IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

RM CRIMINAL APPEAL NO. 24 OF 2022

(Original Criminal Case No. 02/2019 of the Resident Magistrate Court of Iringa before Hon. E. A. Nsangalufu, SRM.)

FAID MUSA MUNISI ..... **APPELLANT**

VERSUS

REPUBLIC ..... **RESPONDENT**

JUDGMENT

3rd March & 3rd May 2023

I.C MUGETA, J:

The appellant and 6 others were charged with three counts. These are conspiracy to commit an offence contrary to section 384 for all accused and stealing by agent contrary to sections 258(1), 265 and 273(b) of the Penal Code [Cap. 16 R.E 2019]. Consequently, the appellant and Abas Seleman Finda Mchina (2nd accused), Gerald John Mlelwa (4th accused), Leonard Mwambelwa (6th accused) and Gaspa Juvenary Shirima (7th accused) who did not appeal were convicted of the offences in both counts. Two accused persons, namely; Frank Manjiri (3rd accused) and Adam Kitururu Mzava (5th accused) were acquitted. The appellant was ordered to serve a jail term of two (2) years for the first count and two (2)

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years for the second count. The sentence was ordered to run concurrently. Again, he was ordered to pay Tshs. 16,050,000/= as compensation for the loss caused.

Dissatisfied with the trial court's decision, he has preferred this appeal based on six grounds as follows:

1. *That the trial court erred in law in not complying with section 230 of the Criminal Procedure Act, [Cap. 20 R.E 2019] as amended by failing to deliver a ruling if your humble appellant had a case to answer or not.*
2. *That the charge and conviction against your humble appellant of the count of conspiracy together with the count of stealing by agent was improper.*
3. *Alternative to ground 2 above, that the trial court having acquitted the 3rd, 5th and 7th accused persons with the offence of conspiracy the conviction and sentence of your humble appellant with the offence of conspiracy was improper.*
4. *That the trial court erred in law and fact in admitting and or relying upon the Extra Judicial Statement – Exhibit P1 and Cautioned Statement- Exhibit P2 both of the 7th accused person in convicting your humble appellant with both counts.*

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5. *That the trial court erred in law and fact in convicting your humble appellant with the offence charged on the basis of weakness of his defence.*
6. *That the trial court erred in law and fact in convicting your humble appellant with the offences charged while the prosecution evidence on court record never proved the offences beyond reasonable doubt as required by the law.*

The appeal was argued by way of filing written submissions. The appellant's submissions were presented by Mr. Jally Mongo, learned advocate whereas the Republic's submissions were presented by unidentified State Attorney as only his signature appears on the record. For the easy of address and coram, I urge State Attorneys to put their names, on documents they file in courts.

On the 1st ground of appeal Mr. Mongo contended that section 230 of the CPA requires the court upon close of the prosecution case, to give a ruling whether the accused person has a case to answer. The rationale being that if the accused has no case to answer he be acquitted rather than compelling him to adduce evidence. This lies on the principle that the prosecution bears the burden of proving the case against an accused person beyond reasonable doubts and that the accused is only convicted

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on the strength of the prosecution case. To support this contention, he cited the case of **DPP v. Ngusa Keleja @ Mtangi and Another**, Criminal Appeal No. 276 of 2017, Court of Appeal of Tanzania – Mbeya (unreported).

He contended further that at pages 83 and 84 of the proceedings, the record shows that upon closure of prosecution case the appellant's advocate prayed to file submissions of no case to answer and the court set the date for ruling. However, the said ruling was not delivered. He submitted that the omission to give the said ruling was fatal and caused miscarriage of justice to the appellant.

On the 2nd ground, the learned advocate submitted that it was wrong to charge the appellant with both counts of conspiracy to commit an offence and stealing by agent in the same charge sheet as conspiracy cannot stand where the actual offence has been committed standing on its own. To support his submission, he cited the case of **Steven Salvatory v. The Republic**, Criminal Appeal No. 275 of 2018, Court of Appeal of Tanzania – Mtwara (unreported). He argued the 3rd ground as an alternative to the 2nd ground in that the appellant's conviction on the offence of conspiracy was wrong as the basis of conviction was exhibit P.1 and P.2 which were the 7th

accused's statements incriminating the appellant. That since t 7th accused was acquitted on the offence of conspiracy, it was not right to convict the appellant of the offence of conspiracy. To buttress his argument, he referred the court to **Steven Salvatory case** (supra).

