

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DODOMA DISTRICT REGISTRY)
AT DODOMA
(APPELLATE JURISDICTION)**

DC CRIMINAL APPEAL NO. 136 OF 2016

(Original Criminal Case No. 137/2012 of the District Court of Singida at Singida)

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

1. **MEDARD ISAIAH**
2. **AZIZ MZAVA**
3. **LOIRUCK MOLLEL** } **RESPONDENTS**

JUDGMENT

16 & 24/08/2021

KAGOMBA, J.

The Director of Public Prosecution (DPP) being aggrieved by the judgement of Singida District Court in Criminal case No. 137 of 2012 has appealed to this court after all three accused persons were acquitted on ground that DPP did not prove the case beyond reasonable doubt. The accused persons are MEDARD ISAIAH (1st

Respondent), Azizi Mzava (2nd Respondent) and LOIRUCK MOLLEL (3rd Respondent). The case against the 1st Respondent abated following his demise. The 3rd Respondent disappeared since the matter was filed in Singida District Court, and a summons requiring him to appear to face his charges was made by publication.

Before the Singida District Court (“trial court”) the three accused persons were charged for use of documents intended to mislead principal contrary to section 22 of the Prevention of and Combating of Corruption Act, No. 11 of 2007. It was alleged before the trial court that Medard Isaiah and Azizi Mzava on 17/3/2008 at Singida Municipal Council within Singida Region knowingly and with intent to deceive did prepare and use letter from AZIRUNA ENTERPRISES AND GENERAL MERCHANTS dated 17/3/2008 to pay AZIRUNA ENTERPRISES AND GENERAL MERCHANTS through payment voucher No. 3/3 worth Tanzania Shillings Twenty Two Million, One hundred and Forty thousand only (Tsh. 22,140,000) purporting that the construction of drainage of 400m between Misuna to Singida-Dodoma Road is complete as per Bill of Quantities (BOQ) while it was false and intended to mislead the principal. The Principal in this matter was the Municipal Director of Singida Municipal Council.

Before the same trial court in the second count, it was alleged that Medard Isaiah and Loiruck Mollel on 29/4/2008 at Singida Municipal Council within Singida Region being a Municipal Engineer and Singida Municipal Tenderer respectively, knowingly and with an

intent to deceive did prepare and use letter from AZIRUNA ENTERPRISES AND GENERAL MERCHANTS dated 28/4/2008 to pay AZIRUNA ENTERPRISES AND GENERAL MERCHANTS through payment voucher No. 4/4 worth Tanzania Shillings Twenty Seven Million, Four Hundred Seventy Six Thousand Seven Hundred and Twenty one only (Tsh. 27,476,721/=) purporting that the construction of drainage 400m between Misuna to Singida - Dodoma Road is completed as per Bill of Quantity while it was false and intended to mislead the Principle. The three accused persons pleaded not guilty to the charges whereupon the prosecution summoned seven witnesses (PW1 to PW7) to prove the charges. However, the trial court after analysis of evidence adduced by prosecution found that the prosecution had failed to prove the case beyond reasonable doubt and thus found them not guilty as charged of both counts and proceeded to acquit all of them as per section 235 of the Criminal Procedure Act, Cap 20 RE 2019. It is this decision which the DPP seeks to overturn vide this appeal.

On 5/08/2021 when the appeal came for hearing the appellant was represented by Ms. Bertha Kulwa, learned State Attorney while the 2nd Respondent appeared in the company of his advocate Mr. Fred Kalonga, learned advocate. The 3rd Respondent was absent while the case against the 1st Respondent had abated following his demise. The petition of appeal was filed on 05/10/2016 containing only one ground of appeal as follows:

“That the trial Court erred in law and in fact for holding that the prosecution side failed to prove the case beyond reasonable doubt and consequently thereof acquit all the accused persons despite of overwhelming evidence adduced by the prosecution which sufficiently proved the charge against all the accused person (Respondents) to the required standard”.

Based on the above ground, the Appellant prayed the judgment of the trial court be set aside and a justified decision be entered by this court.

Submitting on DPP’s appeal, the learned State Attorney Ms. Bertha Kulwa argued that the prosecution witnesses (PW1 to PW7) proved by documents and oral testimonies that the 2nd and 3rd Respondents committed the offence of using documents to mislead the Principal i.e the Director of Singida Municipal Council. She submitted that Respondents built substandard drainage system with reduced specifications in terms of the height and width of the drainage contrary to specifications agreed in the BOQ. She explained that the BOQ and measurement sheets tendered before trial court required the height of the drainage system to be 400m with width of 1.5m for which a total of Tsh. 59,129,690/= was paid but the Respondents built a drainage system with height of 375m and width ranging from 1.27m to 1.3m thereby benefiting from Tsh. 10 Million that resulted from the difference in costs of construction based on reduced measurements.

