

**IN THE HIGH COURT UNITED REPUBLIC OF TANZANIA
(TANGA DISTRICT REGISTRY)**

AT TANGA

CRIMINAL APPEAL NO.24 OF 2020

(Arising from Criminal Case No. 01 of 2018 of Handeni District Court)

SARAH SAMWELI SHEMEMBA.....1ST APPELLANT

JOYCE D. TEMU.....2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

MKASIMONGWA, J.

Sarah Samweli Shempemba and **Joyce D. Temu** (First and Second Appellant, respectively) stood before Handeni District Court charged with separate offences. Whereas the first Appellant was charged with two counts namely; Use of Documents to Mislead Principal Contrary to Section 22 of the Prevention and Combating of Corruption Act No. 11 of 2007 and Embezzlement and Misappropriation contrary to Section 28 (1) of the Act, the Second Appellant stood charged with Aiding and Abetting contrary to Section 30 of the Act. They were convicted of the offences as charged save for the First Appellant who was found not guilty of the second count hence acquitted.



After it had considered the fact that the convicts were first offenders, the trial Court passed a sentence stating as follows:

"Therefore, I sentence all of them to pay fine Tshs. 1,000,000/- or serve four (4) years imprisonment in default"

Going by the record, the Appellants each paid the fine and were, respectively issued with Exchequer Receipt Voucher No. 27265147 and 27265148 valued at Tshs. 1,000,000/=

The Appellants were aggrieved by both the conviction and sentence imposed by the trial Court, hence they preferred this appeal challenging the two. In the Joint Petition of Appeal filed the Appellants listed three grounds which are:-

- 1. That, the trial court erred in law and fact to convict both appellants, while the respondent did not prove the matter beyond reasonable doubt.*
- 2. That, the trial court erred in law and fact to convict both Appellants based on the testimony of prosecution's witnesses while are not corroborated.*
- 3. That, the trial court erred in law and fact by delivering judgment without considering the strong evidence adduced by the Appellants.*

On the date the Appeal came for hearing before me, Mr. Mathias Nkingwa (Advocate) and Ms. Elizabeth Mhangwa (State Attorney) appeared



on behalf of the Appellants and Respondent Republic, respectively. The two learned counsels argued their cases and before starting the argument, let the facts of the case be briefly stated. They are as that: The First Appellant is the Academic Education Officer (Primary School) whereas the Second Appellant is a Caterer whose business she named "My Choice Café". The later was engaged to provide food services to Handeni District Council in case of need. On 01/09/2016 the First Appellant applied from the Council for a sum of Tshs. 5,000,000/= (five million) Special Imprest which was dully granted for purposes of *"kugharamia chakula kwa waandaaji shughuli za mitihani DRS VII, pamoja na dharura"* The amount was eventually on 08/09/2016 deposited in the first Appellant's personal Bank Account No.41502401521 operated by the National Microfinance Bank (NMB) and that it was fully withdrawn from the Account by her on 09/09/2016. The amount was exhausted and among the payments it covered is for Tshs. 3,829,000/= which was paid to the Second Appellant for food services provided. According to Abihudi Kitunga (PW4) the thenAccountant working with Handeni District Council, the first Appellant properly retired the imprest vide a Journal Voucher **(Exhibit P4)**. Moses Herman Ngoma (PW3) and Subira Kimweri (DW2) were among the Primary School



Teachers working with Handeni District Council who attended the Seminar conducted to teachers who were to supervise the 2016 STD VII Exams in the District with a view to equipping them for the exercise. For that purpose PW3 was paid Tshs. 60,000/= cash allowance being per diem (Tshs. 40,000/=), Transport allowance (Tshs. 10,000/=) and meal allowance (Tshs. 10,000/=) whereas DW2 was provided with actual meal served by the Second Appellant. Hamdani Msenga (PW5), the PCCB Investigator at Handeni got information that the first Appellant, an Education Officer at Handeni District Council, did abuse her position and misused the money entrusted to her as special imprest. He reported of the information to his Superior and started to investigate on the matter in which case he got the Imprest Request Form, a list of teachers who attended the seminar and a receipt valued at Tshs 3,829,000/= issued by My Choice Café. He interrogated and recorded the Second Appellant's Cautioned Statement. Patrick Katemba (PW6) an Investigation Officer working with the PCCB also interrogated the First Appellant. The Appellants were then charged with the offences as aforeshown.

In the course of hearing the case, the prosecution tendered various documents to form part of the evidence and they were admitted as follows.



