

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY**

AT MOSHI

CRIMINAL APPEAL NO. 75 OF 2019

[Originating from Criminal Case No. 21 OF 2017 in the Resident
Magistrate Court of Moshi at Moshi]

ANETH CHARLES KIMARO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

MUTUNGI .J.

Originally before the Resident Magistrates Court of Moshi,
the appellant herein was arraigned on a charge that
contained thirteen counts, namely: -

1. Count 1-11; Forgery, contrary to ss. 333, 335 (a) and
337 of the Penal Code, Cap. 16 [R.E. 2002].
2. 12th Count; Fraudulent Accounting by Clerk s. 317 (a)
of the Penal Code, Cap. 16 [R.E. 2002].
3. 13th Count; Stealing by Clerk, contrary to s. 258, 265
and 271 of the Penal Code, Cap. 16 [R.E. 2002].

At the end of the trial in which the prosecution marshalled
a total of eight witnesses, and the defence brought two

witnesses (the appellant and her witness) the court was not convinced to the list that, the respondent had proved the case against the appellant on 1st, 2nd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th and 13th counts to the required standard in criminal jurisprudence. However, the appellant was convicted on the 3rd and 7th counts. Consequently, she was sentenced to serve four years in prison for the former count and two years for the latter count. The sentences were ordered to run concurrently.

The appellant dissatisfied with the outcome, has preferred this appeal, fronting nine grounds. However, in the written submission presented by Ms. Elizabeth Maro Minde, learned advocate, the grounds were narrowed down to three as hereunder: -

1. Whether, the trial court erred in law and fact in convicting the appellant without proof.
2. Whether, the trial court erred in law and fact in failing to adhere to proper procedure in tendering and admitting exhibits.
3. Whether, the trial magistrate erred in law and fact in admitting exhibit P2 while chain of custody was not established.

The particulars set out in the charge sheet were that on diverse dates between 15th April, 2013 to 30th day October, 2014, at the offices of Tumaini Saccos Ltd, Marangu area within Moshi District in Kilimanjaro region, the appellant being employed as a clerk forged a membership ledger in the name of one Elida Nicolous Moshi, and transferred funds in the same name though forged payment vouchers to the fixed deposit bank account. She was also alleged to have stolen Saccos money which in total amounted to approximately Tshs 15,000,000/= without legal authorization.

In the appeal at hand based on two counts which the appellant was convicted with, starting with the 3rd count is that on 25th April, 2013 the appellant with intent to defraud or deceive, forged a payment voucher with serial No. 6746 to show that Elida Nicolous had received Tshs. 3,495,000/=. On the 7th count it was alleged that on 28th July, 2014 the appellant with intent to defraud forged a payment voucher with serial No. 19669 purporting to show that Elida Nicolous had received Tshs. 2,300,000/=.

When the appeal was called up for hearing both parties consented that, the appeal be argued by way of written submissions. As pointed out earlier, the appellant had the

services of Ms. Minde learned counsel, whereas the respondent was represented by Grace Kabu learned state attorney.

Supporting the appeal, Ms. Minde submitted on the 1st ground that, on page 8 of the judgment, the trial magistrate observed that the daily collection form alleged to have been forged with the sum of Tshs 3,405,000/= paid to the appellant was missing. She also pointed out that, the receipts with numbers 857 and 747 that were used to transfer Tshs. 3,485,000/= to fixed deposits account had no proof. Neither bank statement nor audit report was tendered in the trial court to substantiate the forgery allegations.

Ms. Minde further averred that, it was the duty of the respondent to prove the case beyond reasonable doubt as provided for under **Section 110 of the Evidence Act, Cap 6, R.E. 2002 (Evidence Act)** and as it was held in the case of **Jonas Nkize V Republic, [1992] T.L.R. 214**. She submitted further that, the offence of forgery as per s. 333 of the Penal Code has three elements, namely, existence of false document, intention to commit forgery and that, it is the accused who made such documents. Ms. Minde argued that, at the trial the auditing and accounting report to

confirm that the payments issued by the appellant were forged and that there was actual money lost was lacking. She added that since all of the above was not proved at the required standard in criminal jurisprudence, the same create a doubt as to whether the said money was indeed lost and that there is a possibility the money is in the books had the analysis done thoroughly. In that regard the appellant ought to have been acquitted.

On the 2nd ground of appeal Ms. Minde submitted that, it is a mandatory procedure that, before admitting any exhibits in court the trial magistrate ought to give the accused an opportunity to examine and raise objection if any to the said exhibits. Such requirement however, was not complied with in the matter at hand. The appellant was never given a chance to question the content of exhibit P2 which collectively included a letter to PCCB dated 15th February, 2013, receipt No. 6746 and 19669, appellant handwriting and signature sample, other Saccos members signature samples and Saccos stamp seal sample, the core of the 3rd and 4th counts.

On the last ground, Ms. Minde submitted that, there were no explanations on how samples A1 to A3 reached PW3 a police inspector who produced and tendered the same in

the trial court. She was neither the author nor custodian of the said exhibits. She argued further that, it is important to establish the chain of custody of an exhibit. The purpose being that, it provides a chronological documentation showing seizure, custody, control, transfer, analysis and disposition of evidence be it physical or electronic.

