

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA

CRIMINAL APPEAL No. 67 OF 2020

(Originating from District court of Mbulu at Mbulu, Economic case No 02 of 2019)

THE D.P.P.....APPELLANT

VERSUS

JUSTINA D/O PATRICK GIDOHAY.....RESPONDENT

JUDGMENT

2nd February 2022 & 25th March, 2022

MZUNA, J.:

The Director of Public Prosecutions, the appellant herein, having been aggrieved with the decision of Mbulu District court (the trial court) in Economic case No.02 of 2019 preferred this appeal against Justina d/o Patrick Gidohay, the Respondent.

Before the trial court, the respondent stood charged with two counts namely:-

- 1. Embezzlement and Misappropriation, Contrary to section 28(1) of the Prevention and Combating of corruption Act, No. 11 of 2007.*
- 2. Occasioning loss to the Specified Authority, Contrary to Paragraph 10 (1) of the First Schedule to and Section 57 (1) of the Economic and Organized Control Act, Cap 200 [RE 2002].*

It was alleged in the first count that the above respondent on diverse dates between July 2013 and June, 2014 at Mbulu Town Water Authority Offices within Mbulu District in Manyara Region, being an employee of Mbulu Town Water Authority as Clerk, dishonestly and fraudulently converted into her own use Tanzania shillings Two Million, Two hundred Forty one Thousand and Four Hundred (Tshs 2,241,400/-) only which was entrusted to her as a Public Officer by Mbulu Town Authority.

While particulars in the second count alleged that the above mentioned respondent, on diverse dates between July,2013 and June, 2014 at Mbulu Town Water Authority Offices within District and Manyara Region, being an employee of Mbulu Water Authority, by her willful acts, caused the said Mbulu Town Water Authority to suffer a pecuniary loss of Tanzanian Shilings Two Million, Two hundred Forty one Thousand and Four Hundred (Tshs 2,241,400/-) only.

She pleaded not guilty but after full trial she was acquitted of both counts hence the instant appeal.

Briefly stated, the facts are as follows:- The respondent was employed by the Mbulu District Council as a Clerk/Secretary. She used to collect payment

of water bills using different books and used to issue receipts. The dispute arose because there was Tshs 2,241,400/- which was collected but not banked.

The prosecution relied on the evidence of PW2 Innocent Paulo Sule and PW4 Light Kaaya who alleged that the respondent promised to pay the money after being summoned before the District Executive Director (DED).

The trial court found that proof of the charge merely because she admitted to pay back the money was disproved by exhibit PE4 which shows the respondent wrote a letter to the DED refusing to pay the said amount of money. The court found there was no sufficient evidence connecting the respondent which prompted this appeal.

Hearing of this appeal proceeded by way of written submissions. Ms. Akisa Mhando, the learned Senior State Attorney appeared for the appellant whereas the respondent was represented by Mr. Silay Edwin, the learned advocate. This appeal is premised on four grounds:-

- 1. That the trial court Magistrate erred in law and fact for acquitting the Respondent basing on the fact that she was not required to provide written proof of handing over the money to one Martha Herman.*

2. *That the trial Magistrate erred in law and fact for failure to evaluate properly the adduced evidence against the elements for the offence of occasioning loss.*
3. *That, the trial Magistrate erred in law and fact for failure to consider that it was the respondent who was one of the key collectors of money therefore she was supposed to bank the same too.*
4. *That, the trial Magistrate erred in law for failure to analyze and weigh the Prosecution evidence.*

In dealing with this appeal, I propose to start with the 2nd, 3rd and 4th ground of appeal as they are intertwined followed by the 1st ground of appeal. The question relevant for the above three ground of appeal is, was there evidence connecting the respondent? The second issue is whether the charge was proved to the required standard of proof.

The prosecution case was that PW3 Jackline John, the MBUWASA Accountant who used to issue receipt books to the respondent and Martha, noticed the deficit of some money which according to the Auditor PW1 Albin Siostine Hayghaimo, noted a deficit of Tshs 5,201,950/-. The audit report (exhibit P1) was conducted from 3rd August 2014 to 15th September, 2014 for the financial year 2013/2014. PW1 noticed that the said money was collected but not banked.

PW4 Light Kaaya, from PCCB as the investigator said that out of the unbanked money, the respondent was responsible for Tshs 2,241,400/- whereas Martha Herman as the Acting Business Officer, was responsible for Tshs 2,960,550/-.

PW4 talked with Martha Herman, who denied to have received the said money from the respondent. Both Martha and the respondent pointed an accusing finger on one another. The latter alleged that did handle the money to Martha however, due to the absence of receipts for the money she received and banked it, necessitated the institution of the criminal proceedings against her.

In the submission in chief, in support of the appeal, the appellant stated that the respondent was among the public officials who were involved in collecting the revenue for Mbulu water authority. That, in the course of collecting such revenue, the total of Tshs 2,241,400/= ended in the hands of the respondent who did not bank them as required.