The First Accused's Bank Account Bank Statement (**Exhibit P1**); The Pay List of those people who attended Seminars (**Exhibit P2**); Payment Voucher (**Exhibit P3**); Journal Voucher dated 08/09/2016 (**Exhibit P4**); The Second Appellant's Cautioned Statement (**Exhibit P5**) and the First Appellant's Cautioned Statement (**Exhibit P6**). The record is silent if these exhibits were read to the Court upon being admitted in evidence.

On being invited by the Court to argue the Appeal, Mr. Nkingwa argued all three grounds of appeal. In respect of the first ground, Mr. Nkingwa submitted that the case against the accused persons was not proved beyond all reasonable doubt. He said that the first appellant was charged with and convicted of the offence of Use of Documents to Mislead Principal. The Prevention and Combating of Corruption Act No. 11 of 2002 under its Section 3 of the Act defines, among others, the term "Principal" to include the employer, beneficiary under trust etc. In the matter at hand there was no "Principal" called to testify to the Court. In this case, the District Executive Director for Handeni District Council or even the District Education Officer for Handeni District Council was called to testify to the Court if he or she was misled by the first appellant. All documents tendered to the Court as exhibits were signed by first appellant and approved by the



Principal. In evidence Jacob Sungura (DW1) the then Handeni District Council's Internal Auditor and Abihudi Kitunga (PW1) the Handeni District Council Accountant confirmed that all the required procedures in respect to the issuance and use purpose of the imprest money advanced to the first Appellant as Imprest were adhered to. There was no, according to Mr. Nkingwa, Audit Report produced to the court to prove the contrary.

As to the tendered documentary exhibits, Mr. Nkingwa submitted that the exhibits were not procedurally admitted. He said, going by the proceedings and in particular at page 17 of the typed copy of the proceedings witness did not tell the Court as to how he identified the exhibits before it was tendered and admitted in evidence.

Regarding to the Second Appellant, Mr. Nkingwa stated that she (Second Appellant) was charged with an offence established under Section 30 of the Prevention and Combating of Corruption Act. The learned advocate submitted that since the first appellant did comply with all the requirements for obtaining food services from the second Appellant the later did not commit any offence, particularly where she exactly provided services in accordance with the order pressed by the first Appellant.



In respect of the second ground of appeal, Mr. Nkingwa contended that going by the testimonies of PW1, PW2, PW3, PW4 and PW6, it was proved that the first appellant did duly comply with requirements for acquiring the Imprest, its expenditure and requirements for retiring it. It is also clear that the second Appellant delivered the food services as per the order pressed by the first Appellant. If there were any contradictions, such contradictions were curable administratively for they did not amount to a crime. Mr. Nkingwa submitted that a person is not guilty of a criminal offence because his defence is not believed but he/she is convicted of the offence on the strength of the prosecution evidence. He referred the Court to the case of **John Makolobela v. R** [2002] TLR 296 to cement his argument.

Based on the above submission, Mr. Nkingwa prayed that the Court the Appeal should be allowed and therefore the judgment of the lower Court be quashed and the sentence set aside. Consequently the appellants should be acquitted. The learned counsel added that where the Court finds the procedural defects highlighted are material an order be given that the case be tried *denovo*.

A handwritten signature in blue ink, appearing to be 'J. Nkingwa', is written over the text.

On the other hand Ms. Mhangwa (SA) as said earlier did not support the Appeal. She generally submitted that the evidence on record shows that on 08/09/2016 a sum of Tshs. 5,000,000/= was deposited in the first Appellants' personal Bank Account and the whole sum was later on 09/09/2016 withdrawn. This was stated by Vedasto Julius Masaka (PW1), a Banker who printed the Account's Statement. That testimony was corroborated by that of Asha Juma (PW2) who received a sum of money for the services rendered to 293 people and that of Abihudi Kitunga (PW4) who identified and tendered to the Court the Payment Voucher through which the payment was effected (**Exhibits P3**). According to Hamdani Msenga (PW5) the Second Appellant admitted to have requested for payment of Tshs 1.379,000/= for providing food services to 390 people and that at the request of the first Appellant, the Second Appellant issued a receipt for Tshs. 3,829,000/=. The statement was recorded as a cautioned one and it was eventually admitted in evidence without being objected. That evidence was corroborated by that of Patrick Katemba (PW6) who again recorded the first Appellant's cautioned statement in which she confessed committing the offence and that she colluded with the Second Appellant.



