IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

COURT MARTIAL CRIMINAL APPEAL NO. 4 OF 2020

(Appeal from the decision of the General Court Martial, at Upanga Officers Mess, Ilala, Dar es Salaam, dated 30th July, 2020)

EX-P10677 CAPT. NGOJWIKE

ABDALLAH NGOJWIKE ..... APPELLANT

VERSUS

THE JUDGE ADVOCATE GENERAL..... RESPONDENT

JUDGMENT

Date of Last Order: 08/10/2020

Date of Judgment: 08/12/2020

S.M. KULITA, J.

The Appellant was arraigned before the General Court Martial, at Upanga Officers Mess, Ilala, Dar es Salaam charged with 3 (three) different offences in 17 (seventeen) counts namely *Kumhadaa Raia* (cheating), 10 counts; *Kujipatia Fedha kwa njia ya udanganyifu* (Obtaining Money by False Pretence), 5 counts; and *Kitendo Chenye Kuharibu Murua na Utiifu wa Kijeshi* (Prejudice of good order and indiscipline), 2 counts. The Appellant was acquitted in 15 counts but convicted on 2 counts, to wit *Kumhadaa Raia* contrary to C. 65 (1) of the Defence Force Regulation and Section

304 of the Penal Code [Cap 16 RE 2002] which is the 10th count and *Kitendo Chenye Kuharibu Murua na Utiifu wa Kijeshi* contrary to C.64 (1) of the Defence Force Regulation which is the 17th count. He was convicted and sentenced to be expelled from work.

Aggrieved with the decision of the General Court Marshal on both conviction and sentence the appellant filed this appeal relying on the following points of law;

(i) .....abandoned.....

(ii) .....abandoned.....

(iii) That the trial tribunal erred in law and in facts in admitting the evidence and exhibits without seizure certificate as required by the law.

(iv) That the trial tribunal erred in law and in facts by admitting the electronic evidence without well established chain of custody.

(v) That the trial tribunal erred in law and in facts in convicting and sentencing the appellant without assigning reasons, thereby committing a serious miscarriage of justice in denying the appellant a right to know why he was convicted and/or sentenced.

(vi) That the trial tribunal erred in law and in facts by ignoring the defense case, including the appellant's final

submissions which did not only raise the matters of law to be considered and determined by a competent court of law but which raise glaring doubt in the prosecution case.

(vii) That the trial tribunal erred in law and in facts in convicting and sentencing the appellant basing on the insufficient evidence of the prosecution.

(viii) That the trial tribunal erred in law and in facts by proceeding to hear and determine the trial while it was evident that the court was not independent.

(ix) That the trial tribunal erred in law and in facts by continuously ignoring legal opinion of Judge Advocate and undertaking to determine legal issues which ought to have been determined by Judge Advocate, thus arriving at erroneous decision.

(x) .....abandoned.....

(xi) That the trial tribunal erred in law and in facts by constantly giving inconsistence and conflicting decision.

The appeal was argued by way of written submissions. While the Appellant was represented by Mr. Vedastus Majura, Advocate from

Major Attorneys the Respondent was represented by Captain Katule from the Ministry of Defense and National Service.

In his written submission in respect of ground No. (v) of the Statement of Appeal the appellant's counsel stated that the trial tribunal erred in law and in facts in convicting and sentencing the appellant without assigning reasons, thereby committing a serious miscarriage of justice in denying the appellant a right to know why he was convicted and/or sentenced. He said that it is a settled law that the court martial must assign reasons for its decision. He specified that at page 375 paragraph 2 of the typed proceedings the court just stated "Mahakama katika kufikia maamuzi kwamba mshitakiwa anayo hatia au hana iliangalia uaminifu wa mashahidi, uzito wa ushahidi, vielelezo vilivyotolewa na muunganiko wake....". There were no reasons assigned why the appellant was convicted on the said counts no. 10 and 17.

The Appellant's Counsel cited Regulations 112.40(1) and 112.41(2) of the Defense Forces Regulation stating that the court must provide findings for its decision.

To support his argument he cited the cases of P 8626 ABDUL MUKHUSUM KOMBO V. THE JUDGE ADVOCATE GENERAL (HC) Court Martial Criminal Appeal No. 4 of 2014 and MT 83166 PTE

The Counsel concluded that as the trial Tribunal did not give reasons to justify the conviction and sentence against the appellant the conviction was unfair and unjust. He prayed for this ground of appeal to be upheld.

Replying that ground of appeal the Respondent Counsel, Captain Katule on behalf of the Judge Advocate General stated that Regulations 112.41(2) of the Defense Forces Regulation requires **no further words** to be added in its findings of guilty or not guilty for the accused. He drew the court's attention to the recuirements of Regulation 112.41(2) of the Defense Forces Regulation which provides that except as provided in the sub regulations, and except when a special finding is made under sub regulations 112.42 the finding on each page shall be guilty or not guilty without the addition of further words.

