IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 6 OF 2020

(Arising from the District Court of Hanang in Criminal Appeal No. 13 of 2019; Originating from the Primary Court of Katesh in Criminal Case No. 117 of 2019)

CONSTANTINO MATHIAS ..... APPELLANT

VERSUS

JOSEPHINE SHIJA ..... RESPONDENT

JUDGMENT

ROBERT, J:-

The Appellant was charged and convicted of obtaining money by false pretence contrary to section 302 of the Penal Code, Cap. 16 R.E.2002 at the Primary court of Katesh in the District of Hanang. He was sentenced to serve six months imprisonment or pay a fine of TZS 100,000/=. He was also ordered to pay compensation amounting to TZS 2,892,000/=. Aggrieved, he appealed unsuccessfully to the District Court of Hanang. Still aggrieved, he preferred an appeal to this court.

Briefly, the prosecution case was to the effect that between August to November, 2017 at the village of Masakta, Hanang District in the Region of

Manyara the Appellant with intent to defraud, obtained TZS 2,892,000/= from the Respondent as payment for sale of his house and a plot of land located in the village of Homari, Babati District in Manyara region and sold the same house to another person by the name of Joseph Margwe.

At the trial, the Appellant denied to have received funds from the Respondent in order to sell the said house to her but admitted that he sold the said house to Joseph Margwe. The trial Court found the Appellant guilty of the offence charged and sentenced him to serve six months imprisonment or pay a fine of TZS 100,000/=. He was also ordered to pay compensation amounting to TZS 2,892,000/=. Aggrieved, he appealed unsuccessfully to the District Court. Still aggrieved, he appealed to this court armed with eight grounds which reads as follows:

1. *That the Honourable Resident Magistrate of the first appellate District Court erred in law and fact in finding that all grounds of appeal therein were centred on one issue that the trial court erred in law for convicting the Appellant without sufficient/enough evidence.*
2. *That the Honourable Resident Magistrate of the first Appellate District Court erred in law and fact, and misdirected himself in failing or disregarding to cure misdirection and errors of the trial court, which failed to consider defence evidence before concluding to convict the Appellant.*

3. *That the Hon. Resident Magistrate of the first appellate District Court erred in law and fact in finding that the trial court did consider and evaluate the evidence of both parties.*
4. *That the Hon. Resident Magistrate of the first appellate District Court misdirected himself in holding/stating that normally appeal is on point of law.*
5. *That the Hon. Resident Magistrate of the first appellate District Court erred in law and fact in acceding to the trial court's reliance on defective, unreliable and incredible document produced by the Respondent.*
6. *That the Hon. Resident Magistrate of the first appellate District Court ~~erred in law in failing to detect, attend and cure misdirection of the~~ trial court which did not consider and properly evaluate the defence evidence before it concluded to convict the Appellant.*
7. *That the Hon. Resident Magistrate of the first appellate District Court erred in law in failing to detect glaring biasness of the trial court which, inter alia, ordered that the Appellant must refund the Respondent's money before paying the fine.*
8. *That the Hon. Resident Magistrate of the first appellate District Court erred in law in upholding erroneous judgment of the trial court which totally failed to address the main fact and glaring discrepancy that the charge greatly differ with the prosecution evidence, on the important material fact concerning when the offence was done, among others.*

When this matter came up for hearing both parties were present in person, unrepresented. The court ordered the appeal to be argued by way of written submissions as prayed by parties.

Submitting in support of the appeal, the Appellant prayed to argue the first ground of appeal separately whereas the second, third, fourth and sixth grounds were argued together. He also argued the fifth and eighth grounds of appeal together while the seventh ground was argued separately.

Amplifying on the first ground of appeal, he faulted the District Court for making a finding that his four grounds of appeal were centered on one issue that the trial court erred in law for convicting the Appellant without enough evidence. He argued that by reducing all grounds to one issue the District Court did not consider the issue of biasness and the one faulting the trial court for being misdirected in failing to assess the quality of evidence on record. He maintained that the District Court was duty bound to consider all issues brought before it.

Coming to the second, third and fourth grounds of appeal he faulted the District Court, as the first appellate court, for failure to re-assess the

evidence on record as a result it fell into the same error and misdirection as the trial court. He argued that the District Court overlooked the fact that page 7 of the trial court judgment considered prosecution evidence only and convicted him without assessing defence evidence. He stated further that the District Court overlooked the fact that the trial court did not consider and assess the evidence of DW2. He made reference to the cases of Hussein Idd and another v. R (1986) T.L.R at 168; Deemay Daati and Two Others v. R (2005) TLR 132; and Ndizu Ngasa v. Masisa Magasha (1999) TLR 202 in support of his argument.