In supporting the 4th ground, the learned advocate submitted that during the tendering of the 7th accused's cautioned statement, the appellant and his advocate were not given the right to comment on its admissibility. In his view, this violated the appellant's right to be heard as the cautioned statement incriminated the appellant. To support his argument, he cited article 13(6)(a) of the Constitution of the United Republic of Tanzania which provides for right to be heard and the case of **Ambros Elias v. The Republic**, Criminal Appeal No. 368 of 2018, Court of Appeal of Tanzania – Dar es Salaam (unreported).

He added that, exhibit P.1 was not properly tendered and admitted in court as the said exhibit was a photocopy and no reasons were adduced for tendering photocopy instead of original. In his view this was contrary to section 66 & 67(1)(c) of the Evidence Act, [Cap. 6 R.E 2022). Further, he submitted, exhibit P.1 and P.2 being statements of co-accused were not corroborated by other independent evidence as required by section 33(2)

of the Evidence Act. He argued that the court ought to have warned itself on the danger of acting upon uncorroborated evidence of a co-accused as it was the position in **Jilala Mangwana @ Joseph Kalidushu v. The Republic**, Criminal Appeal No. 290 of 2016, Court of Appeal of Tanzania – Tabora (unreported).

On the 5th ground, he submitted that it was wrong for the trial court to convict the appellant based on his weak defence as reflected on page 24 of the judgment. The weaknesses as outlined by the trial court are; one, the appellant's contradictory testimony, two, the act of the appellant to report the incident to Ilula Police station without good Samaritans who helped him. Another weakness as pointed out by the trial court is the refusal of the appellant to be issued with PF.3 for medication and the appellant's act of communicating with his fellow driver and not PW.1 who was his boss.

On the last ground, the appellant's counsel argued that the trial court failed to address the main issues in controversy instead dealt with issues not in dispute. That the evidence of the appellant that he was robbed the motor vehicle by unknown bandits at Kitonga mountain was not challenged or controverted by the prosecution. This fact was also substantiated by PW.1 and PW.2 in their evidence. The appellant's counsel is of the view that, had

the court correctly analyzed the evidence it would have reached a conclusion that the prosecution had failed to prove the case beyond reasonable doubt. He concluded that the court erred in awarding ths. 16,050,000/= as there was variance in the amount of 7,200 liters mentioned in the charge and its value given in evidence.

The respondent vehemently resisted the appeal starting with the 4th ground. The learned State attorney conceded that exhibit P.2 was admitted contrary to the laid down procedure outlined in **Emmanuel Asajile & Another v. Republic**, Criminal Appeal No. 507 of 2017, Court of Appeal of Tanzania – Mbeya (unreported). Since the procedures were not complied with exhibit P.2 lacks evidential value hence should be expunged from the record. On the other hand, exhibit P.1 was properly admitted in evidence.

Submitting on the 1st ground, the learned state Attorney contended that the provision of section 230 does not make it mandatory for the court to make a ruling on whether a *prima facie* case is made out against the appellant. He cited the case of **Abdallah Kondo v. Republic**, Criminal Appeal No. 322 of 2015, Court of Appeal of Tanzania – Dar es Salaam (unreported) which essentially provide that after the closure of the

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prosecution case the court should give a ruling if a prima facie case has been established against the accused. He added that where there is non compliance or partial compliance with section 230 and 231 of the CPA, the key issue will be whether the appellant was prejudiced as observed in **Justine and 4 Others v. Republic**, Criminal Appeal No. 155 of 2005 (unreported). He argued that in the present case, the ruling was truly not given out but the appellant was informed of his rights and given an opportunity to defend himself thus section 231(1) of the CPA was duly complied with. In his view, the omission is curable under section 388 of the CPA.

