IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 29 OF 2022

(Arising from the decision of the Resident Magistrate Court of Musoma at Musoma in Corruption Criminal Case No. 02 of 2021)

EVARIST JOHN AMBETI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

02th November, 2022 & 3rd February, 2023

M. L. KOMBA, J.:

The appellant was charged and tried with two counts of offence of corrupt transaction c/s 15(1) (a) and 15 (2) of the Prevention and Combating of Corruption Act [Cap 329 R. E 2019], he was charged with another person who is not subject of this appeal. It has been alleged that on diverse dates between 15 and 16 February, 2021 during working hours at Kinesi Primary Court, within Rorya District in Mara region being working as an office assistant of Kinesi Primary Court, the appellant did corruptly solicit the sum of Tanzania Shillings Fifty Thousands (50,000/) from Andericus Nyagilo Omanyi in order to assist him to obtain remove order of his wife who was remanded in custody of Kinesi Police Station pending criminal case at Kinesi Primary Court, a matter which relates to the principal affairs of the appellant.

On the second count on the same dates and in similar environment the appellant did obtain the sum of Tanzania Shillings Fifty Thousand (50,000/) from Andericus Nyagilo Omanyi.The accused person pleaded not guilty and followed a full trial. In proving the case, prosecution had six (6) witnesses and five(5) exhibits; and the appellant was convicted and sentenced to a fine of Tsh500,000/ or three years imprisonment for each count, punishment was ordered to run separately.

Dissatisfied with the decision of the trial court, the appellant has now lodged the appeal at hand with five grounds intended to challenge the said decision. For reasons which soon will be adduced I will not reproduce grounds of appeal.

When the appeal was scheduled for hearing, the appellant appeared in person, unrepresented while the Republic was represented by Mr. Isihaka Ibrahim assisted by Mr. Nimrod Byamungu both learned State Attorneys. Mr. Ibrahim reminded the court that it was agreed the matter be heard by way of written submission, they filled reply and if documents complete and each party fulfil his duty he prayed for the date of judgment. Appellant found no need to file rejoinder he prays for the date of judgement.

Before the date of judgement was set, the court informed parties that when perusing the case file, came up with legal issue which need to be addressed. It was the way exhibit was tendered and admitted. The court invited parties to address on that.

Mr. Ibrahim started by concede with court observation that exhibitswere admitted contrary to the law. He submitted that when PW1 tendered Exhibit at page 18 and 19 of the typed proceedings was not properly admitted and refer this court to decision of Court of Appeal in the case of **Geophrey Jonathan @Kitomari vs. Republic**, Criminal Appeal No. 237 of 2017, while seated at Arusha the court introduced three important stagesof admitting exhibit which are; clearing the document for admission, actual admission and ensure that the document is read out in court. He submitted that the first stage was complied of by the Magistrate, the actual admission is not seen directly but through page 19 it was admitted and marked as exhibit P1 and the last factor there is non-compliance.

He submitted that the court record evidence not in narrative as required under section 210(1) (b) of the Criminal Procedure Act, Cap 20 R. E. 2019, (the Act) and that the evidence was supposed to be taken in narration and not reported speech and the requirement that the

document should be read out in court was not complied with. It was his submission that the same problem was featured at page 20 and 21when exhibit P3 was admitted and it was his opinion that due to the omission it is like there was no evidence tendered and that the only remedy is retrial as this was not caused by the appellant nor respondent as was decided in the case of **Fredy Sichembe vs. Republic** Criminal Appeal 148 CAT at Mbeya where after nullification, they ordered retrial.

On his part, being a lay person, the respondent had no much to submit on the legal issues raised by the court, he prays for the appeal be allowed, conviction and sentence be quashed. He was of the opinion that because the Magistrate is the one who default, he should not be subjected to retrial or else, he prayed for his acquittal or his appeal to be determined on the grounds submitted as he believes to be meritorious.

Having carefully perused the record of the case and upon hearing the submissions of the learned State Attorney for the respondent, Republic and the appellant, I have no hesitation to state that, the learned trial Magistrate did not comply with the provisions of Law.

Reading proceedings at page 19 it reads;

> *'2nd accused person; Received such form of trap money and mark as exhibit P1.*

Sgd: E.G.Rujwahuka-SRM

01/11/2021

PW1 went further to elaborate what written inside the said exhibit P1 as explained features above.

Sgd: E.G.Rujwahuka-SRM

01/11/2021

PW1 went further to state that, if I saw those money I will identify them with the following features.....'

PW1 prayed to tender bribe money form as an exhibit and it was not objected. Record shows that it is the second accused person who received the bribe money form and mark as exhibit P1 and the Magistrate continue to narrate other things.

It is trite principle that when a document is sought to be introduced in evidence three important functions must be performed by the court, clearing the document for admission, actual admission and finally, to ensure that the same is read out in court. The principle was aptly stated in the case of **Robinson Mwanjisi and Three Others v. Republic** [2003] T.L.R 218. In that case, the Court held as follows:

'Whenever it is intended to introduce any documentin evidence, it shouldfirstbe cleared for admission, and be actually admitted before it can be read out, otherwise it is difficult for the Court to be seen not to have been influenced by the same.'

As rightly submitted by State Attorney, the three stages in admission of document are important. The significance of reading out a document which has been admitted in evidence has been explained in a number of decisions of Court of Appeal. See among others the case of **Geophrey Jonathan @Kitomari vs. Republic** (supra). In the case of **Joseph Maganga and DottoSalumButwa vs. Republic,** Criminal Appeal No. 536 of 2015 (unreported) in that case the contents of the cautioned statement were not read out to the accused person. The Court stated as follows on the effect of the omission:

> *'The essence of reading out the document is to enable the accused person to understand the facts contained [therein] in order to make an informed defence. Failure to read the contents of the cautioned statement after it is admitted in evidence is a fatal irregularity.'*

Similarly, in the case of **Robert P. Mayunga and Another vs. Republic**, Criminal Appeal No. 514 of 2016 (unreported), the Court had this to say.

