

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CRIMINAL APPEAL 52 OF 2023

(Originating from the District Court of Mbinga in Economic Case No. 2 of 2022)

ROBERT KADASO MAGENI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

Date of Last Order: 30/03/2023

Date of Judgment: 31/03/2023

U. E. Madeha, J.

It is important to note that, before the District Court of Mbinga, the Appellant that is none other than Robert Kadaso Mageni was charged with two counts. The first count was abuse of position contrary to section 31 of the *Prevention and Compacting of Corruption Act*, No. 11 of 2007, read together with paragraph 21 of the First Schedule to and sections 57 (1) and 60 (2) of the *Economic and Organized Crimes Control Act* (Cap. 200, R.E. 2002) for the first count.

It was alleged by the prosecution that on diverse dated in January, 2018 at Mbinga Town Council within Mbinga District in Ruvuma region, in

the use of his position as the District Director for Mbinga Mbinga Town Council, intentionally, he abused his position by appointing a contractor namely; *Ovan Construction Ltd* for the construction of Kalembo Health Center contrary to section 64 of the *Public Procurement Act, No. 07 of 2011*, for the purpose of obtaining undue advantage of Tanzanian Shillings nine million, seven hundred and twenty thousand (TZS. 9,720,000).

In the second count he was charged with the offence of occasioning loss to a specified authority, contrary to paragraph 10 of the First Schedule to and section 51 (2) and 60 (2) both of the *Economic and Organized Crime Control Act* (Cap. 200, R.E. 2002). It was alleged that the Appellant, on diverse dates in January, 2018, at Mbinga Town Council within Mbinga District in Ruvuma Region, being the District Director for Mbinga Town Council, by willful act, caused the said Mbinga Town Council to suffer a pecuniary loss of Tanzania Shillings nine million, seven hundred and twenty thousand (TZS. 9,720,000).

When the charge for the above counts was read the Appellant pleaded not guilty to both counts. On 12th April, 2022, when the case was coming for preliminary hearing, it was confronted with a preliminary point of objection on point of law that the charge sheet is bad in law as it

contravenes section 4 (3) of the *Criminal Procedure Act* (Cap. 20, R.E. 2019) and section 23 of the *Written Laws (Miscellaneous Amendments) Act No. 1/2022, GN. No. 01/2022*. The preliminary objection was dismissed by the trial Court. As a result, the Appellant lodged this appeal on two (02) grounds of complaint. For easy of reference, I reproduce them hereunder:

1. *That, the trial Magistrate erred in law and in fact by entertaining the matter contrary to the law.*
2. *That, the trial Magistrate erred in law and facts to overrule the Preliminary Objection which has merit.*

This appeal was canvassed by way of written submission, whereby the Appellant was represented by none other than the learned advocate Mr. D. P. Ndunguru whereas the Respondent enjoyed the services of the learned State Attorney Mr. Frank Chonja.

To begin with, Mr. D. P Ndunguru the Appellant's learned advocate submitted on the first ground of appeal that, the Trial Court erred in law and in facts by entertained the matter contrary to the law. Furthermore, he stated that the case that the Appellant was facing was of occasioning loss to the employer and the employer was in the position to handle that matter

under the administrative measures, and if that was not enough and the said loss would have been recovered through a civil suit. Notably, he argued further that failure to take the above-named remedies made the matter before the Trial Court incompetent. To cement it, he made reference by citing with approval section 4 (3) of the *Criminal Procedure Act (Cap 20, R.E. 2019)* as amended by section 23 of the *Written Laws (Misc. Amendment Act No. 1 of 2022)*, which provides that:

'Notwithstanding sub section (2) where a matter is of a civil, administrative or criminal nature as the case may be, exhaustion of the remedies in civil or administrative domains shall be mandatory prior to the innovation of the criminal process in accordance with this Act'.

Basically, he added that in this case, the exhaustion of administrative measures was compulsory and mandatory before invoking the criminal measure against the Appellant. To add salt to it, he further contended that this amendment comes into operation on 8th February, 2022 and should be applied in all Courts including Mbinga District Court as per sections 15 and 16 of the Interpretation of Laws Act (Cap. 1 of R. E. 2022. He made reference to the case of **Aselea Kihupi & Others v. Attorney General**

& Another, Land Case No. 177 of 2021, High Court Land Registry at Dar es Salaam. He further stated that in fact the Appellant is not a public servant anymore, however due to this case he will be supposed to compensate his former employer (Mbinga Town Council) if found liable.

As much as the second ground of appeal is concerned, he averred that the Magistrate erred to overrule the preliminary objection without considering section 4 (3) of the *Criminal Procedure Act* (supra), since the objection was based on trial and not the charge. He argued that the Trial Court' jurisdiction was barred under section 4(3) of the *Criminal Procedure Act* (supra).

