

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(DODOMA DISTRICT REGISTRY)
AT DODOMA**

DC CRIMINAL APPEAL CASE NO. 181 OF 2020

*(Arising from decision of District Court of Kongwa in Economic Case No. 1 of 2019
dated 15/9/2020)*

LURE SINDE NDANSHAU1ST APPELLANT
REBECA GODNESS MPEHO.....2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

6/4/2022 & 4/7/2022

KAGOMBA, J

At the District Court of Kongwa (henceforth “trial court”), LURE SINDA NDANSHAU (“the appellant”) and REBECA GODNESS MPEHO were arraigned with nine and eight counts respectively. From the first to the fourth count both were accused of committing forgery c/s 333, 335 (a) and 337 of the Penal Code Cap 16 R.E 2002. From count five to seven, both were accused with the use of documents intended to mislead principal c/s 22 of the Prevention and Combating of Corruption Act No. 11 of 2007.

The eighth count was only for the appellant who was charged with the use of documents intended to mislead principal c/s 22 of the Prevention and Combating of Corruption Act No. 11 of 2007. And on count nine, both were charged with the offence of causing pecuniary loss to a specified authority

c/s paragraph 10(2) of the First schedule to, and section 57(1) and 60(2) of the Economic and Organized Crime Control Act [Cap 200 R.E 200].

After a full trial, REBECA GODNESS MPEHO was acquitted on all the eight counts, while the appellant was convicted on the fourth, eighth and ninth counts. For each of the fourth and eighth count, the appellant was fined Tshs. 500,000/= or serve two years imprisonment in default of paying the fine. But on the ninth count it was a fine of Tshs. 600,000/= or to serve a three years imprisonment in default of payment of the fine.

Being aggrieved by the above decision of the trial court, the appellant seeks to overturn the said conviction and sentences vide her appeal, which is based on the following three grounds: -

1. That, the trial magistrate erred in law and fact in convicting the appellant while the prosecution failed to prove the case beyond reasonable doubt.
2. That, the trial magistrate erred in law and fact in convicting the appellant while there were obvious doubts on the evidence of the prosecution.
3. That, the trial magistrate erred in law and fact in convicting and the appellant basing on the doubtful conviction without taking into consideration the weight of evidence adduced by the appellant.

The facts leading to the conviction of the appellant in respect of the fourth count were to the effect that the appellant and the acquitted REBECA

GODNESS MPEHO, on 22/9/2017 at Kongwa District Hospital, with intent to defraud or deceive, did forge the receipt of VIMA Secretarial Services (Henceforth "VIMA") purporting to show the VIMA has received a payment of Tshs. 1,365,500/= being payment for the stationeries and cleaning materials sold to Kongwa District Hospital, fact which they knew was untrue.

On the eighth count, it was alleged that the appellant, on 22/9/2017 at Kongwa District Hospital, being an employee of Kongwa District Council working as a Nurse In-charge (Matron) with intent to defraud or deceive her principal; namely Kongwa District Council, knowingly used a forged receipt of VIMA containing false particulars purporting to show that VIMA has received a payment of Tshs. 1,365,500/= being payment for the stationeries and cleaning materials sold to Kongwa District Hospital, fact which she knew to be false and which to her knowledge was intended to mislead her principal.

And, on count nine, it was alleged that the appellant and her co-accused between 16/8/2017 and 22/9/2017 at Kongwa Hospital, being employees of Kongwa District Council working as a Nurse In-charge (Matron) and the Hospital Secretary respectively; by their willful acts caused Kongwa District Council to suffer a pecuniary loss of Tshs. 1,995,500/=.

On the date of hearing of the appeal, the appellant was represented by Mr. Erick Shauri, learned advocate while Ms. Bernadetha Thomas, learned State Attorney, appeared for the respondent. Mr. Shauri argued the first and

second grounds of appeal collectively while the third ground argued separately.

Submitting on the first and second grounds of appeal, Mr. Shauri's argument was that since both the appellant and REBECA GODNESS MPEHO, were charged with forgery in the fourth count, where the prosecution tendered receipt No. 1270, and since the prosecution did not take the handwriting samples of REBECA but tested only the appellant's handwriting sample, such an act creates doubts on prosecution's case. He added that the doubt is validated by the provision of section 69 of the Evidence Act, [Cap 6 R.E 2019], where it is a legal requirement that handwritings of both accused persons should have been tested. Hence, this requirement of the law was not observed.