The learned State Attorney relied on the proceedings of the trial court wherein there are records of testimonies of seven prosecution witnesses who proved the case of using document to mislead principal as well as documentary evidence such as different letters and measurements sheets i.e BOQ which were tendered in evidence. She said the construction work was contracted to AZIRUNA ENTERPRISES AND GENERAL MERCHANTS and that the 2nd and 3rd Respondents were its officials being the Accountant and Project Manager respectively. The 1st Respondent, who is a deceased was the Municipal Engineer.

The appellant's State Attorney further submitted that the Municipal Council paid to AZIRUNA ENTERPRISES AND GENERAL MERCHANTS the entire Tsh. 55,129,690/= which was budgeted for the project. She said all these facts were told to the trial court by prosecution witnesses PW1 to PW7. She argued further after sometimes the drainage system started breaking down and the Council had to inquire as to why the same was of very low quality, whereby the Prevention and Combating of Corruption Bureau (PCCB) was informed. She submitted that a team was composed to investigate if specifications and value for money were observed and that the investigation report was tendered showing that there was embezzlement of Tsh. 10Million.

The learned State Attorney, assaulted the defence presented by Respondents before the trial court particularly by the 2nd Respondent Mr. Azizi Mzava who said that the accused persons were not involved

in the re-measurement exercise which was conducted by the Investigation team. The State Attorney said that this defence does not hold any substance because their presence in the re-measurements exercise would not change the measurements of the drainage system. She also challenged another defence made by the Respondents that the work was being done under pressure as the President of the country was scheduled to inaugurate the project. She said this is not a good defence for underperformance and causing loss. She concluded her submission in chief by praying the court to consider the evidence adduced by all prosecution witnesses and give a decision appropriate to the charges against the Respondents.

Mr. Fred Kalonga submitted in defence of the Respondents, particularly the 2nd Respondent. He argued that the letter claiming payment which was dated 17/3/2008 was approved and paid vide payment voucher No. 3/3 by the 1st Respondent who has passed away. He argued that since the 1st Respondent was acquitted on the 1st charge and is not in court to defence himself anymore, this court should consider that what he told the trial court to exonerate himself is true and *ipso facto* this court should draw an inference that the same is true of the 2nd Respondent too.

Mr, Kalonga further submitted that the drainage project forming basis of the charges against the Respondents was for 2007/2008 Financial Year. He argued that the same was examined and accepted by the Municipal Council and that is why retention fee was paid six month later in 2019 after handing over.

In his further submission to the court, Mr Kalonga argued that there was contraction in the testimony of PW2 Twalib Hussein Kihara who said that the drainage system was not there while all other prosecution witnesses confirmed existence of the drainage. He further submitted that PW6 Robert Matando Kitimbo who is the ex-Municipal Director questioned why Peter Gunda was not charged. The learned advocate submitted that it was Peter Gunda who was advising that Municipal Director even on the payment of retention fee.

Advocate Kalinga further assaulted the inspection done by the team for being doubtful. He argued that its members contradicted themselves on existence of the drainage system; the accused persons who were the auditees were not involved; the team did not conduct laboratory examination but focused on accounting; the team included PW7 Peter Gunda who approved payment to AZIRUNA ENTERPRISES AND GENERAL MERCHANTS arguing that PW7 was not supposed to be in the team as that would be equal to being a judge of his own cause. Furthermore, he argued that the inspection was done by the team after two (2) rain seasons and the retention period had already successfully passed.

Mr. Kalonga finally submitted that Exhibit P1 to P5 were tendered and admitted in evidence by trial court contrary to the law. He argued that the exhibits were not read as required. In this connection he referred the court to the case of **STEVEN SALVATORY Vs R**, Criminal Appeal No. 275 of 2018, Court of Appeal, Mtwara

(unreported) where on page 7 of the typed judgment of the court, it was held that a document tendered in court has to be read in court. He argued that during trial, the tendering of documents by the prosecution did not adhere to three stages of evidenced from page 10, 11 and 16 of the typed proceedings, particularly the fact that the same were not read in court. He submitted that according to the cited decision of **STEVEN SALVATORY V. R** (supra), the only remedy is to expunge those exhibits from court record. It was his view that after expunging the exhibits, as he prayed the court to do, the evidence by the appellant will be weaker. He concluded by praying the court to dismiss the appeal.

Rejoining, the learned State Attorney Ms. Bertha Kulwa reiterated her submission in chief. She argued that the submission of the defence advocate had no base as this court has in its record the investigation report as well as oral testimonies of PW4 and PW7 which she prayed to be given due weight. She said that the contradiction in testimonies of Prosecution witnesses on existence of the drainage system is negligible and cannot change the reality of the case.

