IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

MISC. DC CRIMINAL APPEAL NO. 61 OF 2020

(Originating from District Court of Singida at Singida in Criminal Case No. 124/2017)

PAUL S/O MTINDWA FOYA .....APPELLANT
VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

17/05/2022 & 20/05/2022

KAGOMBA, J

PAUL S/O MTINDWA FOYA (the "appellant") has filed a Petition of Appeal to this Court to challenge both the conviction entered against him by the District Court of Singida at Singida (the "trial Court) and the sentence pronounced by the trial Court.

The appellant was charged with a total of forty-two (42) counts whereby in the first to twenty-ninth count he was charged with the offence of stealing by officer of company contrary to section 265 and 272 of the Penal Code [Cap 16 Vol. 1 R. E. 2019] (hereinafter "the Penal Code"). In the thirtieth to forty-second counts, he was charged with the offence of fraudulent accounting by store keeper contrary to section 317(b) of the Penal Code. He was sentenced for the first to twentieth counts to serve three years imprisonment and for the thirtieth to forty-second count to serve one year imprisonment. The trial Court ordered the sentences to run consecutively. In

addition to the jail sentences, the appellant was ordered to compensate the complainant an amount of Tsh. 171,433,000/=.

Being aggrieved, the appellant has come up with the following substantive grounds of appeal: -

1. That, the learned trial Court Magistrate erred both in law and fact to convict the appellant while there is huge confusion on the actual amount of money lost.

2. That, the learned trial Magistrate erred in law and fact in convicting the appellant while there was lack of a link between the appellant with commission of the offences.

3. That, the learned trial Court Magistrate erred in law and law and fact to convict the appellant without resolving important question of existence of the employment contract between Lake Hill Paradise Hotel with the appellant.

4. That, the learned trial Court Magistrate erred in law and fact to convict the appellant while the prosecution side failed to prove the thirtieth to forty-second count on fraudulent accounting by the store keeper.

5. That, the learned trial Court Magistrate erred both in law and fact to convict the appellant on weak audit report.

Before the trial Court, it was alleged that the appellant, in between the years 2016 and 2017 at Jovena area within Singida District, in Singida Region, being a store keeper employed by Lake Hill Paradise Hotel, did steal

various items including pieces of iron bars, iron sheets, flat bars, pipes, sentence, PVC, Marine boards, Gypsum boards, Timbers, nails, Binding wire, wire mesh and other types of building materials.

It was further alleged that, with intent to defraud, the appellant made false entries in receipt books purporting to show sales of some materials, the fact which he knew to be false. He denied all the charges but was the trial Court relied upon the testimonies of eight prosecution witnesses as well as documentary evidence to find the appellant guilty as charge.

During hearing of the appeal, the appellant enjoyed the service of Mr. Onesmo David, learned advocate while the Republic, being the respondent, was represented by Ms. Judith Mwakyusa, learned Senior State Attorney.

Mr. Onesmo David divided his submission in two areas. Firstly, on anomalies or irregularities identified in the proceedings and judgment of the trial Court on point of law; and secondly, about grounds of appeal which he chose to drop some and argued jointly the remaining ones.

Regarding the anomalies or irregularities identified in the proceedings and judgement of trial Court, Mr. David mentioned and elaborated them as follows: -

One; that preliminary hearing was not conducted properly. He submitted that the basic requirements of sections 192(2) of the Criminal Procedure Act [Cap 20 R.E 2019] (hereinafter "**CPA**") which required the memorandum of agreed matters to be signed by both parties and their

advocates and be read out in Court as well as explained to the accused person were not observed as obtained on page 19 of the proceedings. He submitted that an omission to read out the memorandum of agreed matters and to explain it to the accused person was fatal and an incurable irregularity.

Two, exhibits were not read out after admission. He mentioned exhibits with such an irregularity as Exh. P1 to P8. He prayed the Court to expunge them from record, citing the case of **Semeni Mgonela Chiwanza V. the Republic**, Criminal Appeal No. 49 of 2019, CAT Dodoma.

Three, after closure of prosecution case, the charge was not read out to the accused person contrary to section 231 (1) of the **CPA**. He recalled that the cited provision is mandatory but was not observed.

Four, the judgment of the trial Court did not qualify to be a judgment in the eyes of law, because the learned trial Magistrate did not analyze the ingredients of the offence to see if they have been established. He argued that such an omission was contrary to mandatory requirement of section 312 of the **CPA**. He said, for such irregularity, the judgment of the trial Court should be disregarded; and

Five, there was duplicity of charges whereby the offence of stealing by officer of the company had twenty-nine (29) counts, making the accused person unable to defend himself properly. He clarified that the repetition of the same offence which was alleged to have been committed in the same place in the same year was against section 133(1) (2) and (3) of the **CPA**,

and prejudiced the right of his client to defend himself properly. He pointed out page 71 and 72 of proceedings where the appellant defended himself in general terms as he could not grasp the several counts stated in the charge sheet. He argued that such defects rendered the charge incurably defective as per the decision in **Stanley Murithi Mwaura V. R**, Criminal Appeal No. 144 of 2019, CAT, Dar es salaam.

