IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 176 OF 2020

(Arising from Economic case No. 1/2010 in the District Court of Musoma at Musoma)

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

SALIM SELEMANI NG'ITU .....1ST RESPONDENT

JANE GERALD MUSIBA.....2ND RESPONDENT

YOHANA RAJABU TESSUA.....3RD RESPONDENT

HUSSEIN HASSAN MLEKWANYUMA.....4TH RESPONDENT

FORDIA WEMA NYAKUTONYA.....5TH RESPONDENT

EVELYNE EXPERANTIA KAUNDA.....6TH RESPONDENT

LUCIA SITTA MCHELLE.....7TH RESPONDENT

FLORA BINIFACE MABOKO.....8TH RESPONDENT

MONICA KAITIRA MURUSURI.....9TH RESPONDENT

CYPRIAN TOYE MWITA.....10TH RESPONDENT

KAILEMBO SYLVAND NGAIZA.....11TH RESPONDENT

PHILIPO MARCO MASOTA.....12 RESPONDENT

JUDGMENT

25th April and 31st May, 2022

F.H.MAHIMBALI, J.:

This is an appeal by the Director of Public Prosecution against the decision of the District court of Musoma at Musoma that was decided in favour of the respondents, Salim Selemani Ngitu and 11 others. The case

before the district court was instituted by the appellant. The respondents at the trial court were charged with 123 counts with 41 alternative counts where; 41 counts were for use of documents intended to mislead the principal, conspiracy to defraud and stealing by public servant. On the alternative counts, they were charged with occasioning loss to a specified authority. They all pleaded not guilty to all counts levelled against them. The trial court heard the parties and it held that the prosecution has failed to prove its case beyond all reasonable doubt and thus acquitted all the accused persons on all counts.

This decision aggrieved the appellants, hence this appeal to this court. Originally, there a total of ten grounds of appeal preferred. However, before this appeal was determined, the respondents raised a preliminary objection on the competency of the said appeal amongst others that the appeal had mixed grounds of facts and law. This Court then by its ruling delivered on 8th October, 2021 partly allowed the objection and ordered deletion of the five contravening grounds of appeal namely; grounds no. 1, 2, 3,4 and 8 as the once that contravened the law. The remaining grounds of appeal that have not contravened the law which are grounds 5, 6, 7, 9 and 10. The same are:

5. *That, the learned trial Magistrate erred to conclude that prosecution witnesses only explained working procedures rather than stating how documents tender were used to mislead the principal.*

6. *That the Magistrate to evaluates the evidence and ascertain whether there was conspiracy.*

7. *That the trial Magistrate failed to evaluates the evidence and ascertain whether there was conspiracy and ascertain whether fraud was committed.*

9. *That, the learned trial Magistrate erred in law by composing a poorly reasoned and unfocused judgment.*

10. *That, the learned trial Magistrate generally erred in acquitting the accused person/respondent*

The arguments in these grounds of appeal, form the basis of the court's decision. As it can be gleaned from the records, this appeal might be the oldest in the registry. It is because the hearing of this appeal was not smooth, there had been much reluctance by the appellant in prosecuting the appeal. Reasons for adjournments and sometimes even non – attendance to Court could not miss during the pendency of this appeal. Both parties are partly to blame somehow, but mainly it is the appellant's conduct. At last, it was resorted that the appeal be argued by

way of written submissions after the day had been set for hearing, the appellant reported that they were not prepared to argue the appeal as the appeal record is voluminous and it needed much time for its preparation. I wondered if the reason had any colour of light in it for the appellant who lodged the appeal in November, 2020 was not aware of what he was appealing against. I guessed, that perhaps there was change of staffing in the appellant's office. I reluctantly consented to the prayer of filing written submissions.

Whereas the appellant was being represented by Mr. Nchanila, Binamungu and Tawabu learned state attorneys at different times and sometimes jointly, the surviving respondents 2nd, 3rd, 4th, 6th, 8th, 10th, and 12th (after the demise of 8th, 11th and 12th) enjoyed the legal services of Mr. Makoye. Mr. Kassimu Gilla represented the 9th respondent and Mr. Onyango represented the 5th and 7th respondents jointly.

When the appellant's written submissions was filed in support of the appeal, this is what was submitted, I quote:

> *"...Your Lordship, as far as fifth, sixth seventh and tenth ground are about the acquittal of respondents basing on insufficient evidence. The prosecution evidence that is*

witnesses and exhibits as transpired in the proceedings sufficiently proved the offences charged beyond all reasonable doubts.