On non-reading of the exhibits, she conceded to the position of the law that the same have to be expunged. She argued however that all the evidence tendered in court still show that there was embezzlement by using documents. She cited the evidence given by PW4, PW6 and PW7 as well as all other prosecution witnesses who talked in details about measurements versus payments made which

indicated that they knew the documents very well and were thus able to tell the court those facts accordingly. She finally prayed the court to allow the appeal for justice to be done. Such were the submissions of both parties.

Having considered the pleadings and submissions of both parties, the main issue for determination before me is whether the case against the accused persons was sufficiently proved during trial. While embarking on re-evaluation of evidence tendered during trial, this being the first appellate court, I thought I should change the course of my analysis by starting with the last argument submitted by Mr. Kalonga in his submission. Mr. Kalonga has raised a point of significant legal importance that the exhibits relied upon by prosecution during trial were admitted contrary to requirement of the law. It is trite law that when a point of legal significance like this is brought to the attention of the court, it becomes imperative that the same should be addressed first. This is exactly what I am going to do before examining the sufficiency or otherwise of the evidence adduced by PW1 to PW7.

As correctly submitted by Mr. Kalonga the Court of Appeal in **STEVEN SALVATORY V. R (supra)** mentioned three stages a document has to pass before being admitted in evidence. The Court of Appeal in the cited case quoted with emphasis its previous decision in the case of **ROBINSON MWANJISI AND THREE OTHERS V. R** (2003) T. L. R 218 where at page 220 the court held *inter alia* that:-

“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.”

Applying the above stated legal position to the case of **STEVEN SALVATORY V.R** that was before the Court of Appeal, the court held that exhibit P1 whose prior admission by trial court did not complete the third stage of being read out so that its contents could be heard by the appellant therein, was improperly admitted in evidence. For that reason the court expunged it from the record. The Court of Appeal stated that it has taken similar decision in other cases including **JUMANNE MOHAMED AND 2 OTHERS V. R**, Criminal Appeal No. 534 of 2015; **KURUBONE BAGOROGWA AND 3 OTHERS V.R**, Criminal Appeal No. 132 of 2015 and **ERNEO KIDILO AND ANOTHER V.R**, Criminal Appeal No. 206 of 2017 (all unreported). I am accordingly guided by the Court of Appeal decision on the mandatory steps to be considered in admission of exhibits during trial.

I have perused the proceedings of the trial court and I can confirm that there is no record in the proceedings showing that exhibits P1 to P7 (inclusive) were read out in court. Non reading of the exhibits in trial court was a serious irregularity whose remedy is to expunge all these documents which were not illegally admitted. I accordingly expunge the same from court records.

Having expunged all the documentary evidence mentioned above, I shall continue to consider the issue whether the case against the accused persons was sufficiently proved during trial.

I have carefully gone through the typed proceedings, from page 8 (where records of trial starts) to page 32 (where records of prosecution case ends). It is my finding that the prosecution case will lack legs to stand on after expunging the exhibits. The exhibit P1 to P4 tendered in court by PW1 Mr. Alexander Aloyce Rwekila, Investigation Officer from the Prevention and Combating of Corruption Bureau (PCCB) are the three payment vouchers and the contract; exhibit P5 tendered by PW2 Twalib Hussein Kihara was the Information dated 16.6.2008 prepared by a sub-committee, and Exhibit P6 tendered by PW4 Zabron Josiah Mbagu, was the Evaluation report which showed that the drainage had 375m instead of 400m and that actual cost of work done was Tsh. 44,933,930/=. The entire prosecution was simply built on these exhibits.

Based on the Evaluation report (P.6) PW4 was able to convince the trial court on the findings of the Investigation team. The report's findings were compared to what was written in the BOQ. It is the difference between the BOQ requirement and the actual work on the ground that helped the prosecution to build their case during trial. Without the contract, the payment vouchers, the BOQ and the Investigation report being read together following expunging of such reports from records, the prosecution case naturally dies and so does the appeal

. This being the case, it will be academic to discuss the remaining grounds and arguments made before this court.

Based on the reasons above, the appeal is dismissed. I accordingly uphold the judgement of the District Court of Singida in Criminal Case No. 137 of 2012.




ABDI S. KAGOMBA

JUDGE

01/9/2021

Judgement delivered today the 1st day of September, 2021 in the presence of the legal counsels for both sides. The R.M.A M.A Mahmoud was also present.

Right of further appeal to the Court of Appeal duly explained.




ABDI S. KAGOMBA

JUDGE

01/9/2021