

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 114 OF 2022

(Originated from Criminal Case No. 80 of 2021 of the District Court of Bunda at Bunda)

DIRECTOR OF PUBLIC PROSECUTIONAPPELLANT

VERSUS

MAGEMBE MBIZO.....RESPONDENT

JUDGMENT

26th & 27th July, 2023

M. L. KOMBA, J.:

This is an appeal by the Director of Public Prosecution (DPP) against the ruling of the trial District Court of Bunda which found the respondent with no case to answer and consequently acquitted him.

The respondent, Magembe Mbizo was arraigned before Bunda District court charged with stealing by agent contrary to section 258 (1) and 273 (b) of the Penal Code Cap 16 R. [E. 2019].

Particulars of the offence were to the affect that respondent was the village chairman of Sanzate village way back. In the year 2020 the village council noticed that respondent embezzled the village funds to the tune of 2,794,000= which was the proceeds after the sale of the

village scrap metal materials (chuma chakavu) which were at the village office for a long time and some from the constituency funds to the tune of 1,800,000/ and 974,000 respectively. Respondent denied the charge which attracted full trial.

Prosecution paraded two witnesses and tendered two exhibits to prove the charge.

In a nutshell, the prosecution account was to the effect that on 01/12/2020 while in the village council, meeting they noticed the said disbursement by respondent and respondent admitted to spend the said amount for his personal benefits. To boost that assertion PW1 tendered exh. P1 which is a letter to the village council where respondent admitting to refund the claimed amount which was misused during his leadership. The money was entrusted to a bidder who was to supply 51 bags of cements but respondent took the said money. PW2 was a member in the village council meeting where one of the agenda was the village money. He testified that chairman of that time, Mr. Magembe Mbizo explained in that meeting how he took and spend the said money. The minutes of the said meeting were admitted and marked Exh P2.

At the closure of prosecution case, the trial Magistrate found the respondent with no case to answer, as such he acquits him. In the ruling

delivered on 28/09/2022 Hon. Magistrate reasoned that some important key witnesses were not paraded and the exhibits tendered was not and cannot form criminality to accused.

DPP was not happy with the findings of the trial Magistrate and knocked the door of this court armed with two grounds of appeal to wit;

- 1. That, the Honorable trial Magistrate erred in law and fact by completely ignoring the weight of prosecution evidence tendered against the respondent and therefore proceeded to rule out that the respondent has no case to answer.*
- 2. That the learned trial magistrate erred in law and fact by ignoring the evidence of PW1 and PW2 which on face of it was sufficient to require the respondent to make his defence.*

When the matter was scheduled for hearing, appellant, for Republic was represented by Mr. Mr. Isihaka Ibrahim and Ms. Natujwa Bakari, both State Attorneys while respondent fended for himself.

Mr. Isihaka joined the two grounds and submitted that in the offence which respondent was charged, prosecution was supposed to prove that there was a thing capable of being stolen, it was stolen fraudulently and that respondent took it in safe custody. He submitted that all elements were proved by two witnesses and two exhibits. It was the testimony of PW1 that money was taken by the respondent but were not banked

instead use them on personal issues and promised to return the said money, his testimony was corroborated by PW2 and the cross examination did not shake credibility of the witnesses as respondent recognized exhibits and he did not object its admission. He complained that the trial Magistrate made pre-judgment, action which was warned that court should not go to the root of the case when deliver ruling on case to answer as was in **DPP vs. Ernest Waryoba @Muhindi and Another** Crim. Appeal No. 126 of 2021. It was his submission that Hon Magistrate errored to rule out that respondent had no case to answer as he went to the root of the case and pray this court to find the respondent with a case to answer.

Respondent on his part was in full support of the ruling. He informed this court that none of the two witnesses testified to who they give those money which were said he took. Moreover, he submitted that witnesses did not testify on whether there was scrap metal in the village and there was no evidence to show whom they give those money after they sale scrap metal. It was the respondent's submission that he writes exhibit P1 without his consent and there was no justice of peace who witnessed when he was writing the said letter. About witnesses he submitted that prosecution did not parade the one who bought the said

scrap metal and the supplier who was supposed to supply cements. To exonerate himself from the *saga*, he said he was not a village accountant and that it was the village secretary who was supposed to answer those allegations. He prayed this court to find the appeal lacks merit and dismiss it.

I have thorough gone through the court record including the ruling delivered by the trial Magistrate. According to him, the ruling based on non-parade of key witnesses who were buyer and the supplier. His findings go to the root of the case. At that stage, Magistrate was supposed only to rule out if evidence before the court implicate respondent or not but he was not supposed to judge that key witnesses were not called as witnesses. That is to say, Magistrate went beyond what he was required to do at this stage. See **DPP vs. Ernest Waryoba @Muhindi and Another** (supra). He invoked fully fledged probative and weigh analysis of the evidence. If he had properly assessed the evidence, he could find a prima facie case has been established.

From the strength of the prosecution evidence on record, a prima facie case was made sufficiently to require the respondent to enter his defence. I therefore, allow the appeal and set aside the trial court ruling


which acquitted the respondent. I hold that prosecution managed to establish prima facie case against the respondent as such, he has a case to answer. What the respondent inform this court amount to defence.

From that finding and decision, I hereby remit the file to the trial District Court of Bunda for the respondent to enter his defence. The file to be place before another Magistrate with competent jurisdiction.


It is so ordered.

Dated at MUSOMA this 27th Day of July, 2023.




M. L. KOMBA
JUDGE

Judgement Delivered today in chamber in the presence of Abdulkher who represented appellant and respondent Mr. Magembe who appeared in person.


M. L. KOMBA
JUDGE

27 July, 2023