Mr. Shauri submitted further that the second doubt is on the testimony of PW3 Victoria, who being the shop owner, identified the suspected receipt No. 1270 of Tshs. 1,365,500/= as a receipt from her shop, but she objected the handwriting on the receipt and said that there was nothing sold by using the said receipt. Mr. Shauri doubted the reason for prosecution to use the said receipt against the appellant while the PW3 says that nothing was sold by using that receipt.

Mr. Shauri further questioned the whereabouts of receipt No. 1270, during the time the shop owner (PW3) said it was missing, before it was tendered by prosecution in court. He also raised an argument on PW3's

testimony that she sold goods to one Gervas Mushi vide receipt No. 1277, and at the same time she testified that receipts No. 1267, 1268, 1269 and 1270 which are earlier numbers, were missing, and wondered on the possibility of receipt No. 1277 to be used to sell goods.

Mr. Shauri further submitted that both the Hospital Accountant and Store Keeper agree that the appellant bought the goods she was sent to buy, and that the Store Keeper recorded the goods in the ledger of received goods and that the Hospital used those goods but the store keeper was not among the witnesses. He argued that if the goods were received, the offence of causing pecuniary loss cannot stand against the appellant. On the basis of the stated doubts, Mr. Shauri invited the court to find that the prosecution did not prove the case beyond reasonable doubts.

On the third and last ground of appeal, Mr. Shauri submitted that the key document, regarding the use of document to mislead principal, was receipt No. 1270. He repeated his doubts on the testimony of PW3 who said that the said receipt was missing, yet receipt No. 1277 was used to sell goods to Gervas Mushi and non-testing of the handwriting of the appellant's co-accused person. This was regarding count number eight.

On count number nine pertaining to pecuniary loss, Mr. Shauri again questions the reason for treating the appellant and her co-accused differently. He also argued that, since the offence of forgery was not proved beyond reasonable doubt, likewise the offences of using document to

mislead principal and causing pecuniary loss were not proved. He prayed the court to allow the appeal and quash the conviction.

Ms. Bernadetha Thomas resisted the appeal along the same way it was submitted by Mr. Shauri. On the issue of bias in the handwriting examination, she argued that examination was done by the PW6 on two samples, being the appellant's and PW3's. Adding that the samples examined were only for those suspected, according to investigation. Ms. Thomas further submitted that, after examination by the expert (PW6), it was concluded that the handwriting on receipt No. 1270 was of the appellant. She added that the Expert's report (Exhibit P8) was admitted without any objection from the appellant's advocate, to imply its high weight as piece of evidence.

To concretize her reply, Ms. Thomas further argued that the offence of forgery, like any other offence, is proved by its ingredients, which according to section 333 of the Penal Code are; intent to defraud or deceive, existence of document, the purpose of that document and who possesses the document. She demonstrated how the prosecution witnesses proved that it is the appellant who forged the receipt to suit her criminal intentions.

Ms. Thomas, was not short of other arguments to wrestle the appeal. She submitted that since the appellant is in agreement with the fact that she applied for the money and spent the same to buy the goods, she should explain where she got the receipt submitted to the Hospital.

Ms. Thomas opposed the submission by the appellant's advocate where he said that PW3, the shop owner did not deny the handwriting on the receipt. Ms. Thomas submits that the contrary is true, as PW3 did deny.

Regarding the sale of goods by PW3 to Gervas Mushi vide receipt No. 1277, Ms. Thomas submitted that other receipts with numbers 1267, 1268 and 1269 were also missing along receipt No. 1270 according to PW3, but that could not stop the shop to issue available receipts. She was emphatic that the issue is about forgery of receipt No. 1270 and not any other receipts.

Regarding the Hospital storekeeper who said he received the goods but was not called to testify as prosecution witness, Ms. Thomas argued that PW11's testimony showed that not all goods were delivered to Hospital, and that other prosecution witnesses from the same Hospital did testify. She added that the appellant had an opportunity of calling the storekeeper for her defence if she so liked.

Turning to the third ground of appeal, on count number eight and nine, Ms. Thomas observed that the submission by the appellant's advocate was the same as for the first and second ground. She therefore argued that the doubts raised by the learned advocate were not significant to show that the offence of forgery, use of document to mislead the principal and causing pecuniary loss were not proved. She argued that, doubts which don't go to the root of the offence can be disregarded by the court as per Court of Appeal decisions in **Deus Josia Kilala@Deo V. R**, Criminal Appeal No. 191

of 2018, CAT, DSM and in **Jabriel Okash Ahmed V. R**, Criminal Appeal No. 331 of 2017, CAT at Arusha.