Your Lordship, despite the aforesaid grounds, still the proceedings have serious anomalies which can dispose the whole proceedings and order retrial.

Your Lordship, the procedure of retiring the proceedings from one magistrate to another was not complied as per law. Section 214 (1) of the Criminal Procedure Act, Cap 20 R. E. 2019 requires the reasons of not completing proceedings to be adduced. Moreover in retiring the proceedings, the accused persons should be given the right to proceed or to re summon the witness. But this procedure was not complied hence renders the trial proceedings nullity as stated in the case of ***SAID SUI vs THE REPUBLIC, CRIMINA APPEAL NO 266 OF 2015 CA AT DODOMA*** *un reported.*

Your Lordship, most of the exhibits were prayed and tendered omnibus, this infringes the rights of other side to challenge each exhibits separately hence renders un fair trial. It follows that where there is no fair procedural hearing the proceedings are vitiated. This position was advanced in the case of ***DPP vs SABINUS INYASI TESHA AND ANOTHER (1993) TLR 237"***

The respondents on the other side, have reacted against the appellant's submission. Mr Makowe for the 3rd, 4th 10th 11th and 12th respondents first attacked the submission as contravening the law as the drawer of the said written submission is not known. This is contrary to section 44(2) of the Advocates Act, Cap 341 that the drawer of any legal document must be known. As the purported legal document contravenes the law, the same is worthless and thus liable to strike out.

He further discredited the appeal, by the appellant's failure to argue his appeal. The submission that "*as far as fifth, sixth seventh and tenth grounds are about the acquittal of respondents basing on insufficient evidence. The prosecution evidence that his witness and exhibits as transpired in the proceedings sufficiently proved the offences charged beyond all reasonable doubts*" , Mr. Makowe was of the view that the appeal was legally not argued. He invited this Court to dismiss the appeal as lacking any merit.

Thirdly, Mr. Makowe argued on the new grounds of appeal raised and argued by the appellant at the surprise of the parties and without obtaining Court's leave. He argued, whether that was proper. He however argued that even if the said new grounds are considered, the same have not been

argued. There is no any sensible submission done by the appellant. he wondered, whether the said submission is worth of any credit to grant. Leaving them as they are at the consideration of the Court is not proper. The law is, who alleges must prove. The appellant ought, after he had pointed out the said legal anomalies was duty bound to argue them. He wondered if the submission that "*the procedure of retiring the proceedings from one magistrate to another was not complied as per law. Section 214 (1) of the Criminal Procedure Act, Cap 20 R. E. 2019 requires the reasons of not completing proceedings to be adduced, Moreover in retiring the proceeding the accused persons should be given the right to proceed or to re summon the witness. But this procedure was not complied hence renders the trial proceedings nullity as stated in the case of* ***SAID SUI vs THE REPUBLIC, CRIMINA APPEAL NO 266 OF 2015 CA AT DODOMA*** *un reported.*

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237". He queried if this qualifies to be submission as per law. On the issue of succession of magistrate, he discredited the submission as wanting of merit. No predecessor magistrate is mentioned to have ever tried the matter. It was not expected such to be the work of a trained legal mind. As regards the issue of admission of omnibus exhibits, he also wondered if that was sufficient. He expected that, there should have been description of the said omnibus exhibits admitted in contravention of the law. He invited this Court to be inspired by the reasoning of Hon. Nyangarika, J in the case of **M/S KASHERE ENTERPRISES LTD Vs. SHINYANGA MUNICIPAL COUNCIL,** Commercial Case No. 15 of 2013, Mwanza Registry (unreported), where the Hon Judge, rebuked such a tendency as being not the primary duty of the court to act for a either party.

He lastly prayed that the appeal be dismissed in its entirety for want of submission on the raised grounds of appeal.

