IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB- REGISTRY OF MANYARA)

AT BABATI

CRIMINAL APPEAL NO. 77 OF 2023

(Originating from the conviction and sentence of the District Court of Mbulu in Economic Case No. 7 of 2022 Hon. C. A. Chitanda- PRM)

MARIA AWESSO MANIMI.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

Date of last order: 22/2/2024
Date of Judgment: 8/3/2024

JUDGMENT

MAGOIGA, J.

Maria Awesso Manimi (the appellant) was arraigned before District Court of Mbulu (the trial court) charged with four counts. On the first count, the appellant was charged with embezzlement and misappropriation contrary to section 28(1) of the Prevention and Combating of Corruption Act [CAP 329 RE 2019] (the PCCA) read together with sections 57(1) and 60(2) of the Economic and Organized Crime Control Act [CAP 200 RE 2019], (the EOCCA).

It was alleged that in the first count that, on divers dates between 1/1/2017 and 31/3/2017 at Mbulu District in Manyara Region, the appellant being the secretary and chairperson of the loan committee of Mbulu Women Saccos

fraudulently and dishonestly misappropriated a total sum of Tshs.900,000/= the property of Mbulu Women Saccos.

On the second and third counts, the appellant was charged with forgery contrary to section 333, 335(a) and 337 of the Penal Code [CAP 16 RE 2019 now RE 2022], it was alleged on the second count that the appellant forged the signatures of the trustees listed in the loan agreement dated 21/3/2017 purported to show that she had entered into loan agreement with VICOBA NAMBIS and grant VICOBA NAMBIS a loan of Tshs.900,000/=. On the third count, it was alleged that the appellant forged a document namely "hati ya malipo" with number 05077 dated 21/3/2017 purporting to show that Mbulu Women Saccos granted a loan amount of Tsh 900,000/=.

On the fourth count, the appellant was charged with abuse of position contrary to section 31 of the PCCA read together with paragraph 21 of the First Schedule to and sections 57(1) and 60(2) of the EOCCA.

The appellant pleaded not guilty, hence full trial ensued. In attempt to prove its case against the appellant, the prosecution paraded a total of five witnesses and tendered eight (8) exhibits. On the other hand, the defence had three witnesses and tendered one documentary exhibit.

After hearing the parties, the trial court was convinced that the case against the appellant was proved beyond reasonable doubt as such convicted and sentenced the appellant to serve twenty years imprisonment in respect of the first and fourth counts while on the second and third counts the appellant was sentenced to serve one year. The trial court also ordered the appellant to refund the sum of Tshs.900,000/=.

Being aggrieved with both conviction and sentence meted out against her, the appellant preferred the instant appeal with six grounds of appeal as follows: -

1. *That, the trial Magistrate erred in law and fact by convicting the appellant on the case which was not proved beyond the standard of proof in criminal case.*
2. *That, the trial Magistrate erred in law and fact by convicting the appellant on document which was signed by PW4 herself.*
3. *That the learned trial Magistrate erred in law and fact by convicting appellant on unsubstantial allegation that the appellant acquire the said money.*

4. *That, the learned Magistrate erred in law and fact by her reliance on hearsay evidence of PW2 and PW3 and convicted the appellant and sentence on such bad evidence of the prosecution side.*
5. *That, the learned Magistrate erred in law and fact by convicting appellant on the fact that she was a public official.*
6. *That the learned trial Magistrate grossly erred in law and fact in exercising her discretion rather harshly and injudiciously in sentencing the appellant.*

When the appeal was called on for hearing, the appellant was represented by Mr. Simon Shirima learned advocate while the respondent was represented by Ms. Rhoida Kisinga learned state attorney.

Before hearing had commenced, the court raised a concern whether the trial court was clothed with jurisdiction to try the matter since consent and certificate conferring jurisdiction were defective. Hence the court invited the parties' learned trained mind to address on the concern.

Responding to the issue, the learned State Attorney readily conceded that the consent and was issued by Regional Prosecution Officer (RPO) under section 26(1) of the EOCCA and the certificate did not cite the provisions creating the offence. She argued that powers to issue consent under section 26(1) of EOCCA are reserved to the DPP and the same are not delegable. To this, she argued that the trial court lacked jurisdiction and much as the certificate without provisions creating the offence

The learned Attorney, therefore, urged the court to nullify the proceedings and judgment of the trial court. According to learned Attorney, having nullifying the proceedings and judgment the way forward is to order retrial of the appellant before another magistrate after proper consent and certificate have been issued.

To buttress her arguments, the learned State Attorney referred this court to the case of **Peter Kongoli & 4 others v Republic** Criminal Appeal No. 253 of 2020 Court of Appeal of Tanzania (unreported). According to her, there was ample evidence against the appellant to prove all counts with which she stood charged. According to the learned Attorney, there are no possibilities for the prosecution to fill in gaps.

