IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 117 OF 2020

FANUEL MAGESA ..... 1ST APPELLANT

THOBIAS RYOBA ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Serengeti at Serengeti in Criminal Case No. 2 of 2018)

JUDGMENT

21st May and 4th August, 2021

KISANYA, J.:

Fanuel Magesa and Thobias Ryoba (the appellants) were arraigned in the District Court of Serengeti at Mugumu of twenty nine counts of the offence of use of documents intended to mislead principal contrary to section 22 of the **Prevention and Combating of Corruption Act, No. 11 of 2007** (**the PCCA**) and 29 counts of forgery contrary to section 333, 336(a) and 337 of **the Penal Code,** Cap. 16, R.E 2002.

The facts leading to the appellants' arraignment can be briefly stated as follows: The appellants were employees of Serengeti District Council as Chairman of MCU Hamlet and Chairperson of Mugumu Ward Agro Inputs Voucher Committee respectively. It was the prosecution case

that between December, 2010 and March 2011, the appellant were provided with the agricultural subsidies vouchers for purposes of distributing them to the farmers. Instead of distributing the vouchers to the farmers, the appellants prepared false documents purporting to have been signed by the farmers whose name appeared therein to acknowledge receipt of the respective vouchers. It is the said documents which formed the basis of the charges preferred against the appellants.

During the trial, the prosecution relied on the evidence of three witnesses. These were **Ladislaus Ibrahim (PW1)** an investigator from the Prevention and Combating of Corruption Bureau, **Pilly Ncheleli (PW2)** who is one of the farmer whose name appeared in one of the forged vouchers (**Exhibit PE3**) and **No.F17854 Insp. Fatuma Rajabu Mbwana (PW3),** a police officer from FB Department. As hand writing expert, PW3 prepared and tendered a report showing that the signature appearing on Exhibit PE3 were all forged. The prosecution also relied on the following documentary exhibits:

1. **Exhibit PE1**- Letters with Ref. No. PCC/MU/SER/RB/06/2012/04 dated 20th March, 2013 titled "*Hati ya Kupatiwa Nyaraka*" and Ref. No. PCC/MU/ENQ/10/2013 titled "*Hati ya Uchukuaji Vielelezo*";

2. **Exhibit PE2**- Letters with Ref. No. PCC/MU/ENQ/10/2013 dated 22nd July, 2013 and Ref. No. DM/S/15/11/28;
3. **Exhibit PE3** - Twenty nine agricultural input vouchers;
4. **Exhibit PE4** - Twenty nine specimen signature of the 1st accused.
5. **Exhibit PE5** - Report of Forensic Bureau; and
6. **Exhibit PE6** – Cautioned Statement of the 1st accused (now 1st appellant).

In their respective defence, the appellants denied to have committed the offence.

Having considered the prosecution and the defence evidence, the trial court found that the case against the appellants had been proved beyond reasonable doubt. Therefore, both appellants were convicted. Upon conviction, they were sentenced to three years jail term or pay a fine of TZS 1,000,000/=in default, on each count. In addition, each of them was ordered to pay compensation to tune of TZS 3,000,000 to the Government of the United Republic of Tanzania.

The appellants were aggrieved by the decision of the District Court of Serengeti hence, this appeal. Their advocate lodged a petition of appeal containing five (5) grounds as follows:

1. That, the trial court erred in law and in fact for failure to notice that the appellant could not prepare documents and used them to mislead their employer without the prosecution bringing evidence to proof that there was actual loss to the employer.
2. That, the offence of which the appellants were convicted with were not proved to the required standard in criminal cases.
3. That, the trial magistrate in convicting the accused person with the offence charged, failed to consider the appellants defence.
4. That, the trial magistrate wrongly awarded compensation to the respondent Republic without justifiable reason and thus the appellant received double punishment.
5. That, the trial magistrate wrongly awarded compensation to the Republic and forced the appellants to pay it without following proper procedure of awarding compensation in economic offence.

Before me, Mr. Cosmas Tuthuru, learned advocate, appeared to argue the appeal on behalf of the appellants while the respondent was represented by Mr. Nimrod Byamungu, learned State Attorney. Out of the five grounds, Mr. Tuthuru dropped the third ground of appeal. Upon noticing that all documentary evidence were not read to the appellants

after being admitted, I implored the learned counsel for the parties to address the Court on its effects in the proceedings at hand.

