IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF TANGA)

AT TANGA

CRIMINAL APPEAL No. 41 OF 2020

(Arising from the District Court of Handeni at Handeni in Criminal Case No. 168 of 2017)

MICHAEL ALEX KUGUTWA ---------- APPELLANT

Versus

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

30.08.2021 & 02.09.2021
F.H. Mtulya, J.:

On 8th September 2017, a Charge Sheet with four (4) counts was registered by the Republic (the Respondent) against Mr. Michael Alex Kugutwa (the Applicant) and Mr. Omary Juma Kilalile (Mr. Omary) at the **District Court of Handeni located at Handeni** (the district court) in **Criminal Case No. 168 of 2017** (the case). After full hearing of the case, the district court acquitted Mr. Omary of all four (4) counts whereas the Appellant was found guilty of two offences, namely: stealing of Point of Sale Machine (POSS) property of Kilindi District Council at Kilindi and stealing cash money amounting to Tanzanian Shillings Seven Million Only (7,000,000/=) contrary to section 258 (1) and 265 of the **Penal Code** [Cap. 16 R.E. 2019] (the Code). Finally, the district court sentenced the Appellant to five (5) years

imprisonment on each count to be served concurrently. The Appellant was dissatisfied with both the finding and sentence imposed to him arguing, in brief, that the prosecution had not proved its case beyond reasonable doubt and the sentence meted to him is excessive. Following the dissatisfaction, the Appellant approached this court and filed **Criminal Appeal No. 41 of 2017** (the Appeal) to dispute both the finding and sentence of the court. The Appeal was argued by way of written submissions, and in brief, the Appellant contends that:

First, he was prosecuted and found guilty of stealing POSS Machine, which was not tendered in court as prosecution exhibit to substantiate the allegation against him as per requirement of the law in **Director of Public Prosecution v. Mirzai Pirbakhishi & Another**, Criminal Appeal No. 493 of 2016;

Second, there is discrepancy on the amount of money alleged to have been stolen as the Charge Sheet shows Tanzanian Shillings Seven Million Only (7,000,000/=) whereas Urick Patrick Laswai (PW1), Information Technology Officer, testified that the amount of money stolen was Tanzanian Shillings Seven Million Four Hundred Eleven Thousand and Six Hundred Only (7,411, 600/=); and

Finally, the cautioned statement (exhibit P.1) was obtained and admitted in the case contrary to the law in section 51 (1) of the

Criminal Procedure Act [Cap. 20 R.E. 2019] (the Act). The submissions of the Appellant were received well by Ms. Regina C. Kayuni, learned State Attorney for the Respondent, who supported the appeal and produced the following reasons, namely:

First, exhibit P.1 was admitted in the case without court's inquiry after the Appellant had protested the admission of the same. According to Ms. Kayuni that is contrary to the law in the precedent of **Twaha Ali & Five Others v. Republic**, Criminal Appeal No. 78 of 2004;

Second, after admission of exhibit P.1, the contents of the exhibit were not read out after the admission as per law in **Robinson Mwanjisi v. Republic** [2003] TLR 218, which is fatal irregularity going to the root of the matter according to the statement found in the case of **Lack Kilingani v. Republic**, Criminal Appeal No. 404 of 2015.

I have scanned the record of this appeal and found out that PW1, at page 26 of the proceedings of the district court in the case, testified that: *the POSS machine collected shillings 7,411, 600/= and the said amount of money was not presented at the Kilindi District Council offices*. However, the charge leveled against the accused as per Charge Sheet registered on 8th September 2017 depicts in the third count that the amount of money stolen being Tanzanian

Shillings Seven Million. This discrepancy goes to the root of the matter and the district court was supposed to abide with the directives of the Court of Appeal in the precedents of **Stany Loidi v. Director of Public Prosecutions**, Criminal Appeal No. 466 of 2017; **Masota Jumanne v. Republic**, Criminal Appeal No. 137 of 2016; and **Vumi Liapenda Mushi v. Republic**, Criminal Appeal No. 327 of 2016. The highly quoted specific statement in the decisions is to the conclusion that:

> *...the prosecution evidence was riddled with contradictions on what was actually stolen from PW1. Such circumstances do not only imply that there was a variance between the particulars in the charge and the evidence as submitted by the learned state attorney. This is also goes to the weight of evidence which is not in support of the charge.*

In the present appeal, record shows that there was discrepancy on the amount stolen which goes to the root of the matter and shakes weight of evidence on part of the prosecution in proving its case beyond reasonable doubt.

In the present appeal there is also a complaint on admission of the exhibit P.1 extracted from the Appellant. Record shows that the Appellant was arrested on 26th August 2017 and exhibit P.1 recorded

on 31st August 2017, a lapse of five (5) days without plausible explanation. This is contravention of the law in section 51 (1) of the Act. Again, page 42 of the proceedings in the case shows that the Appellant protested admission of exhibit P.1 complaining that he was forced to record exhibit P.1 by a police officer, E.9933 Sgnt. Chinuka (PW4). However, the district court in the case overruled the protest without court's inquiry as per directives of the Court of Appeal in the precedent of **Twaha Ali & Five Others v. Republic** (supra). The most quoted text from the precedent shows that:

> *If that objection is made after the court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry or trial within trial into voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted as evidence.*

Despite this statement of the Court of Appeal, the district court admitted exhibit P.1 and again the exhibit was not read out before the court as per the requirement of the precedents in **Robinson Mwanjisi v. Republic** (supra) and **Stany Loidi v. Director of Public**

Prosecutions (supra) decided by our superior court in judicial hierarchy. The specifically quoted statement from the precedents is:

> *It is noted that the statement were read out before the trial court although they were subsequently rejected, a practice unfortunately common in trials before subordinates courts.* ***Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out. Reading out documents before they are admitted in evidence is wrong and prejudicial****. If the document is ultimately excluded, as happened in this case, it is difficult for the court to be seen not to have been influenced by the same.*
>
> (Emphasis supplied).

In the present appeal the record, at page 42 & 43 of the proceedings in the case, show that exhibit P.1 was admitted without inquiry after the protest emanated from the Appellant hence it was not cleared for admission in the case to be part of the evidences. Following that failure to abide with the law, I have decided to expunge exhibit P.1 from the record.

In the present appeal record further shows that the Appellant was alleged to have stolen POSS machine in the first count of the Charge Sheet and Tanzanian Shillings Seven Million in the third count of the Charge Sheet. However, there was no evidence tendered by the Respondent to substantiate the claimed amount of money, or production of the POSS machine in the case. On my part, after expunging of exhibit P.1 from the record, I see no any other evidence which connects the Appellant with the charged offences.

In conclusion, I agree with the Appellant and learned State Attorney Ms. Kayuni, that the Respondent had failed to prove the offences levelled against the Appellant beyond reasonable doubt as per requirement of the law in section 3 (2) (a) of the Evidence Act [Cap. 6 R.E. 2019] and precedents in **Said Hemed v. Republic** [1987] TLR 117, **Mohamed Matula v. Republic** [1995] TLR 3, and **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005).I have therefore decided to allow the Appeal, quash the conviction, set aside the sentence meted out against the Appellant and order for his immediate release from prison custody unless held for other lawful cause.

Order accordingly.

F.H. Mtulya

Judge

02.09.2021

This judgment is delivered in Chamber under the seal of this court in the presence of the Appellant, Mr. Michael Alex Kugutwa through visual court fixed at Maweni Prison and in the presence of learned State Attorney, Ms. Elizabeth Muhangwa.

F.H. Mtulya

Judge

02.09.2021