Moreover, he contended that the Trial Magistrate erred in refusing to research and make analysis of the *Public Service Act 2003* and its *Regulations* G.N. No. 168 of 2003 which deals with the disciplinary authority of the civil servants which are of civil nature. In addition, he further contended that this action was to be brought in a civil nature and the proper law is the *Public Service (Recovery of Debts) Act (Cap. 76 R.E. 2002)*, in which under section 4 (3) clearly provides the same.

On the contrary, Mr. Frank Chonja the Respondent's learned State's Attorney submitted on the first ground of appeal that the Trial Court erred in law and facts when it entertained the matter for trial contrary to the law, it is his humble submission that the case which the Appellant is facing is on the offence of causing loss to the employer and it cannot be handled through administrative measures since the Appellant is no more an employee of Mbinga District Council.

He argued further that the Appellant's employment was terminated in the year 2018, and in that regard, the Appellant was in a good position to handle that matter under administrative measures when he was still an employee and not after termination. He further stated that, under such circumstances the loss caused by the Appellant cannot be recovered through a civil suit.

He emphasized that following such a condition the court cannot invoke section 4(3) of the *Criminal Procedure Act* (Cap. 20, R.E. 2022), since the Appellant is not within the employer and employee relationship. To crown it all, he stated that the case of **The Director of Public Prosecution V. Jiteshi Jayantilal Landwa & Another**, Criminal Appeal No. 11 of 2022 (unreported) cited by the Appellant learned counsel is

distinguishable and it cannot be applied in the circumstances of the Appellant's case since in that case he was still under employment unlike the Appellant in this case.

Principally, he further contended that even the Appellant in the first paragraph of the last page of his submission concedes that he is not a public servant anymore. He emphasized that this case cannot follow under the category of civil nature.

In that regard, he further submitted that the second ground of appeal supported the findings reached by the Trial Court since the objection raised was baseless and was overruled. He further averred that the Trial Magistrate was right since the Appellant herein does not fall under the category of a public servant. Finally, the Respondent's learned State Attorney prayed for this appeal to be dismissed.

As a matter of fact, with the views of the grounds of appeal raised, the issue here is whether this case can be dismissed by the Court so that the Appellant can be dealt through administrative measures. The Appellant's learned advocate was claiming that the Court was wrong to admit the charge placed before him against the Appellant. He prayed for

this case to be dismissed so that it can be dealt under administrative measure or as a civil suit. The State's Attorney submitted that; this case cannot be handled administratively or as a civil case because the Appellant is not a public servant anymore.

I am of the view that the following are the procedures to be taken by the Court before it admits and determines any criminal case. *First*, the charge sheet is filed in Court and once it is filed the Magistrate In-charge of any rank before the Subordinate Court is responsible to pass through the charge sheet in order to determine if the Court has jurisdiction. *Second*, if he finds that the Court has jurisdiction to hear and determine the matter, he/she admits the charge and makes an assignment. In fact, once the case is assigned, the assigned Magistrate is responsible to deal with that case until final determination.

On the same note, the District Court has the duty to conduct criminal trials of any criminal matters brought before it as prescribed by the law depending on the circumstances each case. Actually, the Court has the duty to deal with the case until final determination by delivering judgements, orders or rulings without any bias or delay.

Eventually and perhaps in the course of the determination of the criminal case, there are mischiefs that may arise in between as follows: either the prosecution side prayed to dismiss the charge and discharge the accused person under section 98 (a) of the *Criminal Procedure Act* (Cap. 20 R.E. 2022) or the prosecution side enters nolle prosequere under section 91 of the *Criminal Procedure Act* (supra). Also, the Court may dismiss the charge and discharge the accused person under section 225 (5) of the *Criminal Procedure Act* (supra). It can do so if the investigation is not complete after the expiry of 60 days and the prosecution did not file the prayers to extend the time to investigate the matter. This remedy is available in cases which the Court has the jurisdiction and not in all categories of criminal cases. Consequently, the Court can dismiss the charge and discharge the accused person on the above grounds but it does not operate as a bar to the subsequent hearing of the same case against the same accused person. Consequently, I find the objections raised by the Appellant's advocate has no merit.

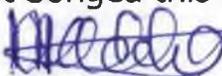
As far as this appeal is concerned, I am of the view that the Trial Magistrate correctly dismissed the preliminary objection raised by the

Appellant's learned advocate. There was no sufficient reason for dismissing the charge and discharging the Appellant.

In a final analysis, I find this appeal has no merit, the Trial Court correctly dismissed the preliminary objection. I dismiss this appeal and uphold the findings of the lower Court and order for the Trial Court to proceed with the hearing of the case. It is so ordered

DATED and **DELIVERED** at Songea this 31st day of March, 2023.




U.E MADEHA

JUDGE

31/03/2023