Responding to the issue, Mr. Shirima joined hands with the invitation by the learned State Attorney that since the consent and certificate for prosecution of the appellant was defective the proceedings and judgment of the trial court are a nullity and therefore should be quashed.

As to the way forward, Mr. Shirima urged the court to acquit the appellant since the case against the appellant was not proved beyond reasonable doubt. The learned advocate submitted at length on the deficiency on the evidence of the prosecution case and he was of the view should retrial be ordered there are dangers for the prosecution to fill gaps.

Having gone through the record, it is without doubt that the consent was issued under section 26(1) of EOCCA but the same was issued by RPO. As correctly argued by the learned counsel for parties and rightly so, it is atrite law that powers to issue consent under section 26(1) of the EOCCA are reserved to the DPP and such powers are not delegable. Such omission was considered fatal irregularity as it was pointed out in the case of **Peter Kongori Maliwa & 4 others v Republic** (supra).

Not only that but even the certificate issued did not cite the provisions creating the offence in issue, as such defective in its face value.

Therefore, since the consent and certificate were incurably defective, the trial court had no jurisdiction to determine the matter. It embarked on nullity. In the case of **Ramadhani Omary Mtiula vs The Republic**, Criminal Appeal No. 62 of 2019 (unreported) when referring to the decision in **Fanuel Mantiri Ng'unda vs Herman Mantiri Ng'unda and 20 Others**, Civil Appeal No. 8 of 1995 (unreported) the Court of Appeal observed thus: -

> *" The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature .... **The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial**.... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case.* [Emphasis added]

In the case of **Jumanne Leonard Nagana @ Azori Leonard Nagana & another v The Republic**, Criminal Appeal No. 515 of 2019 Court of Appeal of Tanzania at Musoma (unreported) it was observed thus;

"The fate which befalls the proceedings and a decision made without jurisdiction is a nullity. Even where a court decides to exercise a jurisdiction which it does not possess, its decision amounts to nothing.

Consequently, the sentence and conviction meted out against the appellant are quashed and set aside as they stemmed from a nullity.

As to the way forward, the learned State Attorney urged the court to order retrial because there is ample evidence on record against the appellant. She argued that PW1 proved that the signature in dispute was signed by one person namely the appellant. She submitted that PW4 who tendered exhibit P4 did not authorize any payment. Hence the offence was proved.

The learned State Attorney argued that the offence of embezzlement and misappropriation of money was proved because there is evidence of DW3 who was called by the appellant and denied to have received the money. she submitted further that the appellant was a public official under section 3 of the PCCA. She argued that the saccos was a registered and purposely to provide service to the public hence the appellant was a public servant.

Mr. Shirima was not amused with the invitation by the learned State Attorney for the appellant to be retried. He argued that the case against the appellant was not proved. He argued that there is doubt regarding the document tendered by PW5 showing that the appellant took the money. The learmed advocate argued that the appellant was interrogated by one Sarah Mbilinyi who was not called to testify but whi was material witness.

Further, the learned advocate submitted that the offence of forgery was not proved since Maria Nicodemus' signature was not compared. He argued that there was no evidence that the appellant took the money. PW2, PW3, PW4 testimony were just hearsay.

As to the issue that the appellant was a public officer, Mr. Shirima argued that there was no evidence that the appellant was an employee, hence she was not supposed to be charged as a public officer. He pointed out that there was no letter of employment tendered to show that the appellant was employed.

Mr. Shirima also pointed out that the sentence meted out to the appellant was manifestly excessive compared with the offence committed. He therefore urged the court to release the appellant.

Having considered the arguments by the learned trained minds for the parties, there are two alternative orders that a court can make after nullifying proceedings like in the instant matter. Those orders can be either to order trial *de novo* or to release the appellant. The principles guiding the court on whether to order trial *de novo* or to release the appellant was expounded in the case of **Fatehali Manji v The Republic** [1966] E.A, 343, in which the court observed that for the court to order a retrial, it should ensure that the prosecution is not going to utilize the opportunity of a rehearing to amount a better prosecution case by filling in the gaps, all to the detriment of the appellant.

I have keenly gone through the record, to start with the trial court's record shows that a total of eight (8) documentary exhibits were tendered and admitted as exhibits but the manner in which the said exhibits were endorsed/marked after being admitted posed serious challenge for reference. Some of the documents were never endorsed. For instance, on record it is revealed that there was letter which was received as exhibit P1 but I have gone through the record I could not find such letter marked as exhibit P1.

