THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO. 56 OF 2020

(Arising from Criminal Case No 19 of 2019 in the Resident Magistrate Court of Lindi)

SAID YUSUPH KINGO..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Hearing date on: 03/8/2020

Ruling date on: 06/8/2020

NGWEMBE, J:

The appellant Said Yusuph Kingo found himself in jail for the period of two years and fine of one million shillings after being convicted on an offence of perjury. Being aggrieved with such conviction and sentence, he referred this appeal armed with five grounds of appeal, which may be summarized into one ground that is *the prosecution failed to establish and prove the case against the appellant beyond reasonable doubt.*

To recap just briefly, the genesis of this appeal traces back to 12th January, 2012 when a search was conducted in the house of Pendo Mohamed Cheusi. After some legal processes, on 30th September, 2019 the prosecution preferred a charge of perjury, contrary to section 102 (1) and 35 of Penal Code (Cap 16 R.E. 2002, now referred as Revised Edition of 2019) before Resident Magistrate Court of Lindi.

In proving the case before the trial court, the prosecution lined up two witnesses, baptized as PW1 & PW2 who were both Christians. On the other side, the appellant stood alone to defend against the accusations of perjury. At the end of trial, the appellant was convicted and sentenced accordingly.

On the hearing date of this appeal, the appellant was represented by learned advocate Issa Chiputula, while the Republic/respondent was represented by learned State Attorney Gideon Magesa. The learned advocate, argued substantially on one ground, that the prosecution though lined up two prosecution witnesses, yet their evidences should not be considered, rather should be expunged by this court for both contravened section 4 of Oaths and Statutory Declarations Act Cap 34 R.E. 2002. That both witnesses testified their evidences without swearing as required by section 198 (1) of Criminal Procedure Act.

Therefore, every witness invited in a criminal case and is required to testify in court, must take oath according to his/her faith. Likewise, sections 5, 7 & 8 of Cap 34 provide mode of swearing and affirmation. In the contrary,

the two prosecution witnesses were both Christians as per pages 11 and 14 of the proceedings, they confirmed instead of swearing according to their faith. Christians always take oath, while Muslims take affirmation. The purpose of swearing or affirmation is to bind the witness according to his/her faith and fear of God to speak only truth. The words used for swearing is different from words used in affirmation by Muslims. He added that, failure to follow the testimonies of each one's faith, is equal to no testimony at all. Therefore, the prosecution witnesses failed to testify anything in support to the accusations against the appellant. In resting his submission, he referred this court to the case of **Lazaro Daud @ Manuel Vs. R, Criminal Appeal No. 376 of 2015 (CAT)** at page 6 to pages 9. Since the consequences of failure to record properly the evidence of witnesses, such piece of evidence must be expunged, then once the two testimonies are expunged nothing remains.

The adversarial side, conceded on this ground that the prosecution witnesses were wrongly recorded for both were Christians and instead of swearing they affirmed as if they were Muslims. Thus when the two testimonies are expunged, the prosecution remains with nothing.

He directed his blame to the court, which recorded the testimonies. He emphatically, argued that the prosecution was blameless, thus should not be punished for mistakes made by the trial court. Therefore, he rested his argument by a prayer that the appropriate remedy in the circumstance is for this court to order retrial before another Magistrate of competent jurisdiction.

From the outset, I find important to point out an apparent jurisdictional issue in this appeal. The case was preferred and filed in the Resident Magistrate Court for Lindi. At the beginning, the case was presided over by Hon. H. Kando Resident Magistrate designated to sit in the Resident Magistrate Court. As time went and after hearing two prosecution witnesses, Hon. Kando was transferred to hold the office of a resident Magistrate Incharge of Tunduru District Court. Thus, the Senior Resident Magistrate Incharge of Lindi region on, 12/3/2020 appointed Hon. Batulaine Senior Resident Magistrate and incharge of Lindi District Court to proceed with a case. Fortunately, she proceeded with it to the end and judgement was accordingly entered.

