IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 06 OF 2023

(C/F Arising from Criminal Case No. 407 of 2022 of Moshi District Court)

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

RICHARD JOSIA MLAY ..... RESPONDENT

JUDGMENT

31/07/2023 & 04/09/2023

SIMFUKWE, J.

On 14th December, 2022 the appellant herein instituted Criminal Case No. 407 of 2022 before the District Court of Moshi at Moshi against the respondent herein (the accused) who was charged with the offence of obtaining goods by false pretence contrary to **section 302 of the Penal Code**, **Cap 16 R.E 2022.**

According to the particulars of the offence, it was alleged that in the year 2019 to the year 2021 at Market Road, KKKT Church Christian Book Shop area within the Municipality of Moshi in Kilimanjaro Region with intent to defraud, the respondent obtained from the Christian Bookshop stationary goods valued at Tanzania Shillings Forty Three Million and Eight Thousand only (43,008,000/=) by falsely pretending that he was a servant of Moshi Secondary School and that he had been sent by Moshi Secondary School

and that he was authorised by Moshi Secondary School to receive the said stationary goods on behalf of Moshi Secondary School.

The charge was read over and explained to the respondent who pleaded not guilty. After recording the respondent's plea, the trial court set bail conditions to the effect that the accused should have two sureties one being a public servant and to deposit half of the stolen amount or to deposit a title deed of an immovable property with the value equivalent to the stolen amount. The respondent did not meet the said conditions.

On 27/12/2022 when the matter came for mention, the accused's counsel told the trial court that the accused had sureties. However, the appellant resisted the application of bail arguing that for bail to be granted according to the amount which the accused stand charged with, he should abide to **section 148(5) (e) of the Criminal Procedure Act** which requires the sureties to deposit cash or other property equivalent to half the amount or value of actual money or property involved or documentary evidence of possession of immovable property equivalent to such amount.

After hearing both sides, the trial magistrate overruled the objection by the learned State Attorney and continued to grant bail through the three sureties who were employees; who signed a bond of Tshs 5,000,000/= each.

The Director of Public Prosecutions was aggrieved, they preferred this appeal on the following grounds:

1. *That the Hon. trial Magistrate erred in both law and facts by releasing the appellant on bail contrary to the*

mandatory provision of section 148(5)(e) of the Criminal Procedure Act [CAP 20 R.E 2022].

2. *That the Hon. trial Magistrate erred in both law and facts by releasing the appellant on bail based on the provisions of the Economic and Organised Crimes Control [Act CAP 200 R.E 2022] and the Written Laws (Miscellaneous Amendment) Act No. 01 of 2022 while the appellant was not charged under the said Act.*

Supporting the first ground of appeal, Mr. John Mgave the learned State Attorney who represented the appellant submitted that the trial magistrate contravened **section 148(5) (e) of the Criminal Procedure Act** (supra) for releasing the respondent on bail. That, according to the said provision, where the offence with which the person is charged involves actual money or property whose value exceeds ten million shillings, that person should deposits cash money or other property equivalent to half the amount or value of actual money or property involved. In the present matter, the trial magistrate was blamed by Mr. Mgave for ignoring the law since the amount involved in this case exceeds ten million. Therefore, it was proper for the trial court to observe the provision of the law and require the respondent to meet the requirement of the same.

Mr. Mgave challenged the findings by the trial magistrate who said the above provision can be ignored because the respondent as well as the sureties are government employees. The learned State Attorney explained that the law does not divide individuals and that the Parliament never meant the said provision of the law to be avoided when it comes to

government employees but to be used to every person since all people are equal before the law including government employees.

It was submitted further that the trial Magistrate ordered the sureties to sign a bail bond of Tshs. 5,000,000/= each knowing exactly that the signed bond is not even half the amount of Tshs 43,008,000 (Forty-three million and eight thousand). That, the total bond signed by three sureties is fifteen Million which is less than half the required amount. It was also noted that the sureties ended up signing and never deposited the amount while in this type of scenario, the law requires that the amount exceeding ten million, half the amount be deposited or the title deed be surrendered before the court.

On that basis, the learned State Attorney prayed this court to quash the trial court ruling and set new bail conditions in accordance with the provision of **section 148(5) (e) of the Criminal Procedure Act** (supra).

Regarding the second ground of appeal, the trial court was faulted for releasing the respondent on bail by citing the provision of the **Economic and Organized Crimes Control Act** [CAP 200 R.E 2022] and the **Written Laws Miscellaneous Amendment Act No. 01 of 2022** while it is clear that the respondent was not charged under the said Act. That, since the case was criminal and not economic one, the proper provision stands to be the **Criminal Procedure Act** under **section 148(5) (e).** He prayed the court to set new bail conditions in accordance with the named provision.

Mr. Kipoko for the respondent instead of replying to the above submission, raised an objection that the appellant was not a party to the matter before the trial court. That, before the trial court the parties were Republic vs. Richard S/O Josia Mlay. He was of the view that this appeal is incompetent and should be struck out and whoever is interested, should re-lodge the appeal through the proper names as reflected in the trial records. He supported his argument with the case of **Attorney General vs. Maalim Kadau & 16 Others (**Court of Appeal of Tanzania) [1997] TLR 69 which emphasized on the importance of the parties appearing in the trial record to appear in the appeal. Also, the learned advocate cited the case of **Jaluma General Supplies Ltd vs. Stanbic Bank (T) Ltd CAT** (Unreported) in which it was held inter alia that the parties involved in the original suit and not any other person, can appeal.

In the end, Mr. Kipoko prayed the court to struck out the appeal.