As to the complaint that the alleged misled Principal was not called as a witness, Ms. Mhangwa (SA) submitted that Section 143 of the Evidence Act [Cap 6 R.E 2002] is clear that there is no specific number of witnesses required to testify in the case. Although the District Executive Director or District Education Officer for Handeni District were not called to testify the witnesses called and testified in the case sufficed proving that the first Appellant did mislead her employer.

Regarding to the evidence given by DW1, the Pre-Auditor, Ms. Mhangwa submitted that the later was not an Internal Auditor. The witness did not either tender to the Court an Audit Report. His testimony was therefore not reliable and it should not be acted upon. Following the submission made by Mr. Nkingwa that Asha Juma (PW2) testified that the number of teachers and other staff involved in the STD VII Examination exercise in issue was 293 and not 350 which rendered the charges not proved, Ms. Mhangwa submitted that the evidence given by PW2 was to the effect that the first Appellant lied by showing that there were 350 people served instead of 293 who were initially estimated. In the premise the evidence of PW2 cannot be faulted on ground that it proved not the charges.



Ms. Mhangwa, joined hands with Mr. Nkingwa in respect of the latter's allegation that the documentary exhibits admitted in the case were not procedurally admitted in evidence for the same were not clearly identified by the witnesses who respectively tendered them before they were tendered as exhibit. The error according to Ms. Mhangwa is curable under Section 388 of the Criminal Procedure Act [Cap 20 R.E 2019]. As such the Court is requested for an order of retrial of the case.

In a brief rejoinder, Mr. Nkingwa contended that it is submitted by his learned sister counsel for the Respondent that going by the cautioned statements, the first Appellant did misled the Second Appellant. He submitted that the cautioned statements which were admitted in evidence were not voluntarily made and their admission did not follow the law for there was no inquiry made by the Court to satisfy itself if or not the statements were truly made. As to the number of witnesses Mr. Nkingwa conceded that there is no specific number of witnesses is required to prove a fact. He said that the issue was not a number of witnesses but that the prosecution had failed to parade in Court a material witness that is the Principal. Mr. Nkingwa again joined hand with Ms. Mhangwa, that as the



documentary exhibits were not properly admitted, the Court orders for trial *denovo* of the matter.


That is briefly what was submitted by counsels respectively representing the Appellants and the Respondent. I have alternatively considered the submissions as well as the records placed before me. As the trial court did, I find it is not disputed that the first Appellant was the District Primary Academic Officer for Handeni District Council. On 08/09/2016 she later was paid a sum of Tshs. 5,000,000/= being special imprest to cover expenses in the STD VII Examinations program. The sum which was paid through her personal bank account was withdrawn on 09/09/2016. It is not disputed also that among the activities, the money was to cover, was payments for provision of food services to the teachers and other staff. For purposes of providing the services, the Second Appellant was engaged. It is not disputed, again that the imprest was retired. The allegation against the first Appellant were that she later did prepare a Journal Voucher dated 8th September, 2016 which contained false material particulars and provisional returns dated 6th September, 2016 purporting to show that she procured 350 teachers' food services with Tshs. 2,450,000/= the fact she knew to be false and which to her



knowledge was intended to mislead the Principal and that she dishonestly and fraudulently misappropriated Tshs. 2,450,000/= the property of the Government of the United Republic of Tanzania which was entrusted into her by virtue of her position. As to the Second Appellant the allegation against her was that she aided Sarah Samwel Shempemba to commit an offence of use of documents intended to mislead Principal and hence enable her to obtain an undue advantage of Tshs. 2,450,000/=.

The Nature of the allegation (charges) leveled against the appellants attracted for the prosecution to tender documentary exhibits. Indeed in the case a total of six substantive exhibits were admitted; these are the First Accused's Bank Statement (**Exhibits P1**), Pay List (**Exhibit P2**), Payment Voucher of Sarah Shempemba (**Exhibit P3**), Journal Voucher dated 08/09/2016 (**Exhibit P4**), and the Second Accused's Cautioned Statement (**Exhibit P6**). The Court in deciding the matter had considered some of these exhibits. At page 9 of the typed judgment of the Court it is stated that;

"Also this court tries to accurate as to whether the participant was given food or meal allowance, in which PW2 being an accountant she was the one made payment and Exhibit P2 marked by this court that 10,000/= paid as meal allowance..."

