**IN THE HIGH COURT OF TANZANIA**

**AT MOSHI**

**CRIMINAL APPEAL NO. 25 OF 2020**

(Originated from Criminal Case No. 675 of 2016 at District Court of Moshi at Moshi)

**ANETH CHARLES KIMARIO.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

06/10/2020 & 30/11/2020

**MWENEMPAZI, J**

The appellant was arraigned in District Court of Moshi together with three others with thirteen counts of an offence of fraudulent false accounting contrary to section 317(b) and (c) of the Penal Code (Cap. 16 R.E 2002). The particulars were that the appellant and the three others being clerks or servants to Tumaini Saccos at Mamba area within the Rural District of Moshi in Kilimanjaro with intent to defraud their employer made the following entries in the cash book to show that on 13/08/2014 the amount of Tshs. 18,500,000/= had been paid to Mapambano Group; on 30/10/2014 Tshs. 1,000,000/= paid to Faraja Group and Tshs. 5,000,000/= paid to Tupendane Group; on 19/11/2014 paid Tshs. 10,000,000/= paid to Kujitegemea Group; on 22/01/2015 paid Tshs. 6,000,000/= paid to Amani Kimangaro Group; on 31/01/205 paid Tshs.

1,000,000/= to Chemchem Group; Tshs. 1,000,000/= paid to Baraka Group; Tshs. 1,000,000/= paid to Urana Group; Tshs. 1,000,000/= paid to Jitegemee Group; Tshs. 1,000,000/= paid to Mapambazuko Group things they knowingly knew to be false; also Tshs. 9,000,000/= taken from the safe and was not recorded anywhere in the cash book; on 31/03/2015 received Tshs. 6,000,000/= from Valentine Paulo Mkonyi but was omitted from cash book, and on 30/09/2015 received Tshs. 3,000,000/= from Meckson Ndeonasia Shayo was omitted from the cash book of their employer Tumaini Saccos. Both denied the allegation and the prosecution called nine witnesses and tendered two exhibits. At the end of the contested trial, it is only the appellant who was found guilty and convicted. She was sentenced to serve 32 months imprisonment and she was ordered to pay compensation to Tumaini Saccos Tshs. 68,993,455/= being the loss she caused when she was working as a clerk/cashier. The compensation was ordered to be paid after completion of her imprisonment term.

The appellant was aggrieved and filed his appeal to this court which comprised of seven grounds of appeal. These can, however, be summarized into four grounds of appeal as follows:-

1. That the trial court erred in convicting the appellant alone of the offence charged without taking into consideration that the misconduct was done by the whole SACCOS.
2. The trial court misdirected itself on the effect and weight to be given to exhibit P.2 as it failed to evaluate the entire evidence-based on the principle of chain of custody and admissibility of secondary evidence.

3. The trial court failed to consider the contradiction and discrepancies on the prosecution evidence.
4. That the trial court erred for in law for failing to explain to the appellant his right of appeal.

At the hearing, Mr. Oscar Ngole, Advocate appeared for the appellant while Mr. Omari Kibwana, Senior State Attorney appeared for the respondent. The parties were granted leave to dispose of the appeal by way of written submissions.

In the appellant's written submission in support of the appeal, Mr. Ngole submitted on the first ground of appeal that normally a SACCOS is governed by a board and management which include several other persons, and some were also a part of the charge. The counsel submitted when the trial Magistrate found that the whole SACCOS adopted bad conduct then she ought to have punished all of them and not the appellant only. He contended that by doing so the trial court performed a double standard, as the whole board members inclusive the manager was guilty too. He said if they were innocent then the appellant is to be set free because the nature of the conduct in the SACCOS cannot be done with a single person whereby the board is constituted. Mr. Ngole submitted that it was wrong for the trial court to evaluate the evidence from one side in isolation of the other because every single evidence should be weighed with the rest of the evidence. He maintained that according to the bylaws of the Saccos, the manager was a responsible person instead of the appellant to be accountable for.

The counsel submitted that PW9 was just an officer from the police force and investigator but he was not aware of what the accused persons were charged with as reflected on page 107 of typed proceedings. He

submitted that there is nowhere PW9 asserted the receipt, ledger book, report, and deposit receipt which he said to have collected. Mr. Ngole further questioned as to why exhibit P.2 was not tendered by PW9 while he alleged to collect it. He contended that for an exhibit to be admitted in court it should be cleared for admission and to establish a chain of custody. He referred the court to the case of **Paul Maduka and Others vs. Republic, Criminal Appeal No. 110 of 2007 CAT** (unreported), and submitted that all the remarks stated in that case were not even ascertained by the trial court to find whether the appellant was a clerk or accountant. He contended that it is not certain whether the prosecution proved the appellant to be an accountant and not a clerk.