It was Ms. Minde's final argument, since the chain of custody was not properly adhered to as it was held in the case of **Paulo Maduka and Others V the Republic, Criminal Appeal No. 110 of 2007 (unreported)**, the same should be to the advantage of the appellant. She prayed on the basis of the foregoing, the appeal be allowed, and the decision of the trial court quashed and set aside.

Ms. Kabu supported the appeal specifically on the 2nd ground that, there is an omission by the trial magistrate in admitting exhibit P1 Forensic Bureau report, and sample A1 to A3 which were collectively admitted as exhibit P2. They were admitted without the appellant's acknowledgment as to whether she had any objection or not. She argued that, for the interest of justice as provided for in the case of **Godfrey Ambrose Ngowi V The Republic, Criminal Appeal No. 420 of 2016 CAT at Arusha (unreported)**, this case be sanctioned to a retrial considering such omission was not

occasioned by the respondent but the court. There was no rejoinder.

In light of the trial court's proceedings, decision and the respective submissions from the rival camps, the main issue is whether the appeal before this court is sound in law. In determining the same, I will start with the 2nd ground of appeal which both sides concede that exhibits "P1" and "P2" did not follow the proper procedures of admission. Going through the typed proceedings on page 44, 45 and 46 it is clear that the examination report from the Forensic Bureau which included the letter from PCCB office, handwriting and signatures samples, and a stamp seal were admitted with no objection from the appellant's advocate (Mr. Captain Siwayaeli) but the same were not read out aloud.

Moreover, exhibit "P2" which included PCCB letter dated 15/2/2013, receipt No. 6746 and 19669, appellant's signature and handwritten sample, signature sample from Elida Nicolous Moshi, Rose Godbless Lyimo, Doroth Dastan Mtui, Willington Wilfred and Saccos stamp seal were tendered and admitted without giving room to the appellant to examine and either object there to or otherwise.

I took the liberty of perusing through other admissions done by the trial court and observed that, even exhibit "P4" at page 50 which included membership book, 'kitabu cha chama' No. 558 and receipts were not read out aloud after the same were admitted without objection. The same also goes to Exhibit "P5" at page 60, this too was never objected to by the appellant neither was it read out aloud.

In the case of **Robinson Mwanjisi and Three others vs. Republic, [2003] T.L.R. 218** the court held that: -

"Documentary evidence whenever it is intended to be introduced in evidence it must be initially cleared for admission and then actually admitted before it can be read out".

The same observation was emphasised in the case of **Erneo Kidilo & Matatizo Mkenza V The Republic, Criminal Appeal No. 206 of 2017 CAT at Iringa (Unreported)** where the Supreme Court cited with approval the case of **Lack Kiligani Vs. R., Criminal Appeal No. 402 of 2015 (unreported)** in which the Court of Appeal held: -

"Even after their admission, the contents of cautioned statement and the PF3 were not read

out to the appellant as the established practice of the Court demands. Reading out would have gone along way, to fully appraise the appellant of facts he was being called upon to accept as true or reject as untruthful. The Court in **Robinson Mwanjisi and Three Others vs. R. [2003] T.L.R. 218, at 226** alluded to the three stages of **clearing**, **admitting** and **reading out**: which evidence contained in documents invariably pass through, before their exhibition as evidence:

'...Whenever it is intended to introduce any document in evidence, **it should first be cleared for admission** and **be actually admitted** before it can **be read out**....' [Emphasis mine]."

As flagged out in the 2nd ground of the appellant's appeal and as admitted by the respondent's counsel, the above irregularity has in fact occasioned failure of justice on the appellant's side and thus requires correction. Under **section 388 (1) of Criminal Procedure Act, Cap 20 R.E 2019**, this Court has been vested with powers to correct such irregularity. For ease of reference the provision reads: -

"Subject to the provisions of section 387, no finding sentence or order made or passed by a

court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; **save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned failure of justice, the court may order a retrial or make such other order as it may consider just and equitable**" [Emphasis Mine]

In the present appeal, I am contented that, the irregularity has caused injustice on the appellant's part, as it has denied the appellant a fair and balanced consideration of her case. She was not fully appraised of contents she was to accept or reject. The remedy to such situation, is in my view, for the interest of justice to order a retrial as was held in the case of **Fatehali Manji V Republic** [1966] EA 244

Merging the above position to the appeal at hand, the exhibits tendered happen to be the centre of the trial court's decision and the same suffered procedural irregularities upon admission. They were introduced in the trial but were not first cleared for admission hence not actually admitted and to put salt to the wound were not read out. I am of the considered opinion that, the matter should be heard afresh before another Magistrate with competent jurisdiction. Having concluded so, I need not venture into the other two raised grounds of appeal, this will simply be an academic exercise.


Conclusively, I hereby order a trial *de novo*. Since the matter has been in court for long the retrial should be conducted expeditiously by fast tracking the case.

It is so ordered.




B. R MUTUNGI
JUDGE
12/08/2020

Judgment read this day of 12/8/2020 in presence of the appellant, Mrs. Minde learned advocate for the appellant and Mr. Kibwana (Senior State Attorney) for the respondent.


B. R. MUTUNGI
JUDGE
12/8/2020

RIGHT OF APPEAL EXPLAINED.