IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 37 OF 2020

(Originating from Criminal case No. 161 of 2019 of Nkasi District Court)

MASWI MASERO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of last Order: 05/09/2020
Date of Judgment: 18/11/2020

JUDGMENT

C.P. MKEHA, J

Before the District Court of Nkasi, the appellant was arraigned for two offences of stealing by agent c/s 273 (b) and 258 of the Penal Code and Forgery contrary to sections 333, 335 (a) and 337 of the Penal Code. It was alleged in respect of the first count that, the appellant, Maswi s/o Masero on 5th day of March 2019 at Isasa village within Nkasi District in Rukwa Region, by virtue of his position as a Representative of Kahama Oil Mills Limited did steal 119 pieces of water pipes valued at TZS 21,948,360/= the property of Kahama Oil Mills Limited which were entrusted to him as an official representative to deliver the same to the said company. The allegation in respect of the second count was to the effect that

the appellant, on 5th day of March, 2019 at Isasa village within Nkasi District in Rukwa Region, with intent to defraud or deceive, did make a false handing over agreement purporting to be made between Wimbe Consult Limited and Kahama Oil Mills Limited a fact which he knew to be false or not true.

At the end of trial, the appellant was found guilty and convicted of both counts. He was sentenced to be jailed for five years in respect of each count. Custodial sentences were ordered to run concurrently.

The appellant was also ordered to compensate the victim to the tune of TZS. 21,948,360/=. The appellant was not satisfied with both, conviction and sentence. He thus appealed to this court with ten (10) grounds of appeal.

In the present appeal, the appellant was represented by Mr. Mwita learned advocate. On the other hand, the respondent was represented by Mr. Peres learned State Attorney. The appeal was argued by way of written submissions.

Despite the fact that the appeal consists of ten grounds of appeal, only two grounds suffice to dispose of the appeal and these are:-

Ground No. 6: That, the Honourable Trial Magistrate grossly erred in law and facts for reaching at convictions basing on proceedings which were tainted with illegalities, irregularities and confusions which fatally affected the same.

Ground No. 8: That, the Honourable Trial Magistrate grossly erred in law and facts for admitting and relying on all the exhibits which had poor evidential value and which were admitted contrary to the law governing the same.

In the course of making arguments, the learned advocate complained that exhibits P1 to P14 which the trial court based its conviction were not read over in court. The learned advocate submitted that, while the record indicates that the trial Magistrate had indeed ordered that contents of the said documentary exhibits be read in court, there was no actual indication that the said orders were ultimately complied with by reading the contents of the said exhibits in court. The learned advocate cited the decision in **Erneo Kidilo and Another Vs. The Republic, Criminal Appeal No. 206 of 2017** where the Court of Appeal held that, even after admission, the contents of the admitted documentary exhibit have to be read out to the accused as the established practice of the court demands. The reading appraise the accused of facts he is being called upon to accept as true or reject as untruth.

In his reply, the learned State Attorney submitted that the case of **Robinson Mwanjisi and Three Others Vs. Republic (2003) TLR, 218** lays down principles governing tendering of documentary exhibits in court. That, the document has to undergo three stages that is, being cleared for admission,

actual admission and reading out of the contents of the admitted exhibit in court. The learned State Attorney submitted that, indeed, if any document is admitted in court without passing the three stages, it is liable to be expunged from evidence. The learned State Attorney insisted that, all documentary exhibits: Exhibits P1 to P14 were first cleared, admitted and read out in court. The learned State Attorney made reference to pages 24, 25, 30, 33, 40, 43, 52, 57 and 61 of the typed proceedings of the trial court.

The only issue for determination is **whether the documents in dispute were read out in court after their respective admission.** I have taken time to go through the entire record of the trial court. It would appear that, the trial Magistrate was fully aware of the requirement to read out the documentary exhibits after their admission. At the pages cited by the learned State Attorney, indeed the learned trial Magistrate made orders that the said documentary exhibits be read out in court. **See:** pages 24, 25, 30, 33, 40, 43, 52, 57 and 61 **See also**: page 37.

However, reading from the above cited pages, you will find no clear indication that the trial Magistrate's orders were actually complied with. Nowhere the trial Magistrate recorded that the contents of the said exhibits were actually read aloud in court in compliance with the court's orders. It cannot therefore be safely

said that the requirement of reading out the contents of the admitted exhibits was complied with.

It is important to note that the appellant's conviction in both counts was based on the contents of Exhibits P1 to P14. But, for no fault on part of the prosecution the said exhibits are liable to be expunged. Before I spell out my instructive words on the way forward, I find it necessary to remind myself of what the Court of Appeal observed in **Adam Seleman Njalamoto Vs. The Republic, Criminal Appeal No. 196 of 2016.** The Court observed that where the trial court fails to direct itself on an essential step in the course of proceedings, it does not automatically follow that a re-trial should be ordered, even if the prosecution is not to blame for the fault. The court held that each case ought to be decided depending on its own particular facts and circumstances.

In **Pascal Clement Braganza Vs. The Republic (1957) E.A. 152 and Fatehali Manji Vs. The Republic (1966) E.A. 343**, the Court held that an order for retrial should only be made where the interests of justice require it.

This appeal is being determined after almost four months since when the appellant started serving his five years jail term. The whole of the prosecution's case depends upon documentary exhibits whose admission skipped a necessary legal step at no fault on part of the prosecution. In my considered opinion, basing on the evidence on record, this is a fit case for ordering retrial.

For the foregoing reasons, the trial court's proceedings and appellant's conviction in respect of both counts are quashed. Sentences and an order for compensation are set aside. Immediate retrial of the accused/appellant is ordered before another magistrate of competent jurisdiction. Should the appellant be again convicted, the duration already spent in prison while serving sentences imposed upon him on 20/07/2020 shall be taken into account. The appellant shall remain in custody while waiting to be summoned by the trial court for his retrial.

Dated at **SUMBAWANGA** this **18th day of November, 2020.**

C.P. MKEHA
JUDGE
18/11/2020

Court: Judgment is delivered in the presence of the accused in person and Mr. Mwashubila learned Senior State Attorney for the Respondent.

C.P. MKEHA
JUDGE
18/11/2020

Order: Right of Appeal explained.

C.P. MKEHA
JUDGE
18/11/2020