Submitting in support the first and second grounds and the issue raised by the Court, Mr. Tuthuru argued that the prosecution's case was not proved beyond reasonable doubt because **Exhibits PE1, PE2, PE3, PE4** and **PE5** were not read over upon being admitted in evidence. He contended that the appellants were not made aware of the contents of the said exhibits. Relying on the decision in **Idd Abdallah @ Adam vs Republic**, Criminal Appeal No. 202 of 2014, CAT at Mwanza (unreported), the learned counsel submitted that the omission to read the document after admission is a fundament irregularity and that the proper recourse is to expunge the said exhibits from record.

The learned counsel went on to contended that, upon expunging Exhibits **PE1, PE2, PE3,PE4** and **PE5**, there remain no evidence to prove the offences levelled against the appellants.

As to the 4th and 5th grounds, Mr. Tuthuru contended the trial court erred by issuing the compensation order. Citing section 61(1) of the Economic and Organized Crime Control Act [Cap. 200, R.E. 2019], Mr. Tuthuru argued that compensation is issued when there is loss caused by the accused. He contended that the prosecution did not prove loss

occasioned by the appellants. That said, the learned advocate urged me to allow the appeal, quash the conviction and set aside the sentence and compensation order.

In his reply submission, Mr. Byamungu readily conceded that **Exhibits PE1 to PE5** were not read over to the appellants. He also moved to expunge the said exhibits on the ground that, the content therein was not made known to the appellants. The learned State Attorney was at one with Mr. Tuthuru, if **Exhibits PE1 to PE5** are expunged, there remain no evidence to prove case against the appellants.

With regard to the fourth and fifth grounds, Mr. Byamungu argued that compensation is not double punishment.

In view of the failure by the trial court to read over the documents to the appellants, the learned State Attorney invited me to make an order for retrial. He was of the considered view that, the prosecution had proved its case beyond all reasonable doubts.

Rejoining, Mr. Tuthuru reiterated that the prosecution case was not proved. Therefore, he asked the Court not to order retrial. He also submitted that the appellants had already paid fine and compensation as ordered by the trial court.

I have keenly pondered the submissions on the appeal and all cited references. Starting with the issue raised by the Court, *suo motu,* the issue for determination is whether **Exhibits PE1, PE2, PE3, PE4** and **PE5** were properly admitted into evidence. As indicated earlier, the learned counsel for both parties are at one that upon being admitted **Exhibits PE1, PE2, PE3, PE4** and **PE5** were not read aloud in Court. There is a plethora of authorities on the settled law that, the omission to read a document admitted in evidence is a fatal irregularity because it denies the parties an opportunity to understand the contents of the admitted exhibits. Apart from the case of **Idd Abdallah @ Adam vs Republic** referred to me by Mr. Tuthuru, other cases where similar position was stated include, **Abdallah Nguchika vs Republic**, Criminal Appeal No. 182 of 2018, **Sylvester Fulgence and Another vs Republic**, Criminal Appeal No. 507 of 2016 and **Emmanuel Kondrad Yaspitati vs Republic**, Criminal Appeal No. 296 of 2017 (all unreported).

The above cited authorities went on to hold that, the proper recourse in the circumstances where an admitted document is not read aloud in court as rightly argued by both counsel is to expunge the respective document. Therefore, guided by the settled law, letters Ref. No. PCC/MU/SER/RB/06/2012/04, dated 20th March, 2013 titled "*Hati ya*

Kupatiwa Nyaraka" and letter Ref. No. PCC/MU/ENQ/10/2013 titled "*Hati ya Uchukuaji Vielelezo* (**Exhibit PE1**); letters Ref. No. PCC/MU/ENQ/10/2013 dated 22nd July, 2013 and Ref. No. DM/S/15/11/28 (**Exhibit PE2**); twenty nine agricultural input vouchers (**Exhibit PE3**); Twenty nine specimen signature of the 1st appellant (**Exhibit PE4**); and the Report of Forensic Bureau; (**Exhibit PE5**) are hereby expunged.