The Prosecution further submitted that, the audit report which is PE1 produced by the Auditor PW1 as well as the deposit slips produced as PE6 and PE5 which is the counter book for recording cash books produced by

PW2 who was the then Manager for Mbulu water Authority, all confirm that the respondent collected the sum of 2,241,400/=TSH and she was duty bound to bank the same after collecting such revenue, but acted dishonestly for not banking the revenue.

Further that, the trial Magistrate failed to observe the principle established under the case of **Vuyo Jack v. The Director of Public Prosecutions**, Criminal Appeal No. 334 of 2016 at page 21, while quoting the decision in the case of **Goodluck Kyando Versus Republic** [2006] TLR 363, the court held that;

*"...every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness. **Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses.**"*

It was the Prosecution submission that since none of the prosecution witnesses gave contradictory evidence or that the evidence has been materially contradicted by another witness, then the evidence of PW1 had to be trusted as it was not challenged by the respondent.

On that account, they say, there was failure by the trial court to determine elements of the offence of occasioning loss to the specified Authority which can be proved where there is sufficient evidence showing that the accused/respondent by any willful act or omission, or by his negligence or misconduct, or by reason of his failure to take reasonable care or to discharge his duties in a reasonable manner, causes any specified Authority to suffer a pecuniary loss of not less than Tanzanian shillings one million. That, the Prosecution have abundant evidence to prove before this court that the respondent who had the legal obligation to ensure that all the money collected was banked or had satisfactory information on whereabouts of all the collected money she collected, failed to do so and as a result caused a pecuniary loss to MBULU WATER AUTHORITY. That, the evidence shows the collected money by the respondent was not banked as required. She failed to cast doubt on the prosecution case, she further said.

The learned Senior State Attorney urged the court to set aside the judgment and proceed to find the respondent guilty as charged.

In reply to the appellant's submission in support of his appeal, the respondent submitted that to require the respondent to produce written proof showing that she handled the revenue she collected to one Martha

Herman is as good as requiring the respondent to prove her innocence which is not proper. That, it is the duty of Prosecution to prove the guiltiness of the accused not otherwise.

The learned counsel made reference to the case of **Republic Versus Kerstin Cameron** [2003] TLR 84 to emphasize a point that it is settled principle that it is the prosecution which has duty to prove the person arraigned before the court is the one who is responsible for the charged offence. It is not for the accused to prove his innocence thus he can only be convicted on the strength of the prosecution case and not on the weakness of his defence case.

The Respondent further stated as per the evidence on record that PW2 stated that it is the duty of Cashier to deposit the collected revenue into the bank. Further that PW3 testified before the trial court that deposit was done by any person. The Respondent further submitted by referring to the case of **Christian Kaale And Another v. Republic** [1992] TLR 302, where the court held that;

"...the accused person ought not to be convicted on the weakness of his defence but on the strength of the prosecution case..."

The Respondent went further arguing that, the appeal is devoid of merit hence be dismissed because it does not reflect any of the elements of the offence of embezzlement and misappropriation as provided for under section 28(1) of the PCCB Act. The learned counsel further cited the case of **Andrea Gwandawe v. Republic**, Dc. Criminal Appeal No.53 of 2016 HCT, at Arusha (Unreported) where the court held that, the offence under section 28(1) of the PCCB Act can be committed in two situations, namely by dishonestly or fraudulently misappropriating or converting for his own use, any property entrusted to him or allows another person so to do.

I have keenly followed the submissions from both counsels. The prosecution's evidence and what this court has noticed is that the prosecution managed to prove that the Accused/Respondent collected the revenue. The witness PW1, produced an audit report PE1, but also PW2 who produced the deposit slips as PE6, also the counter book for taking the cash books as PE5. In their totality all these documents which were produced before the court evidences that a total of Tshs 2,241,400/= was collected by the Respondent.

Now the question which follows is whether there was embezzlement and misappropriation of the said money by the Respondent?

There is no dispute on the 1st element of the 1st and 2nd counts that the Respondent is a public official since other public officials in their testimonials testified that she is indeed a public official though sometimes referred to as employed as a clerk in the charge sheet but the evidence on record shows that she was employed as a Personal Secretary.

Section 28(1) of the Prevention and combating of corruption Act,[cap 329 Revised edition 2019], provides clearly that, for an offence of embezzlement and misappropriation to stand, the prosecution must prove two elements, first whether the accused **is public official**, second whether the public official **dishonestly** or **fraudulently** misappropriate or otherwise convert for her own use any property entrusted to her or under her control as a public official or she has allowed any other person to do so. The second count on occasioning loss contrary to paragraph 10(1) of the first schedule to and sections 57(1) and 60(1) of the Economic and organized crime control Act, Cap 200 R:E 2002, for its proof, the Prosecution must prove that the accused **did willful act** that caused Mbulu Town water Authority to suffer pecuniary loss.