He said that the said principle has been established under the National Defense Act [Cap 192 RE 2002] which is the mother law providing procedures and directives for the Court martial cases. The Counsel is of the view that the trial tribunal was right for not giving reasons on the findings it has made as the said Regulations

112.41(2) requires the Tribunal not to add any further words thereon.

He added that the fact that the term "shall" has been used in the provision of Regulations 112.41(2) thus the said requirement of not adding further words to the findings is mandatory/binding as per section 53 (3) of the Interpretation of the Laws Act [Cap 1 RE 2002].

The Respondent's Counsel concluded his submissions on ground No. (v) of the Statement of Appeal by praying the court to dismiss the same.

Upon going through the submissions of both parties in respect of ground No. (v) of the Statement of Appeal the court has the following observation;

The Respondent's Counsel drew the court's attention to the requirements of Regulation 112.41(2) of the Defense Forces Regulation which provides that the finding on each charge shall be guilty or not guilty without the addition of further words. With due respect, we think that pronouncing verdict of guilty or not guilty without addition of further words does not mean that the reasons for decision should not be given. Regulation 112.41(1) provides;

"On each charge the court shall, subject to paragraph (3) of this sub-regulation, find the accused not guilty, unless it ***concludes*** *that the evidence proves beyond reasonable doubt that the accused committed-*

a. The offence charged

b. .....not relevant .....

either on particulars charged or on the particulars as varied under article 112.42"

The interpretation that we get from the above provision is that the General Court Martial has to find the Accused not guilty unless it concludes that the evidence proves beyond reasonable doubt that the accused committed the charged offence, otherwise, it should find the accused not guilty. The word ***conclude*** there, ordinarily means to arrive at a decision by reasoning or to reach a judgment through reasoning. The law would be absurd if it allowed the trial court to conclude that the evidence proves beyond reasonable doubts that the accused committed the charged offence without giving reasons.

Reasons enhance public confidence in the decision making process. The importance of giving reasons when making a finding of guilty and sentencing cannot be overemphasized. The Court of Appeal of

Tanzania in a case of **HAMIS RAJABU DIBAGULA V. R [2004] TLR 192** observed that;

> *"We have no doubt that this complaint has merit. We have already pointed out, when dealing with the first ground of appeal, that the learned Judge, when he turned to a consideration of the validity or otherwise of the appellant's conviction, merely said that he agreed with the learned state attorney's submission that the prosecution had proved their case beyond reasonable doubt. He made no attempt to consider how the evidence proved each ingredient of the offence the appellant was convicted of, and he gave no reasons for holding that the learned state attorney's submission was well-founded. The necessity for courts to give reasons cannot be over-emphasized. It exists for many reasons, including the need for the courts to demonstrate their recognition of the fact that litigants and accused persons are rational beings and have the right to be aggrieved".*

We subscribe to the provisions of Regulation 112.05(21) (i) and (g) of the Defense Forces Regulation, Vol II (Disciplinary) which states to the effect that where a case for defense has been closed and any further witnesses called by the court have been heard **the court shall close to determine its findings and then reopen**

to pronounce sentence to the accused the finding in each charge.

Generaly, Regulation 112.05 provides the procedures to be followed at the Court Martial like attendance of the prosecutor, the accused's appearance and arraignment, taking oaths, adduction of evidence, verdict and sentences.

According to the Black's Law Dictionary 8th Edition at page 664 the word *"finding"* is used synonymously with the word *"finding of facts"* which is defined to mean *"a determination by a Judge or jury or administrative agency of fact supported by evidence in the record as presented on the trial or hearing".*

We are of the settled view that any judgment is to be supported by evidence on record, the nature of which should be evaluated to constitute the reasons for decision, which for the present case was not done. In **TANZANIA AIR SERVICES LIMITED V. MINISTER FOR LABOUR, ATTORNEY GENERAL AND COMMISSIONER FOR LABOUR [1996] TLR 27** the court stated as a general principle to the effect that;

> *".....where the determination of the rights or obligations of a person is involved,* ***a decision maker must give reasons for the decision". (emphasis is ours)***

The court went further and addressed the issue as to why reasons should be given by referring to writings of experts, including Dr. Mario Gomez's book namely **EMERGING TRENDS IN PUBLIC LAW at page 184-185** where the Learned Author writes;

> *"Reasons indicate that the decision maker has brought his or her mind to be on the subject matter in question. It shows that the decision is not arbitrary or capricious. It boots the integrity of the decision making process if people are told why they were unsuccessful or why a decision had been made in a certain way.* ***Reasons are strong proof that a decision was made fairly taking into consideration all relevant factors and was not motivated by personal factors.*** *Reasons facilitate a subsequent legal challenge to the decision".* ***(Emphasis is ours)***

Failure to assign reasons for the decisions amounts to a miscarriage of justice. Apart from the case of **HAMIS RAJAB DIDAGULA (supra)** this was also held in the following Court Martial Appeals;

