by Mr. Mutalemwa that the same must be sought.

Now, while determined to look into the circumstances of this case to see whether retrial can be ordered or not. The proceedings and the record will be of much assistance.

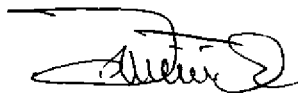
The record is clear and loud, from the grounds of Appeal which have been allowed, the Appeal was allowed not because of insufficiency of evidence, it was allowed because the trial was fatally defective for not observing the legal principles in the admission of exhibits. It is because the presiding trial magistrate omitted to comply with the mandatory procedure of directing the documents to be read out by the witness tendering them.

Further to that, there is allegation that the victim gave out his money Tshs. 5,000,000/= (five millions) to purchase the plot, but the transaction was faulted for want of proper title of the vendor. In the circumstances of this case, the interest of justice requires by all standards, the fate of the right of the victim to be examined and determined on merit. All these said and done, I find this to be a fit case in which an order for retrial can be made.


Having reasoned as above, I hereby order the case to be retried before another Magistrate of Competent Jurisdiction.

It is so ordered.

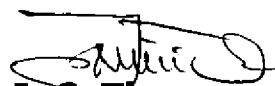



J. C. Tiganga
Judge
05/02/2020

Judgment delivered in open chambers in the presence of the Appellant in person and Mr. Nyamwelo learned counsel for the appellant and Mr. Emmanuel Luinga learned Senior State Attorney for the Respondent - Republic.


J. C. Tiganga
Judge
05/02/2020

Right of Appeal explained and guaranteed

A handwritten signature in black ink, appearing to read 'J. C. Tiganga', written over a horizontal line.

J. C. Tiganga

Judge

05/02/2020