Having expressed her views that the trial court properly analyzed the evidence to convict the appellant, Ms. Thomas invited this court, as the first appellate court, to step into the shoes of the trial court to re-evaluate the evidence on record and make its own conclusion. She prayed the court to dismiss the appeal for lacking in merit, uphold the conviction as well as sentence imposed by the trial court.

In his rejoinder, Mr. Shauri reiterated his submission in chief regarding evidence on forgery, adding that since the shop owner (PW3) was not an accused person, PW6 ought to examine the handwriting of the appellant's co-accused and not otherwise.

Regarding where the receipt submitted to Hospital came from, Mr. Shauri rejoined that according to PW6, it came from VIMA. On denial by PW3 of receipt No. 1270, Mr. Shauri said that PW5 Leah Loti confirmed that the receipt came from VIMA.

On ingredients of the offence of forgery, Mr. Shauri rejoined that the appellant had no ill-intention because she was given the receipt recognized by VIMA and that, goods were bought and were used. As for the submission that some of the goods were missing, Mr. Shauri reiterated that goods were bought and the storekeeper accepted them and the same were used.

Mr. Shauri highlighted that the respondent's State Attorney did not address his argument on the requirements for proving handwriting under section 69 of the Evidence Act, [Cap 6 RE 2019]. He thus argued that for not observing the said legal requirement forgery was not proved.

On allegation that the appellant caused loss to specified authority, Mr. Shauri rejoined that there was no loss caused by her, adding that the goods were bought, recorded in the ledger and were used accordingly. Having so rejoined, Mr. Shauri prayed conviction on counts number four, eight and nine to be quashed and the appeal be allowed.

The above submissions give rise to one general issue for determination which is whether the prosecution proved the case beyond reasonable doubt. In determining this issue, I have at my disposal, the proceedings and judgment of the trial court as well as the submissions for and against the appeal made before this court by the learned counsel. In the outset, the court cordially accepts the invitation by Ms. Thomas to re-examine the evidence adduced to determine if each offence was duly proved.

In my scrutiny of the trial court proceedings, I have found with a little surprise that all the documentary exhibits tendered and admitted in evidence were not read in court, save Exhibit P7 only. The position of the law on admission of documentary exhibits is in black and white. In **Steven Salvatory v. The Republic**, Criminal Appeal No. 275 of 2018, CAT, Mtwara,

and in many other decisions the court of Appel find such an irregularity fatal to the proceedings and the remedy has been to expunge such exhibits from records.

My surprise came about the fact that the trial Magistrate appears to know the procedure for admission of such type of evidence. He did it perfectly well with Exhibit P12 (the cautioned Statement of the appellant) tendered by PW7 Idda Michael @ Silivia, as shown on page 77 of the typed trial court proceedings, where the exhibit was read over aloud in court. Yet he did not do same for the rest of the exhibits. As stated in the cited decisions of the Court of Appeal, the consequence is to expunge the irregularly admitted exhibits. I according do the same, save for Exhibit P12.

The court has in mind the decision of the Court of Appeal in **Andrew Charles v. The Republic**, Criminal Appeal No. 576 of 2017, CAT, Dodoma, whereby some of the evidence was expunged, yet the conviction was supported by using other available evidence such as cautioned statement. Therefore, having so uprooted the said exhibits, this court has to consider if the remaining evidence is sufficient to prove the charges against the appellant by the same standard of proof.

As earlier stated, in the fourth count, it was alleged that the appellant and with her co-accused person, did forge a receipt of VIMA. Proof of this offence obviously relies heavily on production of the forged receipt No. 1270, embedded in Exhibit P1; production of receipt book and daily sales book

(Exhibit P4 and P5) where the subject receipt was observed by PW3 and PW5 to be missing, and more so the handwriting examination report (Exhibit P8), tendered by PW6 Fatuma Rajabu Mbwana, which confirmed the handwriting in the forged receipt to belong to the appellant.

No doubt with the expunging of exhibit P1, P4, P5 and P8, nothing remains in the testimony to prove forgery. Having read the remaining evidence in the proceedings, the court is settled that the conviction for offence of forgery in the fourth count does not stand.

Likewise, the eighth count where the appellant was convicted for the use of documents intended to mislead principal, proof of this offence necessarily requires production of the document alleged to have been used by the appellant. The documents concerned are the payment vouchers collectively admitted as Exhibit P1 tendered by PW1 Isaack Macha. Since 'document' is the very backbone of the charge as per wording of the law, the court finds that the conviction of the appellant on this count also does not stand.