Mr. Onyango and Gillar learned advocates on their side without specifying they are submitting for which respondents (but I take it as representing the 9th, 5th and 7th respondents jointly as per previous records), similarly reacted to the appellant's submission as raising new grounds and abandoning the former. On the omnibus admitted exhibits,

Mr. Onyango was of the view that since it was the appellant's case, they themselves ought to be keen in the prosecution of their case. Failure to read the omnibus admitted exhibits, it was the prosecution's own error. They considered this ground as a scape goat by the prosecution and it is not the court's duty to rectify such an omission unless it occasioned injustice. As per circumstances of this case, since this case has taken so long from 2010, any attempt by the prosecution to persuade the court for a retrial of the case, is tantamount to injustice to the respondents. It has no any justice implication to them as they have been in prosecution of this matter for a long time. They prayed for the inherent powers of the Court to prevent the abuse process by the prosecution in bringing this litigation not to an end. Otherwise it will be an endless litigation. They persuaded this Court to the decision of famous English case of **R V. Telford Justices ex parte Badhan** [1991]2 Q.B 78, which held:

> *"As a general principle, if the argument refers to the first limb of abuse, it will normally be necessary for the defense to prove not only that an abuse has taken place but that the accused has been prejudiced in the presentation of his or her case as a result, so that a fair trial is possible"*

It has been challenged that re-prosecution of the case is to disentitle the respondents with a fair and public hearing of the case within reasonable time by an independent and impartial courts.

I have carefully gone through the parties' submissions in respect of this appeal. I am almost perplexed with the prosecution whether they were really minded to prosecute this appeal. I have weighed the scale of the prosecution's submissions in respect of this appeal; in the first place I agree with Mr. Makowe that the prosecution have failed to prosecute their appeal from the start. Secondly, there is what is called a surprise change of gear in the air. It is like driving at a very high speed, and in front there is a very sharp corner and suddenly the driver opts to make a U turn. This is what is happening in this appeal. The results is the overturning of the car which is the collapse of the said appeal.

In consideration to the submission that as far as fifth, sixth seventh and tenth grounds of appeal are about the acquittal of respondents basing on insufficient evidence and that the prosecution evidence that is (witnesses and exhibits) as transpired in the proceedings sufficiently proved the offences charged beyond all reasonable doubts, I have not seen any submission done to support the change of verdict and findings of the

trial court. In essence, it has never been the responsibility of this Court to go around and fetch the evidence and facts of the case for a party's consumption. He who wishes the Court to give judgment in his favour, is duty bound to prove his case as per required standard provided by law. In the instant matter, the appellant having been aggrieved by the verdict of the trial court acquitting the respondents, was duty bound to convince this Court by the sound arguments explaining the grounds of appeal reflected in the proceedings and judgment of the trial court. The legal errors ought to have been pointed out and stated clearly in the lines of the law. This Court and even the Court of Appeal have more often than not been passionate in the conduct of criminal appeals involving inmates but not others. The rationale has been simple, that those people are lay persons, thus not legally trained minds to know the intricacies of law. For legal trained minds and entrusted into such an esteemed office, it was expected that there had been legal deliberations as per law. I consider the submissions as insufficient of material to make this Court consider the appeal as prayed.

As regards the introduction of new grounds of appeal without Court's leave is not the acceptable legal conduct. It must be rebuked. Legal

proceedings have always been an open battle, not taken as surprise against the other party. Otherwise, there would be no end to litigation. As there was no leave of the Court sought and obtained, the same are thus, improperly before the court. They are thus unworthy of consideration. I have anxiously considered this aspect and in the end, I am of the firm position that the additional grounds raised in the submission without the Court's leave was, but irregular and at best a surprise on the respondents. Accordingly, I am constrained to decline to consider these grounds because it was not part of the grounds the appellant intended to pursue in the appeal. In doing so, I find solace in the passage extracted from **Haystead vs. Commissioner of Taxation [1920]** A.C 155 at page 166 whereby Lord Shaw observed:

> *"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present so as to what should be a proper apprehension, by the Court of the legal result... If this were permitted,* ***litigation would have no end except when legal ingenuity is exhausted***" (emphasis added).

The above passage was quoted by the court of Appeal in **Blue Line Enterprises Limited vs. East African Development Bank,** Civil

Application No. 21 of 2012 (unreported) as also quoted by the same Court in the case of **Georgio Anagnostou and Another V. Emmanuel Marangakis and another**, Civil application No. 464/01 of 2018.

All this said and considered, the appeal lacks merit. In fine, the appeal is dismissed in its entirety for want of merit

It is so ordered.

DATED at MUSOMA this 31st day of May, 2022.

F.H. Mahimbali

Judge

Court: Judgment delivered this 31st day of May, 2022 in the presence of Mr. Malekela, state attorney, 2nd, 7th 8th and 9th respondents and Mr. Gision Mugoa – RMA.

F. H. Mahimbali

Judge

31/05/2022