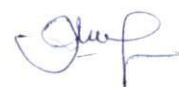
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At page 10 of the judgment, the Court was heard reading that;

"PW5 testified to this court that during recording caution statement of second accused she admitted that she issued receipt of Tshs. 3,829,000/= on caution statement (Exhibit P5) 2nd accused stated that she offered food for two days and was for total of 107 participants which total amount supposed to be paid was 1,379,000/= and the receipt of 2,829,000/= dated 06/09/2016"

In the judgment the court shows to have heavily relied on documentary evidence in reaching at the decision. This can be seen at page 11 of the judgment where it is recorded that:-

"The evidence digested to the most desirable extent to see whether the prosecution proves their case beyond reasonable doubt. DW3 Joyce Temu testified that her café namely "my choice" issued receipt of Tshs. 3,829,000/= and admitted to be paid. However the receipt dated 06/09/2016 was issued before the service to provided, this proves that the accused acted before the crime was completed. On caution statement DW3 stated that the amount which was legally for service she offered was 1,379,000/= but 1st accused told her to raise to 3,829,000/= and she did so, this reflect the intention of facilitate crime as well as aiding the 1st accused to commit crime"



There is consensus among the counsel who represented the Appellants and Respondent, respectively, that at the time they were producing the exhibits, the witnesses did not tell as to how they identify the exhibit before they were admitted in evidence. They also agree that the remedy available in such a situation is for this Court to order for retrial of the case. I have considered this and I am of also the observation that upon being admitted, none of the exhibits was read to the Court by the witnesses tendering it. An omission to read exhibit after it was admitted is fatal. This was well explained in the case of **Issa Hassan Ukiv. R:**Criminal Appeal No. 129 of 2017 CAT (Unreported). There the Court had the following to say:

"... Exh P3 was admitted in evidence and the proceedings do not show if the same was read out in court after admission. This omission is fatal and we held in a number of cases including Thomas Pius v. R Criminal Appeal No. 245 of 2012 and Jumanne Mohamed and 2 others v. R. Criminal Appeal No.534 of 2015. It is fairly settled that once an exhibit has been cleared for admission and admitted in evidence, it must be read out in court"

The court also in cementing its holding that the omission to read them out was a fatal irregularity as it deprived the parties to hear what



they were all about referred to the case of Aweda whose part of decision was quoted in the case of Thomas Pius, where it was stated that:-

"We need to point out that both cautioned and extra judicial statement had a lot of details and immensely influenced the decision of the court... to have not read those statements in court deprived the parties the assessors in particular the opportunity of appreciating the evidence tendered in court. Given such a situation, it is obvious that the omission too constituted error amounting to miscarriage of justice and constituted mistrial"

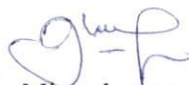
In the case at hand, I have considered the above mentioned exhibits and I am of the view that they are detailed and that they immensely influenced the decision and that parties were deprived the opportunity of appreciating the evidence. This in my view occasioned miscarriage of justice. In the case of **Issa Hassan Uki** (supra) the exhibit was expunged from the record which I think Exhibit P1 – P6 in the matter at hand deserve to be treated of. Exhibit P1 – P6 are therefore expunged from the record. The question which follows is whether in the absence of Exhibits P1 – P6 the prosecution had made the case. I find the answer is no. As said earlier according to witness summoned from the District Council Handeni, the imprest was properly retired. The discrepancies in the retirement of the



imprest if any were raised by the PCCB. In his testimony PW5 the PCCB Investigator relied on the information gathered from the documents and PW6 again the PCCB Investigation Officer just recorded the cautioned statement of the first Appellant. Thus their testimonies were not such capable of proving the case.

Indeed the issue that the documentary exhibits were not read was not raised in the Appeal by the parties. It is the court's own thinking as it is moved to do so in terms of again Section 44 (1) (a) of the Magistrates Courts Act, [Cap 11 R.E 2019]. Under such powers, the Court quashes all proceedings in the lower Court and set aside the conviction and sentence impressed. The Appellants shall have the amount paid as fines been refunded to them.

DATED at **TANGA** this 27th of May, 2021.



E. J. Mkasimongwa

JUDGE

27/05/2021

Date: 27/05/2021

Coram: E. J. Mkasimongwa, J

For Appellants: 1st appellant Present in person

For Respondent: Absent

C/C: Alex

Court: Judgment pronounced in chambers this 27th of May, 2021, in the presence of the first Appellant only. Right of appeal is explained.




E. J. Mkasimongwa

JUDGE

27/05/2021