The glaring legal question herein is whether a district Court Magistrate had jurisdiction to sit and decide a case file in a Resident Magistrate Court? This question is fundamental because jurisdiction is a creature of statute and this is the initial aspect to begin with for a judge or magistrate before embarking on adjudication of a case. Section 6 (1) (2) and (3) of Magistrate Court Act Cap 11 R.E. 2019 requires constitution of Magistrates' Courts stipulates as follows:-

> *(1) Subject to the provisions of section 7, a magistrates' court shall be duly constituted when held by a single magistrate, being:-*
>
> *(a) in the case of a primary court, a primary court magistrate;*
>
> *(b) in the case of a district court, a district magistrate or a resident magistrate;*
>
> *(c) in the case of a court of a resident magistrate, a resident magistrate.*

(2) Notwithstanding the provisions of subsection (1), where jurisdiction is conferred on a district court only when held by a magistrate of a particular description, such court shall not be dully constituted for the exercise of such jurisdiction unless held by a magistrate of that description;

(3) Where two or more magistrates of the same description are assigned to a particular magistrates' court each may hold sittings of the court concurrently with the other or others"

This section likewise was at once, discussed by the Court of Appeal in the case of **William Rajabu Mallya and Two Others Vs. R, [1991] TLR 83**, whereby the appellant was charged in the Resident Magistrates' Court for the offences of obtaining money by false pretences and conspiracy to defraud. When the accused appeared in court for the first time, the court was dully presided over by a Resident Magistrate. Subsequently, the court was presided over by a Principal District Magistrate who tried and eventually disposed of the case. On appeal, the Court of Appeal ended up nullifying the whole trial proceedings by the following words:-

"If a case is designated for a particular court, then it should be heard only by a member of that court notwithstanding that a member of some other court has substantive jurisdiction over the offence and could hear it. Because the Principal District Magistrate presided over the court of Resident Magistrate when he was trying this case, the court was not duly constituted within the meaning of section 6 (1) (c) of the Magistrates' Courts Act 1984"

This conclusion of the Court of Appeal, was repeated in the case of the **Republic Vs. Ahmad Ally Ruambo, Criminal Revision No. 3 of 2017** which was decided on 28/2/2020 where, the Court tried an application for revision of criminal case, where at initial stage, was presided over by a Resident Magistrate designated to sit in a Primary Court instead of a Resident Magistrate designated to sit in a District Court. At the end, the Court of Appeal nullified the whole proceedings of the trial court and directed retrial before another magistrate with competent jurisdiction.

In this appeal, the first trial Magistrate, Hon. Kando was designated to sit and try cases filed in the Resident Magistrates' Court. Upon his transfer to Tunduru District Court, such case was reassigned to a senior Resident Magistrate sitting and incharge of Lindi District Court. Therefore, I would conclude this ground by repeating that jurisdiction is a sacrosanct, which only statute may confer certain powers to a certain court. Failure to follow the letters of law which conferred jurisdiction on courts, usually the whole exercise becomes nullity.

This ground alone is capable of concluding this appeal, however, there is equally, another serious legal issue as rightly, argued by the learned advocate and supported by the learned State Attorney, which I find important to consider it in this appeal.

The issue of proper recording testimonies of both witnesses, be it, for prosecution or defence is crucial. In criminal cases, witnesses testify their evidences according to the dictates of Criminal Procedure Act Cap 20 R.E.

2019. Section 198 (1) of the Act is clearer like day light as I quote hereunder for ease reference:

> **198 (1)** *"Every witness in a criminal cause or matter shall, subject to the provision of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oath and Statutory Declaration Act"*

Further, the law governing oaths and affirmations is clear that a person cannot adduce evidences in court for court use without swearing or affirming according to his/her faith. I agree with the learned advocate Chiputula that the purpose of swearing or affirmation is to bind the witness according to his/her faith and fear of God to speak only truth. Even non-believers must affirm so that what they speak should bind them and when proved that they did not speak truth, consequences will follow including criminal action. Such purpose is demonstrated clearer in section 4 of Oaths and Statutory Declarations Act Cap 34 R.E 2002. Section 4 is quoted hereunder for clarity:-

> **Section 4** *"Subject to any provision to the contrary contained in any written law, an oath shall be made by –*
>
> *a) Any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court;*
> *b) Any person acting as interpreter of questions put to and evidence given by a person being examined by or giving evidence before a court:*
>
> *Provided that where any person who is required to make an oath professes any faith other than the Christian faith or objects to being sworn, stating, as the ground of such objection, either that he has no religious belief or that the making of an oath is contrary to his religious belief, such*

person shall be permitted to make his solemn affirmation instead of making an oath and such affirmation shall be of the same effect as if he had made an oath.