Mr.Ngole submitted that there were contradictions and inconsistency on the evidence of PW3 and PW7 and some of the prosecution witnesses were defending some of the other accused persons.

Mr. Ngole submitted that exhibit P.2 was just a photocopy of the alleged report but DW4 when trying to tender her documents were rejected for the reasons that it was a photocopy and without notice. He contended that if those reasons were alive in the mind of the trial Magistrate then why she didn't apply the same to the prosecution. He further contended that the trial Magistrate intentionally shifted the burden of proof to the appellant as she held that the admission made by the appellant/second accused on her defence is not something to close eyes on. However, the counsel contended that going by the appellant evidence there is nowhere she admitted to having issued any money.

Finally, Mr. Ngole submitted that the appellant was not informed of her right to appeal by the trial Magistrate which according to him rendered

the whole judgment questionable and prayed for the appeal to be allowed and to set the appellant at liberty.

In response, the respondent submitted that all the grounds of the appellant can be crystalized to one single ground that the evidence adduced was not sufficient enough to warrant the appellant conviction.

They submitted that the evidence adduced by the prosecution and then analyzed on page 2,3,4 and 6 of the typed judgment points guilty to the appellant on the charges leveled against her. They contended that even if they say that the appellant was convicted for the faults of the whole saccos still that alone cannot exonerate the appellant from conviction as it is not the principle of the law for offenders to become immune from prosecution and conviction if other co-accused have not being charged or convicted.

They submitted on another aspect of the chain of custody of exhibit P.2, they said that assertion is not supported by court record as there is nowhere in the trial court proceedings shows that exhibit P.2 was a photocopy. They further submitted that exhibit does not change hands easily hence the principle enunciated in the case of **Paulo Maduka** (supra) is distinguishable in this case.

On the ground of contradiction and discrepancies, they submitted that the appellant has failed to pinpoint out the alleged contradiction and discrepancies. They submitted that there was no material contradiction in the prosecution case capable to defeat the roots of the case.

On the ground of failure of the trial court to explain to the appellant right of appeal, they submitted that the record on page 176 shows that the right of appeal was clearly explained. They further submitted that

even if they assume such right was not afforded still one may wonder how the appellant managed to institute this appeal and how far has been prejudiced. Conclusively, they submitted that the grounds raised by the appellant run short of merit and they pray this appeal to be dismissed.

This being the first appellate court, I have a mandate to re-evaluate the evidence before the trial court afresh and to come to my own conclusion. This being a criminal case, the main issue for determination is whether the prosecution established guiltiness of the appellant on the charges leveled against her beyond a reasonable doubt. I have considered the evidence adduced before the trial court, the grounds of appeal, and as well as the written submissions made by both parties to this appeal.

The appellant was charged with various counts of fraudulent accounting contrary to section 317(b) and (c) of the Penal Code. The provision states that:-

*"Any person who, being a **clerk or servant** or being employed or acting in the capacity or a clerk or servant, does any of the following acts with intent to defraud–*

*(b) makes or is privy to making any false entry in a book, document or account; or*

*(c) omits or is privy to omitting any material particular from any such book, document or account,"*

The evidence of the prosecution shows that PW1 and PW2, the cooperative officers' inspectors, were appointed to audit and inspect the account of Tumaini Saccos based on the complaint of mismanagement of funds. According to their investigation, they discovered that there were forgeries on financial books which shows that the money issued or