Lastly, in the ninth count the appellant was convicted for causing pecuniary loss to a specified authority. The conviction for this offence has strong bearing on the testimonies of PW1 Isaack Macha, the accountant who produced the vouchers (Exhibit P1) to show that the appellant had requested for money to purchase certain items and for paying extra duty allowances; PW2 Tuntufye Jacob Mwakatika, who tendered Bank Statement (Exhibit P2

& P3) to show that Tshs. 1,995,500/= requested by the appellant was actually deposited into her account at NMB Bank; PW3 -Victoria Mnemele, who tendered her shop's daily sales book (Exhibit P5) to show that she did not sell the types and value of goods to the appellant on the 22/9/2017, which is the date shown on the forged receipt (Exhibits P1 and P8).

The conviction for causing pecuniary loss also depends on the testimony of PW4 Remija John Ningo. PW4 a one-time Midwife In-charge who relied on the Extra duty allowance book (Exhibit P6) to prove that from 05/08/2017 to 15/08/2017 there is nowhere the appellant, Rebecca Mpeho and Isaack Macha filled in an extra duty claim.

The only key evidence to prove the said pecuniary loss which could correctly relied upon the documentary exhibit is of PW7 Idda Michael Siriwa, a PCCB Investigation Officer whose exhibit was duly admitted in evidence. PW7 tendered the appellant's cautioned statement (Exhibit P12). However, her testimony was largely derived from her own findings following investigation which she had done. She testified that there was a receipt valued at Tshs. 1,365,500/= that was forged; some payment forms for the appellant, Rebecca Mpeho and Isaack Macha which she discovered were false, and the approval for money to buy materials was given by Hospital Secretary instead of the District Medical Officer.

PW7 concluded that the appellant colluded with her co-accused person to gain the money which caused loss of Tshs. 1,995,500/= to Kongwa District

Council. Having re-examined the testimony of PW7, as appearing on page 78 to 79 of the typed proceedings, it is apparent that she relied on three sources for the above information. Firstly; she cited the appellant whom she was interrogating in the course of investigation. Secondly, she cited the appellant's cautioned statement and the lastly, she cited investigation.

In my views, all the above cited sources add up to one known source, which is the appellant herself, who revealed that irregularities were committed in approving payments. In Exhibit P12, the appellant confirms that there were irregularities in the approval of payments for both the purchase of the goods and extra duty allowances. For example, according to P12, the approval of Tshs. 1,365,500/= for purchase of goods was done by Hospital Secretary while endorsement of Tshs. 210,000/= extra duty allowance for Isaack Macha (PW1) was done by the appellant herself.

Despite the above revelations, PW7 conceded that the appellant did not confess in her caution statement. Indeed, the appellant did not confess to the charge of causing pecuniary loss, and the court should exercise care in this kind of situation. In Exhibit P12 the appellant confessed to existence of irregularities in the approval of the payment. This is different from confessing the offence as charged. While in the ninth count the appellant was charged for causing pecuniary loss of Tshs. 1,995,500/=, her confession to irregularities in payment does not add to that amount of loss. The amount of Tshs. 1, 365,500/= and Tshs. 630,000/= were applied by the appellant but were approved by her co-accused person. When the appellant was asked

why Rebeca approved the payment, she replied that she does not know. In this situation evidence should have presented to impute collusion between them. PW7 did not provide the basis for believing there was collusion.

In holding that the confession of the irregularities in payment by the appellant does not amount to confession to the charge, I am guided by the decision of Court of Appeal in **Rhino Migere v. Republic**, Criminal Appeal No 122 of 2002 (unreported), where it was stated:

*"...for a statement to qualify for a confession **it must contain the admission of all the ingredients of the offence charged** as provided for under section 3 (c) of the Evidence Act, 1967..."*

[Emphasis added]


In this case, therefore, the appellant did not confess to the charge. Under such circumstances, the testimony of PW7 alone cannot land conviction. Obviously, after the expunging of the documentary exhibits which were overly relied upon in the whole trial the case collapses.

From the above state of evidence, it's the court's finding that, the charge against the appellant in the fourth, eighth and ninth counts were not proved beyond reasonable doubts. For this reason, the appeal gains merit and is therefore allowed.

Consequently, the court hereby quash the conviction by the trial court and set aside the sentence imposed on the appellant. Order accordingly.

Dated at **Dodoma** this **4th** of **July, 2022**




ABDI S. KAGOMBA
JUDGE