- **P 9219 LT ABDON EDWARD RWEGASIRA V. THE JUDGE ADVOCATE GENERAL, High Court of Tanzania, Court Marshal Criminal Appeal No. 4 of 2010 (unreported)**,

- **MT PTE MOLLEL LUKA SOLOMON V. JUDGE ADVOCATE GENERAL, Court Marshal Criminal Appeal No. 1 of 2011 (unreported),**

- **MT 83166 PTE HAMIS ALLY GWILA V. THE JUDGE ADVOCATE GENERAL, Court Marshal Criminal Appeal No. 1 of 2015 (unreported)** and

- **P 8626 MAJOR ABDUL MUKHUSIN KOMBO V. THE JUDGE ADVOCATE GENERAL, Court Marshal Criminal Appeal No. 4 of 2014 (unreported).**

In the instant case there were no reasons assigned on how each and every ingredient of the offence was proved to the standard required in criminal matters like this one.

We are satisfied that the appellant was not accorded a fair tria for non-assignment of the reasons for conviction by the trial tribunal. What is the remedy then, we hold that the fact that the issue is the appellant having unsatisfactory trial, **the remedy is re-trial if there is a likelihood of the appellant to be convicted, otherwise the appellate court has to acquit the Appellant.** The defunct Court of Appeal for East Africa, in **FATEHALI MANJI V. THE REPUBLIC, (1966) EA 343** provided guidance on determination of proper situations when a retrial can be ordered

by an appellate court. The question before that Court was whether the order for retrial by the High Court was justified or not, and it was held 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 insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial;*** *even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;* ***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 ours)***

The appellant has been convicted on the 10th count - *Kumhadaa Raia* (cheating) and 17th count - *Kitendo Chenye Kuharibu Murua na Utiifu wa Kijeshi* (Prejudice of good order and indiscipline). When you go through the records you can find that PW11 one Grayson Elias Likali who is the victim in the 10th count tendered the academic certificates of his own (Exh. PE 23A-23K) at the trial

tribunal but he was not a right person for that purpose as far as the nature of the case is concerned.

The evidence, particularly that narrated by MT 86281 Cpl. Kasawa Anderson (PW1) who was the Investigation Officer for this matter shows that he recovered the bag with the victims' certificates. He said that it is the Appellant's wife who had dropped the said bag at 671 Regt. Ubungo before he had recovered it. However, during his testimony Cpl. Kasawa Anderson (PW1) never tendered as exhibits the said bag nor the certificates. PW11 who is said to be among the persons submitted their certificates to the appellant tendered his certificates (Exh. PE 23A-23K) to court by himself and according to his testimony the said certificates were submitted to the Appellant through his late brother namely Peter Mgwala Likali.

In the above scenario we have notice two legal defects which demolish the evidential value of the prosecution case in respect of count no. 10. First, PW11 was not a proper witness to tender those certificates though alleged to be owned by him. The issue is that those certificates which were alleged to be in possession of the Appellant's wife who then dropped them somewhere at 671 Regt. Ubungo before they were recovered by PW1 were in that person's (PW1's) possession. The records transpire that neither PW1 nor PW11 testified as to how the same went into possession of PW11.

We expected PW1 to tender as exhibit the said bag and things recovered therefrom which includes the PW11's certificates, if they were among the recovered ones.

Secondly, the records transpire that PW11 mentioned his late brother, Peter Mgwala Likali as the one who had submitted his certificates to the Appellant. Therefore, the prosecution's allegation that PW11's certificates were actually handled to the Appellant is nothing but hearsay, the evidence that has no legal value before the eyes of law.

Those evidential defects in the prosecution case at the General Court Marshal as noted from the records are sufficient enough for us to declare that the Prosecution case against the Appellant was not proved beyond all reasonable doubts. The trial court was therefore wrong to convict the Appellant on the 10th count.

Apart from the 10th count in which the Appellant was convicted for ***cheating*** PW11, the appellant was also convicted for ***Prejudice of good order and indiscipline*** which was the 17th count. The said 17th count cannot stand alone in the absence of any wrongful act (another offence) committed by the same accused person which prejudiced the good order or led to indiscipline. The fact that this appellate court has declared that the Appellant did not commit

cheating (kumhadaa ra'a) against PW11 the offence of *Prejudice of good order and indiscipline* (Kitendo Chenye Kuharibu Murua na Utiifu wa Kijeshi) cannot stand.

From the aforesaid analysis we are of the view that the proper remedy for this appeal is not a re-trial but **acquittal** of the Appellant, and we so order. As ground No. (v) is sufficient to dispose of the matter the **appeal** is hereby marked **allowed.**

B.S. MASOUD

JUDGE

08/12/2020

Y.J. MLYAMBINA

JUDGE

08/12/2020

S.M. KULITA

JUDGE

08/12/2020