In his rejoinder, the learned State Attorney resisted the objection by Mr. Kipoko. He clarified that as a matter of practice in criminal matters where the Republic appeals to the higher court it is the Director of Public Prosecutions who appeals and represent the Republic and names changes when the Republic appeals.

Mr. Mgave continued to submit that the law is very clear as per **section 378 of the Criminal Procedure Act**, which states that if the Director of Public Prosecutions is dissatisfied with an acquittal, finding, sentence or order made or passed by a subordinate court, may appeal to the High Court. That, the Director of Public Prosecutions represents the Republic since he is the head of National Prosecution Services as per **section 4(2) of the National Prosecution Services Act, CAP 430 R. E 2022.** That,

the NPS prosecutes or conducts all criminal trials on behalf of the sovereign of the United Republic, the Central government, independent departments, executive agencies and local government as stated under **section 9(b) of the National Prosecution Services Act** (supra). That, it is the DPP who is prosecuting in lower courts to the higher courts only that the name changes from Republic to DPP but they represent the same person.

The learned State Attorney referred to **section 380 of the Criminal Procedure Act** (supra) which provides that every appeal under section 378 shall be made in the form of petition in writing and presented by the Director of Public Prosecutions. He argued that when the appeal comes to the High Court, it must be presented by the DPP and that is the reason he appears as the appellant or respondent when the appeal is made on behalf of the Republic or against it.

Mr. Mgave notified this court that the respondent did not at all attempt to answer any of the grounds raised by the appellant in this appeal rather than discussing the objection.

From the submissions of the learned State Attorney and the learned advocate for the respondent, the crucial issue for determination is ***whether or not the District Court erred in granting bail to the respondent/accused person.***

To begin with, I wish to consider Mr. Kipoko's contention that this appeal ought to be struck out since the parties are different with the previous matter which was before the trial court. The contention was strongly

disputed by the learned State Attorney who stated the reason of the DPP appearing in this appeal instead of the Republic.

With due respect to Mr. Kipoko, submission is not the proper place of raising preliminary objection. In other words, the learned advocate has taken this court as well as the adverse party by surprise by raising the objection when we expected him to respond to the grounds of appeal. This practice is not acceptable since the learned counsel was supposed to raise the same before the hearing of the appeal began or he could have filed notice of his intention to raise the said objection so that it could be argued. See; **Commissioner General (TRA) vs Pan African Energy (T) Ltd, Civil Application No. 206 of 2016.**

Without prejudiced to what has been stated above, as rightly stated by the learned State Attorney, according to **section 378 of the Criminal Procedure Act**, it is the Director of Public Prosecutions who appeals on behalf of the Republic. Also, the Director of Public Prosecutions represents the Republic because according to **section 4(2) of the National Prosecution Service Act,** he is the head of National Prosecution Service.

Turning to the grounds of appeal, unfortunately enough, the respondent failed to exercise his right of countering the appeal by opting to raise the objection in his submission. Thus, he has waived his right of challenging this appeal.

It is indisputed, that the respondent stand charged with the offence of obtaining goods worths 43,008,000/= by false pretence contrary to **section 302 of the Penal Code** (supra). Undeniably, the provisions of

section 148(5)(e) of the Criminal Procedure Act (supra) governs the issue of bail in respect of the offence charged. I wish to reproduce the said provision as a matter of reference:

> *"148. (5) (e) A police officer in charge of a police station or a court before whom an accused person is brought or appears, shall not admit that person to bail if-*
>
> > *the offence with which the person is charged involves actual money or property whose value exceeds ten million shillings* ***unless that person deposits cash or other property equivalent to half the amount or value of actual money or property involved and the rest is secured by execution of a bond."*** Emphasis mine

In this matter, without wasting the precious time of this court, it is crystal clear that the learned trial magistrate erred in law to release the respondent on bail in contravention of the above provision of the law since the respondent was required to deposit cash or property equivalent to half the amount of Tshs 43,008,000/- or property involved and the rest to be secured by execution of a bond and not otherwise.

The learned trial magistrate tried to state that the law is clear that the court can avoid such conditions where there are genuine reasons. However, he did not cite the law which provides otherwise than what has been stipulated under **section 148(5)(e) of the Criminal Procedure Act** (supra). Therefore, the reasons that the sureties are government

employees is not backed up with the law or reasons of dispensing with the law.

I have noted another irregularity in the proceedings of the trial court to the effect that according to the hand written proceedings, on 14/12/2022 when the respondent was arraigned for the first time before the trial court, his plea was taken. Thereafter, the presiding magistrate set bail conditions as follows:

> *"**Court:** Accused's bail is open upon two sureties one being a public servant, to deposit half of the stolen amount or deposit a title deed of an immovable property with the value equivalent to the stolen amount."*

The above quoted conditions complied to the above provision, thus, **section 148(5) (e) of the Criminal procedure Act** (supra) which requires the sureties to deposit cash or other property equivalent to half the amount or value of actual money or property involved in the case.

Surprisingly, the successor magistrate departed from what was set before by the predecessor magistrate and set different bail conditions.

Basing on the above contravention of the law and basing on the noted irregularity, I hereby invoke the revisionary powers bestowed on this court under **section 373 (1) (b) of the Criminal Procedure Act** (supra) to nullify the trial court's proceedings commencing from 27/12/2022 presided over by Hon. Philly. I hereby order the respondent to comply to the bail conditions as set forth by the trial court on 14/12/2022. Meanwhile, the respondent should be further remanded in custody until he fulfils the bail conditions. Appeal allowed.

It is so ordered.

Dated and delivered at Moshi this 4th day of September 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

04/09/2023