Equally, he submitted that the sixth ground of appeal has merit because the District Court failed or declined to notice the misdirection of the trial court and to look at the evidence on the reason that normally appeals are on point of law and further that the evidence on record was considered by the trial court. He argued that there was glaring misdirection on the trial court which required the District Court to look at the evidence on record of the trial court and make its own finding of fact. He made reference to the case of Ndizu Ngasa v. Masisa Magasha (1999) TLR 202 where the court held that "the first appellate court has a duty to re-assess the evidence of the trial court".

Submitting on the fifth and eighth grounds he argued that, the trial court admitted Respondent's documentary evidence at page 4 of the typed proceedings without asking the Appellant if he had any objections or reading the contents of the said documents.

He noted further that there was discrepancy in the date of the alleged offence between what is stated in the particulars of offence in the charge sheet and what was stated in the testimonies by the prosecution witnesses, PW1 and PW2. He clarified that the charge sheet indicated that an offence was committed in August to November, 2017 but during cross-examination both PW1 and PW2 testified that the Appellant received money from the Respondent on 3/1/2018. He made reference to the case of Abel Ramadhan @madenge v. R, Cr. App. No. 25 of 2015, High Court of Tanzania at Shinyanga (Unreported) and Mohamed Kaningo v. R (1980) TLR 179 to buttress his argument.

Submitting on the seventh ground of appeal, he argued that the trial court was biased in ordering that refund/ restoration of 2,892,000/= to the Respondent must be paid before paying the fine. He maintained that the order was not only irregular but was an obvious biasness on the part of the trial court as it intended to deprive the Appellant's freedom, as it

caused hardship to the Appellant who had no option but to be imprisoned for six months as he did not afford to pay immediately. He argued that the trial court's order violated sections 5(1)(d), (3) and (5) of the Third schedule to the Magistrates' Court Act, Cap. 11 R.E. 2002. He faulted the first appellate court for failing to discern the glaring and obvious irregularity.

In reply, the Respondent started by pointing out what he considered to be an irregularity portrayed and lucidly disclosed in the Appellant's written submission in chief which is that the submission attached a copy of judgment and marked as annexture CM1. He argued that annextures are part of evidence relied by a party in a suit and can only be attached onto pleadings and not on submissions. He prayed that the annexed judgment be expunged and disregarded by the court. He referred the court to the case of Gervas Masome Kulwa v. The Returning Officer and Others (1996) TLR 320 and the case of Tuico @ Mbeya Cement Company Ltd v. Mbeya Cement Company Ltd and Another (2005) TLR 41 in support of her argument.

Responding to the first ground of appeal he argued that, there is nothing cogent stated in the first ground of appeal to make the court

reverse the decisions of the lower courts. He stated that the grounds of appeal raised in the District Court appeared to be different but after being submitted the District Court found them to be centred on one subject which is conviction of the Appellant without enough evidence. On the issues of biasness and misdirection raised by the Appellant he argued that, the Appellant failed to clarify how the trial magistrate was biased and how she misdirected herself.

Reacting to the second, third, fourth and sixth grounds of appeal, he argued that in criminal trials the burden of proof lies on the prosecution and the court is required to deal with both the prosecution and defence evidence before reaching into a conclusion. He maintained that, in the instant case the conviction and sentence entered against the Appellant was because of the strength of prosecution evidence and not because of the weakness of defence evidence as alleged by the Appellant. He made reference to the case of John s/o Makolobela Kulwa Makolobela & Eric Juma alias Tanganyika vs Republic (2002) TLR 296 where this court held that:

"a person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal

offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt"

Based on the reasons given he submitted that the grounds of appeal are not worthy of reversing the judgment of the lower courts.

Replying to the fifth and eighth grounds of appeal he argued that, according to the Primary Court Criminal Procedure Code, (3rd Schedule of the Magistrates' Courts Act (Cap. 11 R.E. 2019) which guides criminal trials in primary courts, specifically paragraph 35 which deals with adducing of evidence and examination there is no requirement that the contents of a document admitted as exhibit must be read to the accused. However, he argued that at page 4 of the trial court proceedings the Appellant was recorded to have no any argument against the document tendered.

Responding to the discrepancy on the date of commission of the alleged offence between the charge sheet and that in the testimonies of PW1 and PW2, he argued that the gist of the prosecution evidence was on the offence committed by the Appellant which was proved by PW1 and corroborated by PW2. He maintained that the fact that the charge sheet

indicated that the offence was committed between August to November, 2017 while prosecution evidence testified that the accused received money on 3/1/2018 is a minor discrepancy which does not go to the root of the case. He stated that the trial magistrate did not address the discrepancy because it was minor. He made reference to the case of **Mohamed Said Mtula vs Republic (1995) TLR 3** where the Court of Appeal of Tanzania held that:

> *"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter".*

Further to that, he made reference to the case of Shukuru Tunugu vs the Republic, Criminal Appeal No. 243 of 2015 (unreported) in support of his argument and implored the court to disregard the fifth and eighth grounds of appeal.