The learned State Attorney proceeded to argue the 2nd, 5th and 6th grounds jointly as they all relate to the prosecution failure to prove the case beyond reasonable doubt. He argued that the prosecution proved the case beyond reasonable doubt. This is because PW.1 testified that the appellant was employed by him as a driver under Panone Co. Ltd and given motor vehicle truck with registration No. T. 692 ATT and trailer No. T. 617 ATS loaded with fuel consignment of 3800 liters to transport to Zambia the fact which was not disputed by the appellant. The consignment never reached its destination and after two days the appellant reported to the Ilula Police

Station alleging that he was robbed. The burden of proof shifted to the appellant to prove that he was robbed on transit, in addition to that the appellant's failure to report the incident immediately to his boss raises doubts as to the occurrence of the incident. The appellant alleged that Samaritans helped him but the said Samaritans did neither escorted him to the police station nor gave evidence in court. He is of the view that an accused person's lies can be taken into account in determining his guilt. To support his view, he cited the case of **Patrick Sanga v. Republic**, Criminal Appeal No. 213 of 2008, Court of Appeal of Tanzania – Iringa (unreported).

In his rejoinder, the learned advocate for the appellant essentially reiterated his submissions in chief. He added that the respondent did not address on the various issue outlined by the appellant, such as propriety of admission of exhibit P.1 and compliance with sections 66 and 67(1)(c) of the Evidence Act. Another issue not addressed is on the corroboration of evidence of a co-accused as required under section 33(2) of the Evidence Act. He contended that the respondent did not argue the 2nd and 3rd grounds thus the two grounds are unopposed.

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In his view, the charge was duplex and that a duplex charge renders proceedings and judgment defective as it was the position in **Lusajo Jamson Mwasambungu and Another v. The Republic**, Criminal Appeal No. 95 of 2021, Court of Appeal of Tanzania – Dodoma (unreported). Thus, the appellant was prejudiced by the duplex charge as he was not fairly tried. A retrial would not be fit in this case as there is no sufficient evidence against the appellant, ordering retrial would give prosecution a chance to fill in the gaps.

Based on the appellant's petition of appeal and submissions of both parties, the grounds of appeal can be grouped into three. **One**, the trial court's failure to comply with section 230 of the CPA. **Two**, the appellant convicted on a duplex charge and **three**, prosecution failed to prove the charge against the appellant beyond reasonable doubt. I will thus, determine them in the said order.

Regarding the complaint by the appellant on compliance with section 230 of the CPA, I have perused the record, which shows that on 16/7/2021 prosecution case was marked closed and the court set ruling on 10/8/2021. The ruling was never delivered and on On 23/8/2021, the accused persons addressed the court that they would testify under oath with no witness to

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call. The matter was then fixed for defence hearing. Indeed, the trial magistrate did not give a ruling on whether the accused persons had a case to answer.

The effect of failure to deliver a ruling of no case to answer was discussed in **Samwel Gitau Saitoti @ Saimoo & Another V. R**, Criminal Appeal No. 5 of 2016, Court of Appeal – Arusha (unreported). It was held that the same is prejudicial vitiating the proceedings from when the prosecution closed its case. The irregularity, therefore, cannot be saved by section 388 as submitted by the learned counsel for the respondent.

I find this ground sufficient to dispose of this case. I, hereby, nullify the subsequent proceedings of the trial court from when the prosecution closed its case onwards. I order the trial court to pass and deliver a ruling on whether the accused persons have a case to answer. This, however, should be done by another magistrate with competent jurisdiction. I also direct the trial court to consider the propriety of substituting the charge sheet on 11/9/2019 against the accused persons who were absent.

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JUDGE

03/05/2023

Court: Judgment delivered in chambers in the presence of the appellant and Jally Mongo, advocate for the appellant and Nashoni Saimon, Barton Mayage and Majid Matitu, learned State Attorneys for the respondent.

Sgd. I.C. MUGETA

JUDGE

03/05/2023