Arguing on the grounds of appeal, Mr. David prayed to drop the 1st, 7th 8th, 9th 10th and 11th grounds of appeal which appeared in the Petition of Appeal. He also prayed to submit on the 2nd 3rd, 4th, 5th and 6th ground whereby he proposed to consolidate the 2nd 3rd, and 4th grounds of appeal into one ground to read; "the prosecution side failed to prove the case against the appellant beyond reasonable doubt". He also proposed to argue the 5th and 6th grounds of appeal separately.

Submitting on the first ground of appeal, after consolidation, Mr. David premised his argument on the fact that the burden of proof lied with the prosecution side who were required to prove the case beyond reasonable doubt. He cited the decision of the Court of Appeal in **Joseph Makune V. R** [1986] T.L.R 44 for emphasis.

He submitted further that there was a big variance between the charge and prosecution evidence. That there was confusion between the testimony of PW1 -the Company Manager, PW3-Director of the Company, PW7-Police Investigator and PW8- Company Accountant with regard to the amount of loss mentioned in the charge. He elaborated that while in the charge sheet the amount allegedly lost for all the 42 counts was Tshs. 176,385,000/=,

PW1 said it was Tshs. 168,507,000/= and PW 8 the Auditor and in his Audit Report (Exhibit P9) showed the loss to be Tshs. 168,510,000/=. He argued that all the prosecution witnesses mentioned an amount which differed with what was stated in the charge sheet.

Mr. David amplified the cited variations by using the evidence of PW3-Company Director, who testified that there was a loss of 7548 bags of cement @ Tsh. 13,000/= and thus the total loss was Tsh. 98,12,000/=, while in the charge, on first count, the accused person was alleged to have caused a loss of 7544 bags of cement @ Tsh. 13,000/= and the total was Tsh. 98,072,000/=.

Based on the cited variations, Mr. David submitted that the first count was not proved by PW3-the Director of the company and so was case for all other counts. He added that counts number 22, 23, 27 28 and 29 were not proved at all as there was no any evidence by prosecution witnesses adduced on those five counts.

Mr. David wound up his submission on this ground of appeal by emphatically asserting that the prosecution side failed to prove the case beyond reasonable doubt. In this connection he cited the case of **Issa Mwanjiku @White V. Republic**, Criminal Appeal No. 175 of 2018, CAT, Dar es Salaam where the Court of Appeal referred to its previous decision in the case of **Abel Masikiti V. Republic**, Criminal Appeal No. 24 of 2015 and stated;

> *"If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of*

the CPA. If this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal".

He added that the cited variations had a fatal effect which could not be cured by the provision of section 388(1) of the **CPA**.

On the second limb of his assertion that the charge was not proved beyond reasonable doubt, he submitted that there was no link between the appellant and the commission of the offence. He argued that the appellant was a storekeeper whose duty was to stay in the store for issuing items. That, there was another person who was recording all the incoming and outgoing items. In this connection it was the learned advocate's views that PW2 Domician Leverian Kyaruzi, a supervising Masonry, who confessed that he was recording the materials taken by the masonry from the store, was supposed to be joined in the case.

For the above reason, Mr. David submitted that the appellant was not responsible for all the counts he was charged with because recording of materials was not his duty, and the register was not tendered in evidence, hence reliance on the audit report, which he attacked for being doubtful. He doubted the audit report because the auditor was hired by the complaint as testified by PW8-Riziki Mesa and that the one supplied the auditor with information was his lawyer, hence it was interfered with by an interested party. He therefore prayed the Court to disregard the audit report.

On the fifth ground of appeal, Mr. David submitted that the thirtieth count and other counts were not genuine because the testimonies of PW5

and PW6 alleging that the appellant prepared the receipts himself were not proved. He submitted that PW5 and PW6 proved the thirtieth to forty second counts otherwise because the receipt tendered were paid by the Director of the Company when they were presented for payment. Also, PW5 and PW6 proved that they did not take goods and on the receipts, it was written "NOT DELIVERED". Also, PW6 testified that he knew the receipt as it had his name, his mobile number and that he was paid what he claiming against the company.

Mr. David concluded that the count number thirty to forty-two were not proved beyond reasonable doubt. He therefore prayed the Court to quash the conviction based on the thirtieth to forty second counts.

On the sixth and last ground of appeal, Mr. David prayed the Court to treat it as covered by previous submission in the consolidated grounds of appeal. He expressed his views that since there was no proof beyond reasonable doubt as already submitted, the sixth ground should die a natural death. He wound up his submission in chief by praying the Court to allow the appeal, quash the conviction and set aside the sentence against the appellant.