The effect of this section was well discussed by the Court of Appeal in the case of **Marko Patrick Nzumila & Another Vs. R, Criminal Appeal No. 141 of 2010** whereby the Court held:-

"The effect of section 4 of this law, is that in all judicial proceedings, all witnesses who are Christians must take oath, and all other witnesses (including those without religious beliefs) have to be affirmed"

In respect to this appeal, the prosecution witnesses were Christians as shown in page 11, of the proceedings, PW1 Gabriel Albert Nanjenje of Christian faith, instead of swearing he affirmed prior to his testimonies in court. Since he is a Christian, the trial court had a duty to ensure that he swears before he could adduce his evidences in court. The same is recorded in page 14 when Monica Mbogo, State Attorney, practicing Christian faith, likewise, affirmed instead of swearing before she could testify in court. Such affirmation instead of swearing, rendered the whole prosecution evidences nullity. The effect of such statutory defect is to discard the whole evidences as if was never testified in court. The Court of Appeal in the case of **Mwita Sigore @ Ogora Vs. R, Criminal Appeal No. 54 of 2008** held:-

"The effect of non-compliance with section 198 (1) of the CPA is that such evidence must be discarded from the record'

In similar vein, the case of **Lazaro Daudi @ Manuel (Supra)** at page 9

ɨ the effect of failure to comply with section 198 (1) of CPA is to

ge from the record all evidences recorded in controversy of the law.

appeal, I find no other remedy on the evidences of PW1 & PW2 who

he only prosecution witnesses, their evidences contravened the cited

ıs of law, hence cannot stand. I accordingly expunge them forthwith.

ırriving to such conclusion, obvious nothing remains on the side of

ution. However, the learned State Attorney convincingly argued on

ed to order for retrial before another competent magistrate, because

nistakes of recording evidences were done by the court and the

ution had no stake to it. I agree with such assertion, but usually

has some guiding principles to be complied with. In the case of

s/o Mutabuzi Vs. R [1968] HCD 149 the Court held:-

"Each case must depend on its own particular facts; re-trials should be ordered only ***"where the interests of justice require it*** *and should not be ordered where it is likely to cause an injustice to an accused person" (Emphasis is mine)*

The emphasis of the court in that decision was on the interest of justice affecting both parties. Likewise in the **Book of Administration of Justice in Mainland Tanzania by Frank Mirindo at page 547**, emphatically provided some elements to be considered for retrial:

(i) Where the court records are lost on appeal.

(ii) Where the charge is defective and has misled the accused;

(iii) Where the trial is bad for misjoinder;

(iv) Where the accused makes serious allegations of bias by the trial court.

In another similar decision, in the case of **Fatehali Manji Vs. R [1966] E.A. 481** the court held:-

> *"in general, a retrial be ordered only when the **original trial was illegal or defective**; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill gaps in its evidence at the trial. Each case must depend on its own facts and circumstances and an order for **retrial should only be made where the interests of justice require it" (emphasis is mine).***

The question remains, whether this court should order retrial or otherwise? The appellant was charged for perjury contrary to section 102 (1) and 35 of the Penal Code Cap 16 R.E. 2019. Upon being convicted, he was sentenced to the maximum of two years' imprisonment with fine of TZS 1,000,000/=. The section cited therein provide imprisonment of not exceeding two years or with a fine or with both imprisonment and fine. The trial court preferred both fine and imprisonment. Though I am not determining merits of the case, but usually, maximum punishment is reserved for hard core criminals. The record of trial court, indicates that the appellant was a first offender not of a type of criminals whose maximum sentence might be preferred.

Moreover, the appellant was jailed on 16/4/2020 to d to three (3) months imprisonment. Under normal circum /e learnt to speak truth whenever he is required to do so

For the reasons so stated and the defects so indicated, the right cause would be to order retrial, but in the circumstances of this appeal such order will not save any useful purpose as discussed above. Therefore, justice demand to decide otherwise. I accordingly, find merits on this appeal and same is allowed. Consequently, quash the conviction and set aside the sentence meted by the trial court. Subsequently, order an immediate release of the appellant from prison unless otherwise lawfully held.

I accordingly Order.

DATED and DELIVERED at Mtwara this 6th August, 2020.

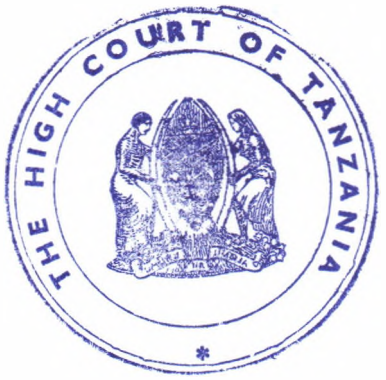
P.J. NGWEMBE

JUDGE

06/08/2020

Court: Judgement delivered at Mtwara in Chambers on this 6th day of August, 2020 in the presence of Mr.Chiputula, Advocate for the Appellant and Mr. Meshack Lyabonga, State Attorney for the Respondent.

Right to Appeal to the Court of Appeal explained.



P.J. NGWEMBE

JUDGE

06/8/2020