I will begin my deliberation whether there was evidence to establish the offences against which the appellant stood charged. As to the first count the appellant was charged with embezzlements and misappropriation contrary to section 28(1) of the PCCA. The said provision reads;

> *28(1) A person being a **public official** who dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public official or allows any other person to do so, commits an offence..." (emphasis mine).*

In the instant matter the learned trial Magistrate was of the view that for the offence under the above provision to stand, there must be proof that the accused was a public official. But she was of the view that the entity in which the appellant was working is a private entity. Both learned trained minds for parties submitted in favour of the respective positions as to whether the appellant was a public official. On one hand the learned State Attorney was of the view that the SACCOS on which the appellant was working was a registered entity providing service to the public, hence the appellant was a public servant.

On the hand Mr. Shirima forcefully argued there was no proof tendered to establish that the appellant was an employee. In terms of section 3 of the PCCA, the term public official is defined as;

> *"public official" means any person holding a* ***legislative, executive, judicial, administrative, political, military, security, law enforcement, and local government authority or any other statutory office and includes-***
>
> *(a) any person performing a public function or providing a public service; and*
>
> *(b) any other person natural or legal so defined in any other written laws.*

Hence it was mandatory for the prosecution to prove that the appellant was a public officer within the definition provided in the above law. I have keenly gone through the evidence on record, I could not find clear evidence whether the appellant was a public officer as per the above definition.

In resolving this issue, the learned trial Magistrate at first pointed out that the entity (SACCOS) in which the appellant was working is a private entity.

However, she ended up holding that the said entity (SACCOS) is one of the cooperative societies which are registered under section 3 and 4 of the Cooperative Societies Act No. 20 of 2003. This finding by the learned trial Magistrate is not supported by the evidence on record. No prosecution witness testified whether the said SACCOSS was registered in the manner stated by the learned trial Magistrate save for the evidence by PW5 who stated that the SACCOS was registered by virtue of exhibit P8. I have carefully gone through the said exhibit it is titled as;

"KATA YA NAMBIS" then underneath there are words written as "CHAMA CHA USHIRIKA NA AKIBA NA MIKOPO CHA WANAWAKE SACCOS TC"

In the instant matter the appellant was alleged to be secretary and chairperson of the loan committee of Mbulu Women Saccos. I could not find the evidence to establish that Mbulu Women Saccos was registered under the law referred by the learned trial Magistrate. To this the learned trial Magistrate relied on extraneous matters not supported by the record to convict the appellant.

Therefore, since there was no proof on record to prove that the appellant was a public official she could not have been charged under section 28(1) of

the PCCA. The charge, if any, was to pegged under section 28(2) of the PCCA. This omission in my settled view was fatal and led to serious miscarriage of justice since the appellant was convicted and sentenced on the offence she did not commit. Therefore, it open for the prosecution to fill in gaps if the appellant is to be retried.

Next issue for my determination is whether there was proof that the appellant misappropriated a sum of Tshs 900,000=. Going by page 13 of the typed judgment, the learned trial magistrate was of the view that it was the appellant who processed the loan and took the money for her own use. The learned trial Magistrate held that the appellant was silent on where the money (Tshs 900,000/=) was, hence she was of the view that the appellant did use the said money.

I have dispassionately gone through the record, I am of the settled view that in arriving to the conclusion that the appellant did not account for the sum of Tshs.900,000/=, the learned trial Magistrate strayed into a serious error. She never considered the appellant's defence on this aspect.

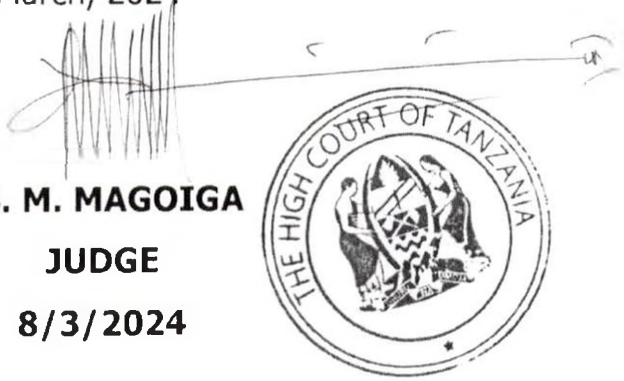
Going through pp 43-45 of the typed proceedings, the appellant gave a detailed account that she is the one who issued the loan of Tshs.900,000/=

to Vicoba Nambis and the said money was received by one Maria Nicodemus (PW4). She further stated that all the procedures were complied with including the authorization by the loan board members. The learned trial Magistrate did not say anything on these pieces of evidence. Hence ordering a retrial will be at the detriment of the appellant.

In final analysis, I decline the invitation by the learned State Attorney to order retrial against the appellant. However, in the circumstance, I order her immediate release from prison unless lawful held for another lawful cause.

It is so ordered.

Dated at Babati this 8th day of March, 2024



S. M. MAGOIGA

JUDGE

8/3/2024