Mr. David further drew the attention of the Court to the case of **Fatehali Manji V. R** (1966) EA 343 and pleaded with the Court not find the case at hand fit retrial.

After that long and candid submission by the appellant's advocate, Ms. Judith Mwakyusa, learned Senior State Attorney took the floor to support the

appeal too. Ms. Mwakysa concurred with the appellant's advocate on key matters, specifically the ground that the case was not proved by prosecution beyond reasonable doubts.

Ms. Mwakyusa was at one Mr. David on the variations in the amount of loss, the number of cement bags and other properties alleged to have been stollen, non-submission of necessary documents such as delivery notes and receipts to show that the company was buying or importing the goods allegedly stollen or lost and the fact that most of exhibits were not read in Court which was a fatal and an incurable irregularity in the eyes of law.

However, the learned Senior State Attorney shared her knowledge with the appellant's advocate with regard to the ground that preliminary hearing was not properly conducted. She submitted that proceedings showed that the trial Court recorded all the facts and the same were read in Court, then prepared a memorandum of agreed matters whereby the appellant agreed only his name and his date of arrest whereupon all parties signed the memorandum. With this explanation she said that the preliminary hearing was properly done and appellant was not prejudiced.

Ms. Mwakyusa also differed with the appellant's advocate with regard to compliance with section 231(1) of the **CPA**. She submitted that the said provision does not require the charge to be read afresh upon finding the accused person with a case to answer. She clarified that what the trial Court was required to do is to "explain" the substance of the charge and not to read it again. She argued that on page 39 of the proceedings, it was shown that section 231 was complied with.

On the judgment not meeting the requirement of the law, Ms. Mwakyusa also differed with the appellant's advocate. She said that the judgment of the trial Court stated the issues to be determined and the trial Magistrate went on to determine the same and gave reasons for the decision. She submitted, therefore, that the trial Court complied with the provision of section 312 (1) of **CPA** and the judgment was very much legal.

Ms. Mwakyusa also explained the allegation of duplicity of charge. She clarified that duplicity referred to having two or more offences in one count. She conceded, however, that there was poor drafting of the charge. On that note she wound up her submission.

Mr. David for the appellant had very little to rejoin. He reiterated his prayers previously made during his submission in chief.

Before embarking on determination of the appeal, I find it prudent to acknowledge the professionalism shown in Court by both the learned advocate for the appellant and the learned Senior State Attorney for the respondent. They read the case, they understood it and above all they showed a lot of respect to each other. That is commendable.

Having gone through the submissions from both parties and despite the fact that the learned Senior State Attorney, Ms. Mwakyusa supported the appeal, the duty of the Court to determine the appeal is still there. The Court has to determine whether the appeal is meritorious.

I have purposely covered the submissions by both parties extensively to avoid repetition. There is no dispute on the key issue that the case against the appellant was not proved beyond reasonable doubt. I agree with both parties that, indeed, there were serious gaps in the prosecution case particularly in establishing the amount of loss the appellant is alleged to have caused. The evidence on this matter was contradictory as the learned appellant's advocate has ably exposed it in his submission in chief.

The Court is, therefore, properly guided by the Court of Appeal in **Issa Mwanjiku @ White V. R** (Supra) that with the obtaining uncertainties in the charge, the same was to be amended in terms of section 234 of the **CPA**. The amendment of the charge to align with available evidence was not done. As such, the only conclusion is that the charge has remained unproved, and the appellant shall be entitled to acquittal.

The above holding is enough to dispose of this appeal. However, before so doing, I wish to commend Ms. Mwakyusa for her analysis of the judgment of the trial Court. It was stated by the Court of Appeal in **East African Development Bank V. Blueline Enterprises Limited**, Civil Application No. 47 of 2010, CAT, Dar es Salaam (Civil Application 47 of 2010 [2011] TZCA 53 (06 September, 2011) that no judgment can attain perfection. Indeed, the trial Court's judgment was not perfect. However, from the trial Magistrate's narration of the facts of the case, analysis of evidence adduced, his reasoning on the issues raised and the decision made thereon, this Court holds no doubt that the learned trial Magistrate aspired to render justice.

The judgment has complied with the law, as perfectly submitted by Ms. Mwakyusa. What went wrong is the drafting of the charge which did not align to the available evidence, and did not observe good drafting practice; improper investigation by auditor which defied the principles of independence of the auditor and such other weaknesses in the prosecution of the case as clearly exposed by Mr. David.

For the above stated reasons, I therefore allow the appeal, quash the conviction and set aside the sentence passed by the trial Court against the appellant who should set free forthwith unless otherwise held for a lawful cause. Order accordingly.

Dated at **Dodoma** this 20th day of May, 2022.

ABDI S. KAGOMBA
JUDGE