received does not correspond to the receipt or the balance on the safe. They also found that there was a loan issued to groups without the letter of application. Furthermore, they found out that the appellant was a cashier and she issued a voucher to that effect. That was evidenced by exhibit P.2 which shows all the transactions that the appellant issued. The same was supported by PW3, who was the then-assistant chairperson of the Saccos confirmed it was discovered that some receipts in the cash book figures differ. She said the ledgers differ from what is reflected in the cash book. That was also supported by the testimony of PW4, the loan officer who has the mandate to confirm all payments made to the complainant who said he discovered payment issued to the Kamangara group showing they were given Tshs. 600,000/= but the payment voucher shows were given 6 million which was filed by the appellant. Also, PW5, a member of the Tupendane group testified that they borrowed only Tshs, 500,000/= and it was the appellant who used to issue money to them. They denied having borrowed Tshs. 5 million. Also PW6 a founder of Irana group said it was the appellant who gave them a loan form and after they filled it they were issued with the loan of Tshs. 500,000/= and denied to have requested a loan of Tshs. 1,000,000/= from them. Also, PW7 from the Jitegemee group testified to have been advanced a loan of Tshs. 500,000/= but not Tshs. 1,000,000/=. Also, PW8 testified that when he went to deposit Tshs. 3,000,000/= the money was handed over to the appellant as a cashier but later when he went to collect his money he was shocked to find that the record shows he deposited only 30000/=. The prosecution evidence was cemented by PW9, the investigator who confirmed that the appellant was the one who signed the payment voucher and issued loan money to the groups. The appellant in her

defence she did not deny to make those entries but she maintained that her duty was to record after being instructed by the first accused who was the manager. She admitted that from count one to 10 she recorded in the cash book but it was the 1st accused who issued the money. In my view, the evidence presented by prosecution witnesses proved that it was the appellant who filled the cash book and issued the money to the groups. Her defence that she was instructed by the 1st accused is not supported by any documentary evidence. The appellant being a clerk/cashier she is answerable to all transactions she made in her capacity. She cannot now shift the burden to the 1st accused who was just a manager or other employees of the complainant. She was issuing valid receipts to group members but the fraudulent account in the ledger's book. Therefore there was enough evidence that it was the appellant who made the false entries and her action cannot visit the other employees.

Concern exhibit P.2, the record is very clear that the exhibit was admitted in evidence without being objected by the appellant. The appellant had the service of the learned counsel who knows the procedure better but he did not object to its production. In my view challenging its admissibility at this stage to me, I find it as an afterthought. In the case of **Deus Kavola vs. The Republic, Criminal Appeal No. 142 of 2012, Court of Appeal of Tanzania, at Iringa registry** (unreported) the court held that:-

> *"The law is settled that if the accused person, in the course of trial, intends to object to the admissibility of say a statement/confession, he must do so before it is admitted. (see,* ***SHIHOZE SENI AND ANOTHER V.R*** *(1992) TRL.330,* ***JUMA KAULULE V.R;*** *Criminal Appeal No. 281 of 2006 and* ***NYERERE***

***NYANGUE V.R;*** *Criminal Appeal No. 67 of 2010 (both the latter cases unreported). It is our considered view that objections to the admissibility of Exh. P1 and Exh P2 should have been made under section 169 (1) of the CPA in the course of trial, at which stage the prosecution would have an opportunity under subsection (3) to discharge its obligation of satisfying the trial court that such evidence obtained in contravention of the law should be admitted."*

On the basis of the above principle also I find that the issue of chain of custody as alleged by the appellant's counsel has no basis on reasons that the exhibits were tendered by a competent witness who had a knowledge of it, the same was not objected. Besides the appellant in her defence did not deny making the entries in the cash book. Therefore, the case of Paulo Maduka (supra) is distinguishable from the present case.

Turning to the ground of inconsistency and contradiction, I do agree with the respondent that the appellant has failed to point out the contradiction between PW3 and PW7 as alleged. Even if I discount the evidence of PW3 and PW7, still the evidence of the remaining witnesses suffices to hold a conviction against the appellant. Therefore I don't need to detain myself much on this ground as it has no merit.

On the last ground of failure of the trial court to inform the appellant of her right of appeal, the record shows that soon after the appellant was sentenced, she was informed of her right to appeal. Then she immediately filed a notice of her intention to appeal as reflected on court record on time hence this appeal. Therefore even if agree with the appellant that she was not informed of her right to be heard, still such failure did not occasion any miscarriage to her.

Taking into consideration the totality of the evidence adduced at the trial court, I find no fault with the trial court conviction of the appellant as there was enough evidence implicating her to the offence charged. In that regard, the appeal is hereby dismissed.


**T. MWENEMPAZI**

**JUDGE**

**30/11/2020**

Judgement delivered in court in the presence of the appellant and Ms. Kowero, learned State Attorney for Respondent.

**T. MWENEMPAZI**

**JUDGE**

**30/11/2020**