The term "**public officer**" or "public department" is defined under section 2 of the Interpretation of Laws Act, Cap 1 RE 2009 that it:-

"extends to and includes every officer or department invested with or performing duties of a public nature, whether under the immediate control of the President or not, and includes an officer or department under the control of a local authority, the Community, or a public corporation."

Similarly, **Oxford Advanced Learners' Dictionary**, define the term embezzle to mean *"to use money placed in one's care wrongly, esp. so as to benefit oneself"* while the term misappropriate means *"to use sb else's money wrongly, esp for one's own benefit"*.

In order for the prosecution to prove such element had to go further showing how the Respondent converted the money for personal gain or use or for any other person's use. In the case of **Andrea Gwandawe Versus Republic, Dc** (supra) the court held that;

"The offence under section 28(1) of the PCCB Act can be committed in two situations, namely, by dishonestly or fraudulently misappropriating or converting for his own use, any property entrusted to him or allows another person so to do. In this matter, there was not adduced any evidence to establish fraud or dishonest on the part of the Appellant. Nor was there any suggestive evidence that the money in question was converted or misappropriated for the personal use of the Appellant or any person whomsoever..."

The crucial element under the second count of occasioning loss to specified Authority is that, the Prosecution must prove as to whether the

Respondent did willful act or omission or by her negligence or misconduct or by reason of her failure to take reasonable care or to discharge her duties that caused the specified Authority to suffer the pecuniary loss of 2,241,400/=. As shown above, the prosecution managed to prove the total collection of Tshs 2,241,400/= made by Accused/Respondent. Apart from the collection of such revenue, the defence evidence of the respondent was that the amount alleged to have been misappropriated by Respondent was handled to one Martha Herman as a Cashier to deposit them into a bank account of MBUWASA.

The Prosecution's witness i.e. PW2 testified at page 23 that the one responsible to bank money was cashier, Martha Marmo who was helped by Justina Patrick (i.e the respondent). PW3 (Accountant) evidenced before the trial court after being cross examined, by saying that:-

*"... I once took my annual leave, I left my office with Justina. **Justina told me she noted that some money was not banked. I told her yes I even noticed she should wait for me...**"*

The above narration by the accountant, stresses that there are no circumstances where Respondent acted willfully or omitted his duties or had negligent conducts that caused a pecuniary loss to Mbulu Town Water

Authority. She is the one who detected the loss and then notified him (PW3). Even when PW2 was cross examined, it is shown at page 23 paragraph 3 of the certified proceedings where PW2 narrated that;

"the one responsible to bank money was Cashier Martha Marmo..."

"Its true that cashier is the one to bank the money, I assigned her to deposit and withdraw money".

The above evidence suggest that Martha was a key witness in this case but never testified for the prosecution. Paragraph 37(3) of the Local Authority Financial Memorandum of 2009 which was cited by PW1 on paragraph 1 of page 16 provides that;

"The Cashier shall issue a receipt for the money and ensure prompt banking of amount deposited."

It was held in the case of **Azizi Abdallah V. Republic [1991] TLR 71** that;

"The general and well known rule is that the Prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question are able to testify on material facts. If such witness is within reach but are not called without sufficient reason being shown; the court may draw an inference adverse to the Prosecution"

Based on the above authoritative case law, the prosecution was duty bound to call Martha Marmo who was a material witness in this case.

This takes me to the last issue on proof of the charge relevant for the 1st grounds of appeal. In order for the prosecution to prove the charges levelled against the accused/Respondent both for the 1st count as well as the 2nd count, they are duty bound to prove how the Accused/Respondent benefited from such revenue which she collected and thereby occasioning loss. In the case of **Jonas Nkize Versus Republic** [1993] TLR 213, the court established a rule that;

"...the general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt is on the prosecuting party that is our law, forgetting or ignoring it is unforgivable and is a peril not worth taking."

Ground No. 3 says that the trial Magistrate erred in law and fact for failure to consider that it was the respondent who was "***one of the key collectors of money therefore she was supposed to bank the same too***". The point on proof of a charge, is not on "one of the key collectors" but the one who collected the alleged money and as per established rules, failed to bank the money. Banking transaction as per the evidence above shown, was placed on the cashier Martha. The whole case was based on mere suspicion which, case laws have held time without number, that suspicion whatever strong it may be, cannot form the basis for conviction. That being the case,

it is clear that the Respondent acted properly as per the normal office instructions as narrated by PW2. It cannot be said in my considered view as indeed did find the trial magistrate, that her acts do qualify to say that she embezzled and misappropriated the employer's fund leading to the pecuniary loss to Mbulu Town Water Authority.

Therefore, having failed to prove the first count of embezzlement and misappropriation, similarly, the 2nd count of occasioning loss to specified Authority had not been established by the Prosecution. The allegation of embezzled or misappropriation of the revenue of Mbulu Town Water Authority has not been proved. In the event and for the reasons stated herein above, the appeal is without merit. It is hereby dismissed in its entirety.




M. G. MZUNA,
JUDGE.
25/03/2022.