Having expunged Exhibits **PE1 to PE5**, what remains is oral testimonies adduced by PW1, PW2 and PW3 and the cautioned statement of the 1st appellant (**Exhibit PE6**). I agree with the learned counsel for both parties, the remaining evidence was not sufficient to prove the offences of forgery and use of documents intended to mislead the principal. This is so because all counts preferred against the appellants were based on the vouchers (**Exhibits PE3**) which alleged to have been forged by the appellants and used to mislead the principal. The prosecution also intended to rely on the specimen signature and report of forensic bureau to prove that said voucher (**Exhibit PE3**) were all forged. For that reason, in the absence of **Exhibits PE3, PE4** and **PE5,** all counts preferred against the appellants were not proved.

Even if the expunged exhibit were to be considered, I find merit in the first and second ground of appeal that, the prosecution did not prove

its case beyond all reasonable doubts. As stated earlier, the prosecution case was to the effect that the appellants committed the offences of forgery and use of documents intended to mislead the principal.

With regard to the counts of use of documents intended to mislead the principal, it was predicated under section 22 of the PCCA which provides:

> *"**A person who knowingly gives to an agent or an agent knowingly uses with intent to deceive, or defraud his principal any receipt**, account or other documents such as voucher a proforma invoice, an electronic generated data, minutes **relating to his principals affairs or business and which contains any statement which is false or erroneous or** defective in any material particular and **which to his knowledge is intended to mislead the Principal** commits an offence and shall be liable on conviction to a fine not exceeding seven million shillings or to imprisonment for a term not exceeding five years or to both." (*Emphasize supplied).

In this case, the prosecution alleged that, the appellants with intent to defraud or deceive their principal, Serengeti District Council, they knowingly used an agro inputs vouchers (**Exhibit PE3**) which had false material particulars purporting to show that the persons named therein received the respective agro input with value shown therein, the fact they

knew to be false and which to their knowledge was intended to mislead their principal. However, appellants' principal to wit, Serengeti District Council was not called upon to testify how the appellants used the forged voucher and how the Council was misled by the said voucher. In my view, PW1's being an investigator, his evidence was not sufficient to prove the offence.

As that was not enough, save for PW2, the persons whose names and signatures appear in the forged vouchers were not called as witnesses. The reasons for not calling them were not stated by the prosecution. There was a need of calling them to state that fact. This is so when it is considered their specimen signature were taken to the Forensic Bureau for examination. It is my considered view that the said farmers were material witnesses to prove the counts of use of documents intended to mislead principal and forgery. Had the trial court considered this fact, it would have drew adverse inference against the prosecution and arrive at the finding that the prosecution had not proved its case.

I have also considered that the prosecution called PW2, who was one of the farmers. He testified that the signature appearing on voucher No. 15635721 was not his. It is on record that PW2 testified at the time when the forged voucher and his specimen signature had been admitted

in evidence. Nothing showing that the said exhibits, the forged voucher in particulars was shown to him. Therefore, it is not known whether PW2 was referring to the signature appearing on the voucher which has been tendered in evidence.

In that regard, I am of the considered view the evidence adduced by the prosecution was not sufficient to prove the counts of use of documents intended to mislead the principal and forgery. Therefore, the remaining grounds of appeal which are premised on the compensation order is rendered nugatory.

For the reasons deliberated herein above, I hereby allow the appeal, by quashing the conviction and setting aside the sentence as well as orders thereto. The settled law as expounded in **Fatehali Manji versus Repulic** (1966) E.A 343 requires that a retrial be ordered only when the interests of justice requires it. Upon being satisfied that there was insufficient evidence, I make no order for trial *de-novo*. In consequence, I order the monies paid by the appellants as fine (in lieu of imprisonment) and compensation to be paid back to them. It is so ordered.

DATED at MUSOMA this 4th day of August, 2021.

E.S. Kisanya
JUDGE

Court: Judgment delivered this 4th day of August, 2021 in the absence of the appellants and in presence of Nimrod Byamungu, learned State Attorney for the respondent. BC Simon present.

E. S. Kisanya
JUDGE
04.08.2021