> *'Failure to read out to the appellant a document admitted as exhibit denies [him]the right to know the information contained in the document and therefore puts him in the dark not only on what to cross-examine but also how to effectively align or arrange his defence.'*

The effect of the omission as held in all the above cited cases is to expunge the documents from the record, and here I do.

State Attorneys while submitting on issue raised by this court, further explain that even the recording of evidence was not taken in accordance with the law. Evidence was not taken in narration as required. This issue made me to visit the proceedings on the evidence by witnesses. For instance, at page 21 proceedings read as follows;

> *'PW1 went further to state that, on his investigation also he requestedthe court file through court letter and then court file was handled over.....*
>
> ***Sgd: E.G.Rujwahuka-SRM***
>
> ***01/11/2021***
>
> *PW1 went further to elaborate exhibit PIV by giving features of the court file by reading over.....*
>
> ***Sgd: E.G.Rujwahuka-SRM***
>
> ***01/11/2021***
>
> *Then PW1 stated that, after we collected all exhibits and statements of witness, we took the accused.....*
>
> ***Sgd: E.G.Rujwahuka-SRM***
>
> ***01/11/2021'***

From the record it is obvious that the learned trial Magistrate did not comply with the provisions of section 210(1)(b) of the Act. The said section provides for the manner of recording the evidence of the witnesses in trials before a magistrate. For purpose of clarity, I deem it appropriate to reproduce the respective section in full hereunder:

"210 (1). In trials, other than trials under section 213, or by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner-

(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record; and

(b) the evidence shall not ordinarily be taken down in the form of question and answer but subject to subsection (2), in the form of a narrative.

(2) The magistrate may, in his discretion, take down or cause to be taken down any particular question and answer.

(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence. [Emphasis Added].

It is noted that, the most relevant part from the above quoted provisions is subsection (b) of section 210(1). In terms of that provision, it is mandatory for the evidence of witnesses to be recorded in a narrative form and not in a reported speech as it was done in Corruption Criminal Case No. 02 of 2021 by the learned trial Magistrate, which is the subject of this appeal.

From the reproduced paragraphs above, it is apparent that the learned trial Magistrate recorded the evidence of PW1 and PW2 in reported speech instead of a narrative form. In general, I wish to state that, in this case, in recording the evidence of witnesses, the learned trial Magistrate quoted what he thought that witness stated.

All in all, a thorough scrutiny of the entire proceedings of the trial court leads me to the conclusion that both parties, that is, the prosecution and defence were prejudiced by the form in which the evidence of witnesses was recorded by the learned magistrate.

Be that as it may, at this juncture, it is instructive to refer to the observations of the Court of Appeal in **Juma Bakari vs. Republic,** Criminal Appeal No. 362 "B" of 2009 (unreported) when it was confronted with a kin situation. It was stated as follows: -

> *'(1) Section 210(1)(a) and (b) of the CPA is a general provision which regulates the procedure for recording of evidence in the Magistrates Courts (Primary Courts not included).*
>
> *(2) It is clear from the wording of the provisions of subsections (a) and (b) of section 210(1) of the CPA that in recording the evidence of a witness, the trial magistrate must record it in the first person. In other words, he/she must record and not report what the witness says.*

(3) The manner in which the trial magistrate recorded the evidence of the witnesses was obviously wrong and it contravened section 210(1)(b) of the CPA ....

(4) Recording of evidence is a function which the trial magistrate must perform. The word used in subsection (b) of section 210(1) is "the evidence shall not ordinarily. ... This means that it was mandatory for the trial magistrate to comply with the said law in the recording of evidence of the witnesses. As there was no compliance the proceedings were vitiated. This means that there is no appeal before the Court.'

In that appeal the proceedings of both the trial and first appellate court were declared a nullity, indeed, in the present case, considering what I have stated above with regard to the proceedings of the trial court on the failure of the learned trial Magistrate to comply with the mandatory provisions of the law in recording of evidence, I am settled that the proceedings of the trial court and that of the first appellate court, a subject of the appeal before this court were vitiated.Where a trial Magistrate does not comply with the mandatory provisions of section 210 (1) (b) of the Act, the proceedings are liable to be set aside as I did. See **Malando Charles @ Madwilu vs. The Republic,** Criminal Appeal No. 510 of 2016 CAT at Tabora.

After expunge the exhibit which was tendered contrary to the law and after setting aside evidence which was recorded in violation of provisions of law, what is remaining is the way forward. State Attorney prayed for retrial as it was in the case of **Malando Charles @Madwilu vs. The Republic (supra)** and **Fredy Sichembe** (supra). These two cases are distinguishable to the extent that both cases the accused persons were sentenced to 30 years imprisonment and the court of appeal ordered re trial as there was a long way for accused to serve the sentence. In the appeal at hand, the appellant was sentenced to fine and in alternative, to imprisonment of three years. The circumstance of this case makes me to find that the retrial is not the proper channel. Bearing in mind that each case may be decided on its own fact,I proceed to nullify the proceedings, quash the conviction and set aside the sentence and ordersoriginating from nullified proceeding.

It is so ordered.

Right of appeal is fully explained.

DATED at **MUSOMA** this9th day of January, 2023.

M.L. KOMBA
JUDGE

Judgement Delivered under the seal of the court today 3rdFebruary, 2023 in the presence of Isihaka Ibrahim, State Attorney and Mr. Evarist Ambet who was remotely connected.

M. L. KOMBA
JUDGE
03 February, 2023