Responding on the seventh ground of appeal he argued that, allegations of biasness are mere accusations which needs to be

disregarded by the court. He maintained that the order of restoration given by the trial court has no any element of biasness and further that the sentence given to the Appellant is very lenient compared to the sentence prescribed by law for that offence.

Based on the stated reasons he prayed for the appeal to be dismissed in its entirety.

In a short rejoinder, the Appellant responded to the issue of the alleged irregularity caused by attachment of a copy of judgment as annexture CM1 to the written submissions. He argued that, the case of TUICO at Mbeya Cement Company LTD cited by the Respondent prohibits introduction of evidence through annextures attached to written submissions except extracts from judicial decisions or textbooks. Therefore, annexture CM1 being a copy of unreported judicial decision is not prohibited from being attached as annexture to the written submissions.

The Appellant reiterated what he submitted in his written submission in chief in support of this appeal.

Having heard submissions from both parties, I will now make a determination on whether this appeal has merit.

I will start with the fifth and eighth grounds of appeal as I consider them capable of disposing of this appeal. The Appellant argued these grounds together, he faulted the courts below for relying on exhibit "A" which was admitted by the trial court without asking if the Appellant (accused then) had an objection against the documents and further that the contents of the document were not read out after being admitted. He also faulted the courts below for failure to address the discrepancy between the particulars of offence as stated in the charge sheet and the prosecution evidence in respect of when the alleged offence took place.

With regards to exhibit A, this court has noted at page 4 of the trial court proceedings that when SU1 tendered what she referred to as exhibit "A" the trial court proceeded to admit and mark it as exhibit "A" without asking if the Appellant (accused then) had any objection to the document. Further to that, the contents of the said document were not read out to the Appellant. It is a trite law that whenever a document is intended to be introduced in evidence, it should be cleared for admission, properly admitted and then be read out in court. The Respondent's argument that

there is no requirement in the Primary Court Criminal Procedure Code for the contents of the admitted documents to be read to the accused person comes from a point of obliviousness.

In the case of **JUMANNE MOHAMED & OHERS vs REPUBLIC, Crim. App. No. 534 of 2015,** it was held that:-

> "It is necessary to read the document to the accused person after its admission as exhibit. In all fairness an accused person is entitled to know the contents of any document tendered as exhibit to enable him marshal a proper defence wherever they contain any information adversely affecting him."

Having faulted the manner in which the exhibits were admitted in court in the fifth ground of appeal, I find that the said exhibit could not be relied by the court to prove the offence charged and must be expunged from the court records.

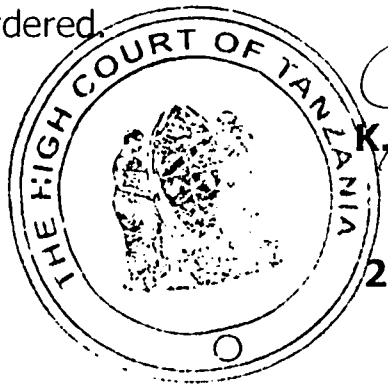
On the discrepancy between what is alleged in the charge sheet and what is stated in the prosecution evidence, after perusal of the records, I have noticed that, while the charge sheet alleged that the offence took place between August to November, 2017, the prosecution evidence

particularly, SU1 and SU2, who testified in respect of this matter, stated that the Appellant received money from the Respondent on 3rd January, 2018. It is obvious that the evidence adduced did not conform to the particulars of offence as alleged in the charge sheet. Although the Respondent argued that the trial court did not address this discrepancy because it is minor, this court holds a contrary view. This is a material discrepancy as it goes to the root of the case by touching on the particulars of the alleged offence as stated in the charge sheet. This court finds that the evidence adduced by prosecution witnesses do not support the particulars of offence as stated in the charge sheet and therefore cannot form the basis of conviction in this case.

In the absence of evidence connecting the Appellant to the alleged crime which took place between August to November, 2017 this court cannot sustain the conviction of the trial court. In view of this, I find no pressing need to deal with the remaining grounds of appeal.

All said, I allow this appeal for the reasons given, quash the conviction and set aside the sentence and orders of the courts below. The appellant should be released forthwith from prison unless he is otherwise lawfully held.

It is so ordered.



K.N.ROBERT

JUDGE

29.01.2021